Appendix – A

Appx A

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-14146

Non-Argument Calendar

MARK A. MARCHETTI,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-23940-KMM

Before ROSENBAUM, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Mark Marchetti, a Florida state prisoner, is serving six consecutive life sentences (and multiple other consecutive terms of imprisonment) after he was found guilty of several offenses following his repeated sexual abuse of his minor daughter C.M. Proceeding pro se, Marchetti appeals the district court's denial of his petition for a writ of habeas corpus. We affirm.

Marchetti was charged with four counts of sexual battery on a victim under twelve, one count of lewd and lascivious molestation on a child under twelve, one count of kidnapping a child under thirteen with the intent to commit a sexual offense, one count of battery on a child under eighteen by bodily fluids, one count of lewd and lascivious conduct on a child under sixteen by a defendant over the age of eighteen, and one count of incest. At Marchetti's criminal trial, the state of Florida offered testimony from Elaine Marchetti, Marchetti's ex-wife and C.M.'s mother, about the night she learned of the sexual abuse. Elaine explained that when she confronted Marchetti to ask if he had abused C.M., he responded that he "d[idn't] know" if he had but that his "daughter [wa]s not a liar" and that "if she said [he] did it then [he] did it." Marchetti then began acting erratically, smashing cups against his forehead, crying, screaming, and threatening to jump off a nearby balcony. The state corroborated this account with the testimony of Gloria Martinez, a friend of Elaine and Marchetti's who was present when

Elaine confronted Marchetti. Martinez confirmed that when confronted with the allegations Marchetti claimed he "d[idn't] remember that he did it" but that there was no reason for C.M. to lie and repeatedly exclaimed, "I did it, I did it."

The jury also heard C.M. discuss the abuse, both in a recorded interview with a forensic nurse and through closed circuit testimony. In both, C.M. stated that Marchetti forced her to participate in oral, vaginal, and anal sex. Marchetti would also take pictures of C.M. with his cellphone while he forced her to perform oral sex on him. C.M. believed that Marchetti had deleted most of the photos, however, because when looking through Marchetti's phone one day she only saw one photo depicting the abuse. Seemingly describing Marchetti's penis in the picture, C.M. recalled that it "had like an outer layer at the tip."

Marchetti was found guilty of all counts. After his convictions were affirmed on direct appeal, Marchetti moved for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Seizing on the statement describing his penis as having "an outer layer at the tip," Marchetti argued that C.M. "clearly" misdescribed him as uncircumcised when he had in fact been circumcised as a child. He argued his trial counsel therefore rendered constitutionally ineffective assistance of counsel by not introducing a photograph of his penis at trial, which would have "conclusively refute[d]" C.M.'s testimony and proven her claims of sexual abuse were "simply implausible."

The state habeas court denied Marchetti's motion, finding his argument "unfounded . . . for the simple reason that C.M. never" claimed he was uncircumcised—in fact, the state habeas court found she seemingly described Marchetti as circumcised, so introducing a picture of his penis would have incriminated him further. The state appellate court affirmed without a written opinion. Marchetti then filed a petition for federal habeas relief on the same claim, and the district court denied his petition. We granted a certificate of appealability on one question:[1] Whether counsel provided ineffective assistance by failing to introduce photographs of Marchetti's circumcised penis, as evidence that the victim may have incorrectly described Marchetti's genital anatomy?

Our review of Marchetti's petition is governed by the Antiterrorism and Effective Death Penalty Act's "highly deferential standards." *Davis v. Ayala*, 576 U.S. 257, 269 (2015). Under AEDPA, when a petitioner's claim is first adjudicated in state court, a federal court cannot grant habeas relief unless the state court's rejection of his claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law"; or "(2) resulted in a decision that was based on an

[1] Marchetti's rule 3.850 motion and federal petition raised other grounds for relief that are not at issue in this appeal. He briefs issues not in his certificate of appealability, but we don't reach them because "[w]e may only review claims encompassed by the COA." *See Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 948 (11th Cir. 2016).

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

AEDPA's unreasonable application standard requires a petitioner to show more than that the state court's decision was "merely wrong or even clear error." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quotation omitted). Instead, he must show that "no 'fairminded jurist' could agree with the state court's determination or conclusion." *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

When a petitioner presses an ineffective assistance of counsel claim, he "must show that [his] counsel's performance (1) 'fell below an objective standard of reasonableness' and (2) 'prejudiced the defense.'" *Tharpe v. Warden*, 834 F.3d 1323, 1338 (11th Cir. 2016) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). To establish prejudice, the petitioner must demonstrate there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability means a substantial, not just conceivable, likelihood of a different result." *Shinn*, 592 U.S. at 118 (quotation omitted). Because the "[f]ailure to establish either prong is fatal" to an ineffective assistance claim, if the state court's prejudice determination was reasonable we need not address counsel's allegedly deficient performance. *See Tuomi v. Sec'y, Fla. Dep't of Corr.*, 980 F.3d 787, 795 (11th Cir. 2020).

