UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 07, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 24-10356-D
Case Style: Edvin Santiagomazariegos v. Secretary, Department of Corrections, et al
District Court Docket No: 6:21-cv-00696-GAP-LHP

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10356

EDVIN SANTIAGOMAZARIEGOS,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:21-cv-00696-GAP-LHP

ORDER:

As construed from his notice of appeal, Edvin Santiagomazariegos moves for a certificate of appealability ("COA") and to proceed *in forma pauperis*, in order to appeal the district court's denial of his 28 U.S.C. § 2254 habeas petition. To merit a COA, Santiagomazariegos must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Santiagomazariegos cannot make the required showing, his motion for a COA is **DENIED** and his motion to proceed *in forma pauperis* is **DENIED AS MOOT**.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

EDVIN SANTIAGOMAZARIEGOS,
Petitioner,

v. Case No. 6:21-cv-696-GAP-LHP

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.
_____/

ORDER

This cause is before the Court on Petitioner Edvin Santiagomazariegos's Petition for Writ of Habeas Corpus (Doc. 1), filed pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition (Doc. 17) in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases for the United States District Courts*. Petitioner filed a Reply (Doc. 27). Also before the Court is Petitioner's Amended Motion to Stay (Doc. 33) and Respondents' Response thereto (Doc. 35).

Petitioner alleges seven claims for relief in the Petition. For the following reasons, both the Amended Motion to Stay and the Petition are denied.

I. PROCEDURAL HISTORY

Petitioner was charged by Information with four counts of capital sexual battery (Counts One through Four) and one count of lewd or lascivious

molestation (Count Five). (Doc. 21-1 at 35–38). Following a jury trial, Petitioner was found guilty as charged. (Doc. 21-1 at 182–86). Petitioner was sentenced to a mandatory term of life in prison, followed by lifetime sex offender probation. (Doc. 21-1 at 149–52). He was also found to be a sexual predator. (Doc. 21-1 at 158–59).

Petitioner appealed. Counsel filed an *Anders*[1] brief (Doc. 21-1 at 624–44), and Petitioner filed a *pro se* brief. (Doc. 21-1 at 654–67). Florida's Fifth District Court of Appeal ("Fifth DCA") affirmed Petitioners convictions and sentences, *per curiam*. (Doc. 21-1 at 672); *Santiagomazariegos v. State*, 224 So. 3d 246 (Fla. 5th DCA 2017) (table).

Petitioner then moved for post-conviction relief under Rule 3.850, Florida Rules of Criminal Procedure. (Doc. 21-1 at 758–98). The post-conviction court summarily denied claims three, five, seven, and eight, ordered an evidentiary hearing on claims one, two, four, and six, and reserved ruling on claim nine. (Doc. 21-1 at 861–66). Following the evidentiary hearing, the post-conviction court denied the remaining claims. (Doc. 21-1 at 895–907).

---

[1] In *Anders v. California*, 386 U.S. 738, 744 (1967), the Supreme Court set forth the procedure for court-appointed counsel to pursue an appeal requested by his client when counsel has determined there is no merit to the appeal.

Petitioner appealed (Doc. 21-1 at 1112–28), and the Fifth DCA affirmed the denial, *per curiam*. (Doc. 21-1 at 1155); *Santiagomazariegos v. State*, 311 So. 3d 858 (Fla. 5th DCA 2021) (table).

Petitioner then filed the present Petition for federal habeas relief under 28 U.S.C. § 2254. After briefing was complete, Petitioner filed the Amended Motion to Stay (Doc. 33). Because the Court can resolve the request for a stay and the entire Petition on the basis of the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

II. AMENDED MOTION TO STAY

Petitioner moves to stay this action and explains that he has filed in state court a Motion to Correct Illegal Sentence, under Florida Rules of Criminal Procedure 3.800(a). (Doc. 33 at 1). He states that the motion will "give the lower court a meaningful opportunity to correct a constitutional due process violation that occurred during sentencing that potentially []resulted[] in the conviction of Petitioner[,] who is 'actually innocent' of the substantive offense." (Doc. 33 at 1). Petitioner also describes the claims raised in the Motion to Correct Illegal Sentence: (1) that the State included false information in the notice used to qualify Petitioner as a sexual predator; (2) the trial court was, therefore, misled into considering the false information during sentencing and incorrectly considered a "prior record" even though Petitioner had no prior record; and (3) Petitioner, despite the

requirement that he "be afforded the opportunity to rebut the allegations and false information relied upon by the sentencing judge," he "was not informed of his right to allocution or shared information of relevant and material value." (Doc. 33 at 3–4).

