

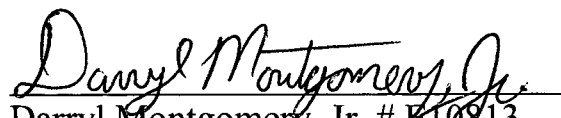
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the foregoing document, (MOTION FOR IN FORMA PAUPERIS) has been placed into the hands of prison officials for mailing, via first-class U.S. Mail to: the Clerk of the Supreme Court of the United States, One First Street N.E., Washington, D.C. 20543-0001, on this 20th day February, 2018.

OATH

UNDER PENALTIES OF PERJURY, I declare that I have read the foregoing document, and the facts stated herein are correct and true; 28 U.S.C. §1746, Executed on this 20th day of February, 2018.

Respectfully submitted,



Darryl Montgomery, Jr. # E10813
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Pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DARRYL MONTGOMERY, JR.,

Petitioner,

v.

CASE NO. 6:14-cv-1578-Orl-37GJK

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

ORDER

This cause is before the Court on an Amended Petition for Writ of Habeas Corpus ("Amended Petition") filed pursuant to 28 U.S.C. § 2254 (Doc. 6). Respondents filed a Response to the Amended Petition in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases for the United States District Courts* (Doc. 11). Petitioner filed a reply (Doc. 14).

Petitioner alleges two claims for relief in the Amended Petition. For the following reasons, the Amended Petition is denied.

I. PROCEDURAL HISTORY

Petitioner was charged by second amended information with sale of cocaine (count one), accessory after the fact to robbery with a firearm (count two), and accessory after the fact to attempted robbery with a firearm (count three) (Doc. 12 at 32-33). After a jury trial, Petitioner was convicted as charged of counts one and two and was acquitted of count

three (Doc. 12-30 at 23-24). The trial court sentenced Petitioner to two concurrent ten-year terms of imprisonment (Doc. 12-31 at 12-19). Petitioner appealed, and the Fifth District Court of Appeal affirmed (Doc. 12-32 at 24). *See Montgomery v. State*, 123 So. 3d 637 (Fla. 5th DCA 2013). Petitioner sought discretionary review in the Supreme Court of Florida, and the court denied the petition for review. *Id.* at 41-56.

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

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

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

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the 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, 1306 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh

Circuit Court of Appeals 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.

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." *Id.* 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*); cf. *Bell v. Cone*, 535 U.S. 685, 697 n. 4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

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

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984),

established a two-part test for determining whether a convicted person is entitled to relief on the ground that 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.¹ *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 Court of Appeals, 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

¹ In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

on the ground of ineffective assistance of counsel are few and far between.” *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

Petitioner alleges in claim one that the trial court erred by conducting an inquiry into his right to testify in the presence of the jury and by later admonishing him in the jury’s presence (Doc. 6 at 5). In his second claim, Petitioner asserts that the prosecutor knowingly allowed false testimony to be introduced at trial. *Id.* at 7. Respondents argue that these claims are unexhausted (Doc. 11 at 11-13).

Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842-44 (1999). In order to satisfy the exhaustion requirement, a state petitioner must “fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citations omitted); *McNair v. Campbell*, 416 F.3d 1291, 1302 (11th Cir. 2005). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

The Court has reviewed the record and agrees that these claims are unexhausted. Although Petitioner raised claim one on direct appeal, he did not include the federal constitutional basis of the claim in his initial brief (Doc. 12-31 at 35-46; 12-32 at 1-4).

Appellate counsel merely argued that the trial court's actions with regard to claim one amounted to fundamental error pursuant to state law. *Id.*; see also Doc. 12-32 at 16-20; *Zeigler v. Crosby*, 345 F.3d 1300, 1307 (11th Cir. 2003) (holding that federal habeas petitioner failed to "fairly present" his juror misconduct claims to the state courts where his brief to the state appellate court did not refer to the federal constitutional issues raised in his federal habeas petition, and none of the cases cited in his direct appeal discussed the federal constitution); *Upshaw v. Singletary*, 70 F.3d 576, 578 (11th Cir. 1995) (stating that to meet the exhaustion requirement, a petitioner must have "fairly apprised the highest state court of his state with the appropriate jurisdiction of the federal rights which allegedly were violated.") (citations omitted).

Furthermore, Petitioner raised claim two for the first time in his jurisdictional brief filed with the Supreme Court of Florida (Doc. 12-32 at 48). The claim is not listed as a separate ground but is contained within the argument regarding the trial court's error in relation to claim one. *Id.* However, to the extent this claim was fairly presented to the state court, Petitioner did not raise the federal constitutional basis of this claim. See *Zeigler*, 345 F. 3d at 1307; *Upshaw*, 70 F.3d at 578.

Therefore, these claims are unexhausted, and the Court is precluded from considering them because they would be procedurally defaulted if Petitioner returned to state court. *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1342 (11th Cir. 2009) (citing *Snowden*, 135 F.3d at 736 ("[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to state-law procedural default, we can forego the

needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief.")). Petitioner could not return to the state court to raise these claims because a Rule 3.850 motion or state habeas petition would be untimely at this juncture.

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). The second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Petitioner argues, in a cursory fashion, that he is actually innocent (Doc. 14 at 8). However, Petitioner does not support his claim with any new evidence that was not presented at trial or was unavailable to him to demonstrate the applicability of the actual innocence exception. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (stating to be credible, an actual innocence claim requires a petitioner to support his allegations with new reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial). A review of the record reveals that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Accordingly, the Court is barred from reviewing claims one and two.

Any of Petitioner's allegations not specifically addressed herein have been found

to be without merit.²

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner "makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a Petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The Court concludes that Petitioner has not made the requisite showing in these circumstances. Petitioner is not entitled to a certificate of appealability.

² The Court notes that to the extent Petitioner has attempted to raise a claim challenging the violation of his speedy trial rights (Doc. 14 at 12-13), that claim is also unexhausted as it was not presented in any state court proceeding. Petitioner has not demonstrated any cause or prejudice for the default or established the applicability of the actual innocence exception. Therefore, the Court is barred from reviewing this claim.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Amended Petition for Writ of Habeas Corpus filed by Darryl Montgomery, Jr. (Doc. 6) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.
2. Petitioner is **DENIED** a certificate of appealability.
3. The Clerk of the Court is directed to enter judgment and close the case.

DONE AND ORDERED in Orlando, Florida, this 27th day of January, 2016.




ROY B. DALTON JR.
United States District Judge

Copies to:
OrlP-3 1/27
Darryl Montgomery, Jr.
Counsel of Record

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