Marchetti's only argument as to prejudice is that the phrase "an outer layer at the tip" conclusively described his penis as uncircumcised. Therefore, he argues, a picture showing he is circumcised would have either proven C.M.'s allegations were fabricated or excluded him as her abuser.

Marchetti has failed to establish that no fairminded jurist could reach the same no-prejudice conclusion that the state habeas court did. First, the state habeas court did not unreasonably determine that C.M.'s testimony that the penis had "an outer layer at the tip" was not necessarily a statement that Marchetti was circumcised. C.M. was describing a picture she saw on Marchetti's phone—not what she observed during any instance of sexual abuse—and did not elaborate on what she meant by "an outer layer at the tip." If C.M. did not mean that Marchetti was uncircumcised, a picture of his penis wouldn't have been exculpatory and he wasn't prejudiced by any failure to present it. *See Rhode v. Hall*, 582 F.3d 1273, 1287 (11th Cir. 2009) (noting that a defendant cannot establish prejudice when counsel did not present "evidence incompatible with the defense strategy"). Because Marchetti's argument relies on his speculative interpretation of this phrase, he hasn't shown a "substantial" probability he would have been acquitted had his counsel rebutted what he interpreted it to mean. *Shinn*, 592 U.S. at 118 (quotation omitted); *Putman v. Head*, 268 F.3d 1223, 1228 n.3 (11th Cir. 2001) ("[The petitioner] has utterly failed to show that . . . there is a reasonable probability the jury would have found [him] not guilty.").

Second, at trial, the jury heard C.M. describe, both in her forensic interview and testimony, Marchetti's repeated acts of sexual abuse. They also heard both Elaine and Martinez testify that Marchetti told them to believe C.M. when he was initially confronted with the allegations. The jury clearly credited some or all of this testimony when it found Marchetti guilty on all counts. Marchetti hasn't shown a substantial probability that, had his counsel rebutted this single point in C.M.'s testimony, the jury would have instead completely discredited the remainder of her testimony and his admission and acquitted him. *See Fortenberry v. Haley*, 297 F.3d 1213, 1229 (11th Cir. 2002) (concluding the petitioner failed to establish prejudice where there was "strong" evidence of guilt). The state habeas court therefore did not unreasonably apply federal law in denying Marchetti's ineffective assistance of counsel claim for lack of prejudice.

AFFIRMED.

Appendix – B

ORDER DENYING § 2254

Appx B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 1:20-23940-cv-KMM

MARK A. MARCHETTI,

Petitioner,

v.

RICKY D. DIXON, Secretary of the Florida Department of Corrections,[1]

Respondent.
_____/

ORDER

THIS CAUSE came before the Court upon Mark A. Marchetti's ("Petitioner") *pro se* Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, attacking the constitutionality of his convictions and sentences entered in Florida's Eleventh Judicial Circuit Case No. F16-002310. ("Am. Pet.") (ECF No. 10, 11). The State of Florida ("State") filed a Response ("Resp.") (ECF No. 14), to the Court's Order to Show Cause (ECF No. 12), along with a supporting appendix (ECF No. 15) and state court transcripts (ECF No. 16). The case is now ripe for review.

I. BACKGROUND

On February 24, 2016, the State charged Petitioner by Information with four counts of sexual battery on a victim under twelve years of age (Counts One, Three, Five, and Seven); lewd and lascivious molestation on a child under twelve years of age (Count Two); kidnapping a child

[1] Ricky D. Dixon became the Secretary of the Florida Department of Corrections in November 2021. Pursuant to Federal Rule of Civil Procedure 25(d), he is substituted for Mark S. Inch as the Defendant.

under the age of thirteen years of age with the intent to commit a sexual battery (Count Four); battery on a child under the age of 18 by throwing, tossing, projecting, or expelling bodily fluids (Count Six); lewd and lascivious conduct on a child under the age of sixteen by a defendant over the age of eighteen (Count Eight); and incest (Count Nine). (ECF No. 15-21) at 15–24.