A "federal district court[] may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims." *Rhines v. Weber*, 544 U.S. 269, 273 (2005) (citing *Rose v. Lundy*, 455 U.S. 509 (1982)). Generally, such a petition must be dismissed without prejudice to allow the petitioner "to return to state court to present the unexhausted claims to that court in the first instance." *Id.* (citing *Lundy*, 455 U.S. at 522).

However, because "the filing of a petition for habeas corpus in federal court does not toll the statute of limitations," *id.* at 274–275 (citing *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001)), "[i]f a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review." *Id.* at 275. Consequently, a district court may, instead, stay the federal habeas corpus action to permit return to the state court for exhaustion purposes under certain circumstances. *Id.* at 276–79.

Such stay and abeyance procedure, however, is "available only in limited circumstances." *Id.* at 277. Specifically, "stay and abeyance is only appropriate

when . . . there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, . . . the district court would abuse its discretion if it were to grant [the petitioner] a stay when his unexhausted claims are plainly meritless." *Id.* Finally, "if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.* at 278.

Here, however, the Petition does not contain the claims Petitioner describes as now being raised in the state Motion to Correct Illegal Sentence.[2]

Even were Petitioner to move to amend the Petition to add the claims, the claims would be untimely. The Fifth DCA affirmed Petitioner's convictions and sentences on March 14, 2017. (Doc. 21-1 at 672). Petitioner then had ninety days, or through Monday, June 12, 2017, to petition the Supreme Court of the United States for a writ of certiorari. *See* Sup. Ct. R. 13(3) (the 90-day period commences upon the date of entry of order, not the mandate); *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002) (holding that the one-year period of limitation does not begin to run until the ninety-day period for filing a petition for certiorari with the Supreme Court of the United States has expired). Thus, Petitioner's judgment of conviction, for purposes of Section 2244(d)(1)(A), became final on June 12, 2017. Petitioner,

---

[2] This is despite the Court's previous note (in the order denying without prejudice Petitioner's original motion to stay) that Petitioner "has not moved to amend or supplement the Petition to add the claim(s) raised in the pending Rule 3.800 motion." (Doc. 32 at 4, n.1).

accordingly, had through Wednesday, June 13, 2018, absent any tolling, to file a federal habeas corpus petition. *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011) (applying Fed. R. Civ. P. 6(a)(1) in computing the AEDPA's one-year limitation period to run from the day after the day of the event that triggers the period); *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing *Ferreira v. Sec'y Dep't of Corr.*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)) (AEDPA's one year "limitations period should be calculated according to the 'anniversary method,' under which the limitations period expires on the anniversary of the date it began to run.").

Under Section 2244(d)(2), the limitations period tolls during the pendency of "a properly filed application for State post-conviction or other collateral review." But the limitations period is not tolled during the pendency of a federal petition under Section 2254. *See Duncan v. Walker*, 533 U.S. 167, 181–82 (2001). The Court, therefore, need not undertake the exercise of calculating the limitations period day by day in this case because, in any event, the limitations period expired during the more than two years since Petitioner filed the present Petition. Further, the claims, as described by Petitioner, do not "relate back" to the Petition under Rule 15(c), Federal Rules of Civil Procedure. The claims do not "arise[] from the same set of facts as the [claims in the Petition]," but, instead, arise "from separate conduct or a separate occurrence in both time and type." *See Davenport v. United*

States, 217 F.3d 1341, 1344 (11th Cir. 2000). Therefore, the described claims would be untimely, unless some exception applies.

The Supreme Court has held that that Section 2244(d) is "subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). "Equitable tolling may apply 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1332 (11th Cir. 2008) (quoting *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir. 2006)) (citing *Helton v. Sec'y for the Dep't of Corr.*, 259 F.3d 1310, 1313 (11th Cir. 2001); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001)). "The diligence required for equitable tolling purposes is reasonable diligence." *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011) (citation and internal quotation marks omitted).