Petitioner proceeded to trial where the State introduced the following evidence. Petitioner's wife, Elaine Marchetti ("Elaine"), gave birth to their child, C.M., on August 10, 2006. (ECF No. 16-1) at 140.[2] From 2008 through 2011, Elaine and C.M. lived in California with her relatives while Petitioner lived in North Carolina and then Florida. *Id.* at 155. In 2011, Elaine and C.M. moved to Florida. *Id.* In their 2011 divorce decree, Petitioner and Elaine obtained joint custody of C.M. *Id.* at 155–56.

From 2011 through 2015, Petitioner lived in Hialeah while Elaine and C.M. lived in Broward County. *Id.* at 142–43. In the summer of 2015, Petitioner and Elaine reconciled and began saving money to pay for a single residence for all three of them. *Id.* at 145. Around the same time, C.M. went to live with her maternal grandmother, Esther Dees ("Dees"), in California. *Id.* at 145, 167. Dees agreed to let C.M. stay with her for a year. *Id.* at 167.

On November 5, 2015, C.M. and Dees were watching a talk show on television involving stories of sexual assault within families. *Id.* at 169–70. C.M. then told Dees that Petitioner had been sexually molesting her. *Id.* at 170–71. Dees took C.M. to a rape treatment center where C.M. underwent a medical examination and a forensic interview. *Id.* at 174–76. Nurse Tapia-Jaffee conducted the interview and recorded same on video. *Id.* at 227, 229. The State played the video for the jury at trial. *Id.* at 238. C.M. provided details about Petitioner's actions towards her beginning when she was eight years old. *Id.* at 247. On many occasions, he forced her to engage

[2] The Court shall cite to the page number of the underlying state court transcript.

in oral sex, vaginal sex, and anal sex. *Id.* at 246–88. C.M. testified at trial consistent with her statements during the forensic interview. *Id.* at 302–25.

On November 5, 2015, Elaine and a friend went to Petitioner's home to socialize. *Id.* at 146–47. While there, Elaine took a phone call from her sister who informed Elaine that Petitioner had raped C.M. *Id.* at 149. Elaine immediately confronted Petitioner. *Id.* at 149. He responded, "my daughter is not a liar . . . and if she said I did it, then I did it." *Id.* at 149. Petitioner then began acting erratically and smashed coffee cups against his forehead. *Id.* at 150–51. The following day, a detective left a card at Petitioner's home requesting that he contact the police. *Id.* at 151. Elaine was with Petitioner when he found the card. *Id.* Petitioner said he wanted to "end it all" and did not "want to be alive anymore." *Id.* at 152. He voluntarily checked himself into a hospital to receive mental health treatment. *Id.*

The jury found Petitioner guilty as charged in the Information. (ECF No. 15-2) at 37–39. The trial court adjudicated Petitioner guilty and sentenced him to several consecutive life terms, with a twenty-five-year mandatory minimum. *Id.* at 42–51.

On April 18, 2017, Petitioner filed a notice of appeal in Florida's Third District Court of Appeal ("Third DCA"). *Id.* at 53. On October 31, 2018, in *Marchetti v. State*, 258 So. 3d 437 (Fla. Dist. Ct. App. 2018), the Third DCA *per curiam* affirmed without written opinion. (ECF No. 15-1) at 113.

On September 14, 2019, Petitioner filed a Motion for Postconviction Relief under Florida Rule of Criminal Procedure 3.850. *Id.* at 121–94. On October 25, 2019, the trial court denied Petitioner's Rule 3.850 motion. *Id.* at 196–203. Petitioner filed a notice of appeal in the Third DCA. *Id.* at 205–06. On March 4, 2020, the Third DCA *per curiam* affirmed without written

opinion in *Marchetti v. State*, 302 So. 3d 847 (Fla. Dist. Ct. App. 2020). Mandate issued September 21, 2020. *Id.* at 267.

On September 28, 2020, Petitioner initiated the instant proceedings under § 2254. (ECF No. 1). He subsequently filed an Amended Petition and Memorandum ("Mem.") in support thereof. (ECF Nos. 10, 11). Construing the Amended Petition liberally, consistent with *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), the Petitioner presents the following claims for relief:

1. Ineffective assistance of counsel for failing to object to the State's improper closing argument ("Claim One"). Am. Pet. at 5–6; Mem. at 7–9.

2. Ineffective assistance of counsel for failing to investigate and call lay witnesses ("Claim Two"). Am. Pet. at 7–8; Mem. at 10–13.

3. Ineffective assistance of counsel for failing to investigate and call expert witnesses ("Claim Three"). Am. Pet. at 9–10; Mem. at 14–17.

4. Ineffective assistance of counsel for failing to present exculpatory evidence refuting the victim's testimony ("Claim Four"). Am. Pet. at 11–12; Mem. at 18–21.

5. Ineffective assistance of counsel for misadvising Petitioner regarding his right to testify ("Claim Five"). Am. Pet. at 13–14; Mem. at 22–25.

6. Ineffective assistance of counsel for failing to effectively impeach a state witness ("Claim Six"). Am. Pet. at 15–16; Mem. at 26–27.

7. Ineffective assistance of counsel for failing to object to a jury instruction ("Claim Seven"). Am. Pet. at 17–19; Mem. at 28–31.

II. STATUTE OF LIMITATIONS AND EXHAUSTION

To begin, the State concedes that the Petition is timely. Resp. at 22. The State asserts that Petitioner has exhausted Claims Two through Five. *See generally* Resp. However, the State addresses the merits of Claim One. Resp. at 27–31. The Court shall do the same, without making a specific ruling on exhaustion as to Claim One. *See Smith v. Crosby*, 159 F. App'x 76, 79 n. 1 (11th Cir. 2005) (per curiam) (holding that a § 2254 petition "may be denied on the merits,

notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.").

III. LEGAL STANDARD

This Court's review of a state prisoner's federal petition for habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. "The purpose of [the] AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Ledford v. Warden, GDCP*, 818 F.3d 600, 642 (11th Cir. 2016) (quoting *Greene v. Fisher*, 565 U.S. 34, 38 (2011)). Federal habeas corpus review of final state court decisions is "'greatly circumscribed' and 'highly deferential.'" *Id.* at 642 (quoting *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011)), and is generally limited to the record that was before the state court that adjudicated the claim on the merits. *Id.* (citing *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)).

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

Where the claim was "adjudicated on the merits" in the state forum, § 2254(d) prohibits relitigation of the claim unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

of the United States;" [3] or, (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 97–98; *see also Williams v. Taylor*, 529 U.S. 362, 413 (2000). When relying on § 2254(d)(2), a federal court can grant relief if the state court rendered an erroneous factual determination. *Tharpe v. Warden*, 834 F.3d 1323, 1337 (11th Cir. 2016).

Because the "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court," *Burt v. Titlow*, 571 U.S. 12, 19 (2013), "federal courts may grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'" *Tharpe*, 834 F.3d at 1338 (11th Cir. 2016) (quoting *Harrington*, 562 U.S. at 102). This standard is intentionally difficult to meet. *Harrington*, 562 U.S. at 102.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). When assessing counsel's performance under *Strickland*, the court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

To prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate that: (1) counsel's performance was deficient and (2) the petitioner suffered prejudice as a result of that deficiency. *Id.* at 687–88.

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[3] "Clearly established Federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the Supreme Court at the time the state court issues its decision. *White v. Woodall*, 572 U.S. 415, 419 (2014) (citing *Williams*, 529 U.S. at 412).

To establish deficient performance, the petitioner must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence and "fell below an objective standard of reasonableness." *See id.*; *see also Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009). The review of counsel's performance should not focus on what is possible, prudent, or appropriate but should focus on "what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794 (1987).

Regarding the prejudice component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697. Further, counsel is not ineffective for failing to raise non-meritorious issues. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001). Nor is counsel required to present every non-frivolous argument. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013).

Furthermore, a § 2254 Petitioner must provide factual support for his or her contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406–07 (11th Cir. 1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012).

IV. DISCUSSION

Under **Claim One**, Petitioner argues that his counsel was ineffective for failing to object to the State's improper closing argument. Am. Pet. at 5–6; Mem. at 7–9. Specifically, Petitioner argues that the prosecutor improperly denigrated defense counsel and Petitioner during closing. *See generally id.*

Defense counsel's closing argument took aim at the victim's credibility. (ECF No. 16-1) at 358–59. Counsel suggested that C.M. fabricated the allegations against Petitioner to get attention and because she wanted to go on television. *Id.* However, C.M. did not understand the ramifications of accusing Petitioner of molesting her. *Id.* at 359–60. The prosecutor countered with the following arguments:

> **Prosecutor**: At ten years of age C.M. is a lying manipulative cunning monster who makes allegations so horrific against her own daddy because she has an ulterior motive to stay in California, the land of everything that's wonderful, and to become a TV star. That is what the defense attorney just spent about the last 40 minutes telling you. Now, she didn't say it that bluntly of course because when you say it's true and honest for what it is and you don't dress it up with nice words, it's preposterous. The defense makes zero sense. It's nice words –
>
> **Defense Counsel**: Objection to denigration of the defense.
>
> **The Court**: All right. This is argument. Ladies and gentlemen, and naturally the attorneys are going to see things very differently. Let's confine ourselves to the evidence of the case.
>
> **Prosecutor**: Because the evidence in this case tells you flat out C.M. is not a lying manipulative conniving child. She has not been emboldened by lying incompetent police. She has not been enabled in this great exception by a sub-standard nurse with no duty to the truth and she has not come forward today because her mother has an axe to grind or because her grandmother loved her grandchild. Once again, the evidence shows that that kind of allegation no matter how you dress it up or how nice the words are is preposterous. Now the defense attorney said to you things that really amount to little more than an absolute smear job of the credibility.
>
> **Defense Counsel**: Objection denigration of defense.
>
> **The Court**: Let's address the evidence, please.

Id. at 370–71.

The purpose of closing argument is to explain to the jury what it must decide and what evidence is relevant to its decision. *See United States v. Iglesias*, 915 F.2d 1524, 1529 (11th Cir. 1990). The jury's decision is to be based upon the evidence presented at trial and the legal instructions given by the court. *See Chandler v. Fla.*, 449 U.S. 560, 574 (1981) ("Trial courts must

be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."); *see also Ward v. State*, 765 So. 2d 299, 300 (Fla. Dist. Ct. App. 2000) ("most of the prosecutor's comments were 'fair comment' on the defense counsel's closing argument"); *Laboo v. State*, 715 So. 2d 1034, 1035 (Fla. Dist. Ct. App. 1998) (per curiam) (prosecutor's comments to be viewed in context of all the evidence presented and the initial arguments of defense counsel).

To establish prosecutorial misconduct, a petitioner must demonstrate that the prosecutor's comments (1) were improper and (2) prejudiced his substantive rights. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45 (1974); *Conner v. GDCP Warden*, 784 F.3d 752, 769 (11th Cir. 2015). To demonstrate that a prosecutor's prejudicial comments affected a petitioner's substantial rights requires there be a reasonable probability that, but for the remarks, the outcome of the trial would have been different. *See United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006).

The prosecutor's comments about which Petitioner complains constituted a rebuttal to the defense counsel's closing arguments. The comments about C.M.'s testimony were also based on facts in evidence. *See* (ECF No. 16-1) at 370–71. As a result, the comments were proper. *See DeChristoforo*, 416 U.S. at 642–45; *Conner*, 784 F.3d at 769. Even assuming the comments were improper, Petitioner cannot establish that the comments resulted in prejudice. *See Eckhardt*, 466 F.3d at 947. As is indicated above, the victim testified regarding ongoing sexual abuse and the jury found her to be credible. *See* (ECF No. 16-1) at 302–25.

The trial court's rejection of this claim in its order denying Petitioner's Rule 3.850 motion, affirmed by the appellate court, is not contrary to or an unreasonable application of federal

constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413. Thus, the Court finds Claim One of the Petition to be without merit.

Under **Claim Two**, Petitioner argues that his counsel was ineffective for failing to investigate and call lay witnesses. Am. Pet. at 7–8; Mem. at 10–13.

In the habeas corpus context, claims of uncalled witnesses involve the "epitome of a strategic decision" that will seldom, if ever, serve as grounds to find counsel constitutionally ineffective. *Knight v. Fla. Dep't of Corrs.*, 936 F.3d 1322, 1340 (11th Cir. 2019); *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004). A defense counsel's conduct is unreasonable where no competent counsel would have taken the action that defense counsel did take. *See Chandler*, 218 F.3d at 1315. Petitioner has not met this high standard. A defense counsel's decision is not unreasonable where the witnesses may have provided inculpatory, rather than exculpatory evidence. *See Miranda v. United States*, 433 F. App'x. 866, 869 (11th Cir. 2011).