Petitioner explains that he did not previously raise the new claims now presented in state court "because he was unaware of the issue." (Doc. 33 at 2). He states that he "is a layman in the law and has been a pro-se litigant for the past 7 years, following his Public Defender representation on direct appeal." (Doc. 33 at 2). Petitioner required the help of prison law clerks and other inmates to prepare his *pro se* filings, including the Petition, and also needed assistance reading and understanding English, because his first language is Spanish. (Doc. 1 at 2).

Petitioner explains that he only discovered the new issues after learning it from another inmate in the summer of 2023. (Doc. 33 at 2).

However, neither Petitioner's *pro se* status nor his limited legal knowledge or need for assistance constitute exceptional circumstances that form a basis for the application of equitable tolling. *See, e.g., DeLeon v. Fla. Dep't of Corr.*, 470 F. App'x 732, 734 (11th Cir. 2012) (citing *Outler v. United States*, 485 F.3d 1273, 1283 n.4 (11th Cir.2007); *United States v. Montano*, 398 F.3d 1276, 1280 n. 5 (11th Cir.2005); *Rivers v. United States*, 416 F.3d 1319, 1323 (11th Cir.2005)) (explaining that "[a]n inability to understand English does not constitute extraordinary circumstances justifying equitable tolling. The lack of a legal education, the absence of legal counsel in this collateral context, and the resulting consequence of reliance upon a bilingual inmate law clerk also do not excuse a failure to file a § 2254 petition in a timely fashion.").

Therefore, even were Petitioner to move to amend with the new claims, Petitioner does not demonstrate entitlement to equitable tolling. For the same reasons, he has failed to show good cause for his failure to exhaust his claims in state court before seeking federal habeas relief.

Consequently, the Amended Motion to Stay (Doc. 33) is denied.

III. SECTION 2255 STANDARDS OF REVIEW

A. The Antiterrorism Effective Death Penalty Act

Pursuant to the Antiterrorism Effective Death Penalty Act ("AEDPA"), a federal court may not grant federal habeas relief on 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 United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite

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

Id. (quoting Williams, 529 U.S. at 412–13). Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."[3] *Id.* (quotation omitted).

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." But, the state court's "determination of a factual issue . . . shall be presumed correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Parker*, 244 F.3d at 835–36.

---

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

The Supreme Court has stated that nothing in Section 2254 requires a state court's decision to be accompanied by a statement of reasons or other explanation. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Where the Court is presented with an appellate court's *per curiam* affirmance, "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 v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Otherwise, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

B. Ineffective Assistance of Counsel

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person may have relief because his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the

particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

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

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

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

IV. ANALYSIS

A. Grounds One, Three, Five, Six, and Seven

In Ground One, Petitioner claims counsel erred by failing to convey to him a plea offer until the date of the pretrial hearing and then improperly advised Petitioner to reject it. (Doc. 1 at 4–6).

In Ground Three, Petitioner contends counsel erred by "fail[ing] to object to and move for a mistrial when the prosecutor on redirect of Janice Torres called the Petitioner and his family child molesters." (Doc. 1 at 9).

In Ground Five, Petitioner claims that counsel erred by

> fail[ing] to argue during closing . . . exculpatory evidence that impeached the alleged victim's testimony and evidence that showed a logical conclusion that [the victim] was coached by someone to make up the allegation of sexual battery and that it was physically impossible for the crimes to have occurred based on the medical evidence presented at trial[.]

(Doc. 1 at 13).

In Ground Six, Petitioner contends that counsel erred by "fail[ing] to request an instruction that provided an accurate definition of the vagina and distinguishing differences between the vulva, vagina, and the general area of the female genital[s]." (Doc. 1 at 15).

Finally, in Ground Seven, Petitioner argues that he was denied his right to effective assistance of counsel due to the cumulative errors of counsel.

Respondents concede these claims were raised before the state post-conviction court, but argue that, because Petitioner did not appeal the denial of these claims, he failed to fully exhaust them. The Court agrees.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears

that – (A) the applicant has exhausted the remedies available in the courts of the State[.]" 28 U.S.C. § 2254(b)(1)(A). Under Florida law, because an evidentiary hearing was held, Petitioner was required to address in his appellate brief each claim that he desired the Fifth DCA to review. *See* Fla. R. App. P. 9.141(b)(3).