Petitioner provided affidavits executed by Timothy Marchetti ("Timothy"), Tamara Marchetti ("Tamara"), and Emily Riester ("Riester"). (ECF No. 15-1) at 187–94. Timothy would have testified that Elaine continued to spend time with Petitioner after C.M. made the allegations and that Elaine told Timothy that C.M. was a liar. *Id.* at 187. Tamara would have testified that in 2010 she witnessed Esther Dees threaten to cut Elaine off financially and disown her if Elaine returned to Florida with C.M. to live with Petitioner. *Id.* at 190. Riester lived across the street from Elaine and Petitioner. *Id.* at 193. According to Reister's affidavit, she witnessed Elaine verbally and physically abusing Petitioner, using C.M. as a tool to obtain money from Petitioner, and fabricating stories about Petitioner to the police. *Id.*

The proffered testimony of Timothy and Tamara regarding what Elaine said to them in the past constitutes inadmissible hearsay. *See* Fla. Stat. §§ 90.801(1)(c); 90.802. Furthermore,

Riester's testimony regarding Elaine's prior bad acts is also inadmissible. *See* Fla. Stat. § 90.405. As a result, counsel's failure to attempt to introduce the testimony of these three witnesses does not constitute ineffective assistance of counsel. *See Chandler*, 240 F.3d at 917 (holding that counsel is not ineffective for failing to raise non-meritorious issues). Regardless, Petitioner's proffered testimony does not alter the outcome of the proceedings, given the evidence adduced at trial. *See Fugate v. Head*, 261 F.3d 1206, 1239, n. 54 (11th Cir. 2001).

The trial court's rejection of this claim in its order denying Petitioner's Rule 3.850 motion, affirmed by the appellate court, is not contrary to or an unreasonable application of federal constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413. Thus, the Court finds Claim Two of the Petition to be without merit.

Under **Claim Three**, Petitioner argues that his counsel was ineffective for failing to investigate and call expert witnesses. Am. Pet. at 9–10; Mem. at 14–17.

Under Florida law, to allege ineffective assistance of counsel due to the failure to call an expert witness, the claim must include (1) the identity of the witness; (2) the substance of the witness's testimony; (3) an explanation of how the omission of this testimony prejudiced the outcome of the case; (4) and assert that the witness was available to testify at trial. *Nelson v. State*, 875 So. 2d 579, 582, 584 (Fla. 2004).

Petitioner alleges that his counsel should have called an expert to rebut the state's experts regarding the victim's physical examination and forensic interview. *See generally* Am. Pet. at 9–10; Mem. at 14–17. Petitioner further asserts that this unidentified expert would have been able to effectively challenge the victim's credibility. *See id.* Petitioner fails to identify the expert witness or provide more than conclusive assertions regarding the substance of the expert testimony. *See Nelson*, 875 So. 2d at 582. Furthermore, Petitioner has not demonstrated that had

an expert witness been secured that they would have offered favorable, much less exculpatory testimony. Petitioner's allegations are, at best, speculative. Further, Petitioner cannot maintain an ineffective assistance of counsel claim "simply by pointing to additional evidence that could have been presented." *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324 (11th Cir. 2002).

The trial court's rejection of this claim in its order denying Petitioner's Rule 3.850 motion, affirmed by the appellate court, is not contrary to or an unreasonable application of federal constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413. Thus, the Court finds Claim Three of the Petition to be without merit.

Under **Claim Four**, Petitioner argues that his counsel was ineffective for failing to present exculpatory evidence refuting the victim's testimony regarding the Petitioner's genital anatomy. Am. Pet. at 11–12; Mem. at 18–21.

"When a petitioner claims that he was prejudiced from counsel's failure to present certain evidence during trial, the necessary inquiry is whether such evidence is material." *Osborne v. Terry*, 466 F.3d 1298, 1307–08 (11th Cir. 2006). Evidence is material only when there is a reasonable probability that, had the evidence been presented, the result of the proceeding would have been different, namely, the petitioner would have been acquitted of the underlying offense. *Id.* at 1308.

Petitioner appears to be arguing that C.M. stated in her forensic interview that he was not circumcised because she referred to his penis having "like an outer layer at the tip." Because he is circumcised, Petitioner takes issue with counsel's failure to cross-examine C.M. on this issue or introduce a photograph of Petitioner's genitals to the jury to undermine her testimony. *See generally* Am. Pet. at 11–12; Mem. at 18–21.

Regardless of whether Petitioner is circumcised, the victim repeatedly testified a trial to many instances of sexual abuse perpetrated by Petitioner. *See* (ECF No. 16-1) at 302–25. The jury accepted the victim's testimony as true. Petitioner cannot establish that had counsel introduced the evidence he describes under this claim, he would have been acquitted of the underlying offense. *See Osborne*, 466 F.3d at 1307–08.

The trial court's rejection of this claim in its order denying Petitioner's Rule 3.850 motion, affirmed by the appellate court, is not contrary to or an unreasonable application of federal constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413. Thus, the Court finds Claim Four of the Petition to be without merit.

Under **Claim Five**, Petitioner argues that his counsel was ineffective for misadvising Petitioner regarding his right to testify ("Claim Five"). Am. Pet. at 13–14; Mem. at 22–25.

A criminal defendant has a fundamental constitutional right to testify on his or her own behalf at trial. *See Rock v. Arkansas*, 483 U.S. 44, 49–52 (1987); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992). This right is personal to the defendant and cannot be waived by the trial court or defense counsel. *Teague*, 953 F.2d at 1532. Under the first prong of the *Strickland*, an attorney is deficient if he or she refused to accept the defendant's decision to testify and refused to call the defendant to the stand to testify or, alternatively, where counsel never informed the defendant of the right to testify, and that the ultimate decision belonged to the defendant alone. *Id.* The prejudice prong requires a showing that, but for counsel's deficiency, the outcome of Petitioner's trial would have been different. *Id.* "If counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify." *Beasley v. State*, 18 So. 3d 473,495 (Fla. 2009).

Petitioner's claim is refuted by his sworn statements on the record. After the State rested, the following exchange took place.

> **The Court**: Mr. Marchetti, you understand that you have a constitutional right to testify in your own defense if you wish to do so, do you understand that?
>
> **Petitioner**: Yes, sir.
>
> **The Court**: You also have a constitutional right not to testify and I will instruct the jury to have no adverse inference in your decision, do you understand that as well?
>
> **Petitioner**: Yes, sir.
>
> **The Court**: Have you discussed both these rights with your attorneys?
>
> **Petitioner**: Yes, sir.
>
> **The Court**: Have they answered all your questions?
>
> **Petitioner**: Yes, sir.
>
> **The Court**: Do you feel that you are fully informed with respect to the exercising of those rights?
>
> **Petitioner**: Yes.
>
> **The Court**: You don't need [to] talk to your lawyers any further about that?
>
> **Petitioner**: No, sir.
>
> **The Court**: The decision whether to testify or not is yours, your lawyers can and should advise you as you have said they've done, but it's your decision. What is your decision?
>
> **Petitioner**: To not testify, sir.

(ECF No. 16-1) at 328–29.

The state court ruled that the above colloquy barred Petitioner's post-conviction claim that counsel was ineffective in misadvising him not to testify. *See* (ECF No. 15-1) at 201. This conclusion was not an "unreasonable determination of the facts in light of the evidence presented" to the state court. *See* § 2254(d)(2); *see also Terrel v. State*, 9 So. 3d 1284 (Fla. Dist. Ct. App.

2009) (holding that a defendant is "bound by his sworn answers during the colloquy"); *McIndoo v. State*, 98 So. 3d 640 (Fla. Dist. Ct. App. 2012) (holding that a defendant "is bound by his answers to the court."); *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity.").

The trial court's rejection of this claim in its order denying Petitioner's Rule 3.850 motion, affirmed by the appellate court, is not contrary to or an unreasonable application of federal constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413. Thus, the Court finds Claim Five of the Petition to be without merit.

Under **Claim Six**, Petitioner argues that his counsel was ineffective for failing to effectively impeach a state witness, specifically, Elaine Marchetti, with her history of making false accusations and being deceptive. Am. Pet. at 15–16; Mem. at 26–27.

The decision regarding whether and how to cross-examine a witness is "a tactical one well within the discretion of a defense attorney." *Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001) (quoting *Messer v. Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985)). A petitioner cannot establish prejudice under *Strickland* without first pointing to a "specific instance where cross-examination arguably could have affected the outcome of . . . the trial." *Id.* (quoting *Kemp*, 760 F.2d at 1090).

Here, defense counsel was prohibited from cross examining Elaine with her prior bad acts and prior statements under sections 90.801(1)(c), 90.802, and 90.405 of the Florida Statutes. As a result, defense counsel's failure to impeach as alleged under this claim does not constitute ineffective assistance of counsel. *See Chandler*, 240 F.3d at 917 (holding that counsel is not ineffective for failing to raise non-meritorious issues).

The trial court's rejection of this claim in its order denying Petitioner's Rule 3.850 motion, affirmed by the appellate court, is not contrary to or an unreasonable application of federal

constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413. Thus, the Court finds Claim Six of the Petition to be without merit.

Under **Claim Seven**, Petitioner argues that his counsel was ineffective for failing to object to the trial court's response to a jury question during deliberations. Am. Pet. at 17–19; Mem. at 28–31.