Petitioner did not raise the claims now presented in Grounds One, Three, Five, Six, and Seven when he appealed the denial of his Rule 3.850 motion. (*See* Doc. 21-1 at 1112–29). Therefore, he did not properly exhaust and has procedurally defaulted the claims. Petitioner does not assert cause and prejudice or the fundamental miscarriage of justice to overcome the default. *See Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) ("If the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established."). Therefore, Grounds One, Three, Five, Six, and Seven remain defaulted, are barred from federal habeas review, and are denied.

B. Ground Two

In Ground Two, Petitioner contends that counsel erred by failing to call Christina Mauri as a witness at trial. (Doc. 1 at 7). Petitioner claims he told counsel that Mauri lived with him and his wife between the ages of twelve and eighteen, that "he had never touched her in sexual ma[nn]er and had never acted out of the

way with her in any way." (Doc. 1 at 7). Further, T.P. and J.P. lived there as well, "[s]he had never seen the Petitioner touch [them] in any inappropriate way," and neither she nor T.P. or J.P. were left alone with Petitioner. (Doc. 1 at 7). Petitioner states that Mauri was available and willing to testify at trial and that counsel had her address, but counsel still failed to call her as a witness. (Doc. 1 at 7). He claims that her testimony would have supported Petitioner's defense, that it would have impeached T.P. and J.P.'s testimony, and that there was a reasonable possibility it would have caused a jury to find him not guilty. (Doc. 1 at 7).

Petitioner raised this claim in his Rule 3.850 motion (Doc. 21-1 at 765–68), and an evidentiary hearing was held on the claim. (Doc. 21-1 at 862). In denying the claim, the post-conviction court explained:

> Ground 2: Defendant has failed to demonstrate that trial counsel was deficient. From counsel's testimony, it is clear that he attempted to contact Ms. Mauri for a deposition, and she failed to appear. Defendant stated that at the time of trial, Ms. Mauri was living in New York, but would have been available to testify because she visited Orlando at the time of trial. However, he does not know where Ms. Mauri is currently located. Defendant did not explain why, if everyone else in his family was available and willing to testify at trial, Ms. Mauri failed to appear for a deposition. The Court does not find it plausible that Ms. Marui would have made herself available to testify.
>
> Ms. Mauri did not testify at the evidentiary hearing. The only testimony that Ms. Marui would have been willing and available to testify at trial came from Defendant. A defendant's self-serving testimony about

> what a witness would say is not sufficient, standing alone, to establish ineffective assistance of counsel based on the failure to call a witness. *Thomas v. State*, 117 So. 3d 1191, 1195 (Fla. 2d DCA 2013). Thus, Defendant has not established counsel was ineffective for failing to call Ms. Mauri as a witness, and Ground 2 is denied.

(Doc. 21-1 at 905). The Fifth DCA affirmed the denial, *per curiam*. (Doc. 21-1 at 1155).

The post-conviction court erred in determining that counsel attempted to contact Ms. Mauri to appear for a deposition. Counsel actually testified at the evidentiary hearing that he did not recall Petitioner bringing up Ms. Mauri's name. (Doc. 21-1 at 1075–76). However, the rest of the post-conviction court's reasoning provides a sufficient basis for denying the claim. As the post-conviction court determined, Petitioner presented only his own self-serving speculation to support his claim that Ms. Mauri was willing and able to testify and that her testimony would support his defense. Such speculation is insufficient, standing alone, to support a claim of ineffective assistance of counsel. *See Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978)[4] ("[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

speculative."); *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) ("[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or [a]n affidavit.[] A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim.").

Accordingly, on that basis, the post-conviction court's decision was not contrary to, or an unreasonable application of, federal law or based on an unreasonable determination of the facts, and Ground Two is denied.

C. Ground Four

In Ground Four, Petitioner claims counsel erred by "elicit[ing] an uncharged sexual assault on J.P. – the alleged victim's younger sister." (Doc. 1 at 11). He asserts that the trial court ruled on a motion in limine that no testimony about Petitioner touching the younger sister could be presented at trial, yet counsel elicited such testimony at trial, requiring the trial court to give a curative instruction following the prosecution's objection. (Doc. 1 at 11). Petitioner argues the jury was, therefore, "compelled . . . to find [him] guilty of crimes and evidence not charged." (Doc. 1 at 11).[5]

---

[5] To the extent Petitioner additionally claims in his Reply that counsel should have proffered the testimony first and that the curative instruction did not "unring th[e] bell" (Doc. 27 at 6), Petitioner may not raise new issues or arguments in the Reply. *See United States v. Krasnow*, 484 F. App'x 427, 429 (11th Cir. 2012) (per curiam) (citing *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008)).

The following transcribes the relevant exchange at trial:

> Q. You preferred living with your stepmother Janice and your dad, right?
>
> A. Yes.
>
> Q. Mr. Santiago, Giovanni, never touched you; isn't that correct?
>
> A. Yes.
>
> Q. Yet you told Janice that he did touch —
>
> [Prosecutor]: Objection. Your Honor, may we approach?

(Doc. 21-1 at 386). The trial court sustained the objection and gave a curative instruction. (Doc. 21-1 at 388).

Petitioner raised this claim in his Rule 3.850 motion (Doc. 21-1 at 772–74), and Counsel testified regarding this issue at the evidentiary hearing. The post-conviction court summarized counsel's testimony as follows:

> [Counsel] understood that the ruling on the motion in limine meant he was not allowed to get into the second half of his question. He could ask if the victim had ever been touched by Defendant, but he was not allowed to ask, "But you never told anyone about it?" The ruling on the motion in limine was that he could not get into the girls' fabrication or their lack of reporting that Defendant had touched them. [Counsel] thought it was important for the jury to understand that there was another child who had brought allegations and she had never been touched or manipulated at all by Defendant. He believed it was a strategic decision and the line of questioning would help Defendant. His strategy was to

> show the jury that another minor had falsely accused Defendant with similar allegations.

(Doc. 21-1 at 903). This summary accurately reflects counsel's testimony. (Doc. 21-1 at 1078–80, 1088–89).

Following the evidentiary hearing, the post-conviction court denied the claim:

> Ground 4: This claim lacks merit. The Court finds trial counsel's testimony is credible and consistent with the record in that the motion in limine did not preclude him from asking [redacted] if Defendant had ever touched her. The Court did not allow, however, testimony that [redacted] told her stepmother that Defendant had touched her. (T. 104-06.) The jury heard that Defendant never touched [redacted]. However, the Court sustained the State's objection to counsel's questioning regarding [redacted] telling her stepmother that Defendant had touched her. The Court finds trial counsel made a reasonable strategic decision in attempting to show the jury that another minor had falsely accused Defendant with similar allegations. Counsel is credible in that he believed the line of questioning would help the defense. Defendant has not demonstrated that counsel was ineffective. Accordingly, Ground 4 is denied.

(Doc. 21-1 at 905–06). The Fifth DCA affirmed the denial, *per curiam*. (Doc. 21-1 at 1155).

The state court's decision was not contrary to, or an unreasonable application of, federal law or based on an unreasonable determination of the facts. A tactical or strategic decision within the range of reasonable professional

competence is not subject to collateral attack unless counsel's decision was so "patently unreasonable that no competent attorney would have chosen it." *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983).

As credited by the post-conviction court, counsel desired to show that a prior similar allegation against Petitioner turned out to be false, and he believed that strategy would be helpful to the defense. Petitioner presents no clear and convincing evidence to rebut the presumption this credibility determination is correct, *see* 28 U.S.C. § 2254(e)(1), and the Court finds that a reasonable attorney could have made the same strategic decision. *See White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.").

Accordingly, Ground Four is denied.

V. 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 shown that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. 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 and leave to proceed *in forma pauperis*.

VI. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. The Amended Motion to Stay (Doc. 33) is **DENIED**.
2. The Petition for Writ of Habeas Corpus (Docs. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

3. Petitioner is **DENIED** a Certificate of Appealability and leave to proceed *in forma pauperis*.

4. The Clerk of the Court is directed to enter judgment accordingly and **CLOSE** this case.

DONE and **ORDERED** in Orlando, Florida on January 8, 2024.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

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