After deliberating for approximately seven hours, the jury sent a note to the judge. (ECF No. 16-1) at 391. The note stated: "If we can't come up with a 6 and 0 on either side of the verdict, what happens with the case?" *Id.* at 392. Outside of the jury's presence, the court proposed the following response:

> Ladies and gentlemen of the jury, I am in receipt of your inquiry, your job is to attempt to reach a verdict in good conscience [if] you can do so. Your verdict as I have previously explained must be based on the evidence and the jury instructions. Do not concern yourself with the consequences if you're unable to reach a unanimous verdict. Those consequences are for me to deal with according to the law. Please resume your deliberations. Thank you.

Id. The following exchange then took place:

> **Defense Counsel**: My concern . . . is it comes very close to being an *Allen*[4] charge without the language of an *Allen* charge. It's not that I would have a preference for the *Allen* charge language . . . [but] their note implies that they are deadlocked, and I think after 7 hours of deliberation, that's a pretty likely assumption. It can't be *Allen* charged more than once. And I think this amounts to the *Allen* charge.
>
> **The Court**: On the face of the deadlock they said, what happens if we're deadlocked? I have never given an *Allen* charge . . . and I'd be disinclined to do so. There is a first time for everything. I would like to try to be responsive to their inquiry, the answer to their inquiry is it's none of your business but if you can't reach a verdict, it's my responsibility. And I try to say that in somewhat nicer language. Do you have a specific objection?
>
> **Defense Counsel**: Can we have a moment to discuss?
>
> **The Court**: Of course.

[4] *Allen v. United States*, 164 U.S. 492 (1896).

> **Defense Counsel**: Your Honor, we have no objection to this answer being returned to the jury.

Id. at 392–93.

Petitioner argues that defense counsel should have challenged the court's instruction as coercive and should have requested a standard *Allen* charge instruction. *See generally* Am. Pet. at 17–19; Mem. at 28–31.

An *Allen* charge "instructs a deadlocked jury to undertake further efforts to reach a verdict." *United States v. Douglas*, 572 F. App'x 876, 877 (11th Cir. 2014) (quoting *United States v. Bush*, 727 F.3d 1308, 1311 n. 1 (11th Cir. 2013)). When giving an *Allen* charge, a court "abuse[s] its discretion only if the charge [i]s inherently coercive." *Id.* (citing *United States v. Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008). For example, "[a]n instruction which appears to give a jury no choice but to return a verdict is impermissibly coercive." *Id.* (quoting *United States v. Jones*, 504 F.3d 1218, 1219 (11th Cir. 2007)). On the other hand, "an *Allen* charge is not coercive where the district court specifically states to the jury that no juror is expected to give up his or her honest belief regarding the evidence." *Id.* at 877–78 (citing *United States v. Trujillo*, 146 F.3d 838, 846–47 (11th Cir. 1998)).

Here, because the jury was not deadlocked, the trial court was not required to give an *Allen* charge. Furthermore, the trial court's instruction was not coercive. The trial court explained that the jury's job was to "attempt to reach a verdict in good conscience . . . based on the evidence and the jury instructions." (ECF No. 16-1) at 392. The state court did not instruct the jurors to give up on their "honest belief regarding the evidence." *See Douglas*, 572 F. App'x at 877–78.

Petitioner asserts that the trial court's use of the word "consequences" somehow rendered the instruction coercive. However, the court was merely properly informing the jury not to consider the court's procedure following a hung jury. (ECF No. 16-1) at 392. Because the trial

court did not err in responding to the jury's question, defense counsel had no valid basis to object. *See Chandler*, 240 F.3d at 917 (holding that counsel is not ineffective for failing to raise non-meritorious issues).

The trial court's rejection of this claim in its order denying Petitioner's Rule 3.850 motion, affirmed by the appellate court, is not contrary to or an unreasonable application of federal constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413. Thus, the Court finds Claim Seven of the Petition to be without merit.

V. CERTIFICATE OF APPEALABILITY

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

After review of the record, the Court finds that Petitioner is not entitled to a certificate of appealability. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *see also Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, Petitioner cannot satisfy the *Slack* test and the Court, therefore, finds that a certificate of appealability shall not issue as to the claims asserted in the Petition.

VI. CONCLUSION

Movant has failed to set forth an entitlement to *habeas* relief.[5] Accordingly, UPON CONSIDERATION of the Petition, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (ECF No. 1) is DENIED. No certificate of appealability shall issue. The Clerk of Court is INSTRUCTED to CLOSE this case. All pending motions, if any, are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of November 2022.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

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[5] Because the Court can "adequately assess [Petitioner's] claim[s] without further factual development," *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing is not required.

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