NO: _____

IN THE UNITED STATES SUPREME COURT

HALE R. HARRIS,
Petitioner,
Vs.

STATE OF FLORIDA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO ELEVENTH CIRCUIT COURT OF APPEAL

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

APPENDIX-A-Opinion of the United States Court of Appeals

APPENDIX-B- Opinion of the United States District Court

APPENDIX-C- Opinion of the Highest State Court

APPENDIX-D- Opinion of the Broward County Circuit Court (Trial Court)

APPENDIX-E- United States Court of Appeals Motion for Reconsideration

APPENDIX-F- December 5, 2016 Evidentiary Hearing

Hale R. Harris
Union Correctional Institution
P.O. Box 1000
Raiford, Florida 32083

EXHIBIT A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10767

HALE R. HARRIS,

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. 0:21-cv-61371-KMM

ORDER:

Hale Harris's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Charles R. Wilson

UNITED STATES CIRCUIT JUDGE

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 21-61371-cv-KMM

HALE HARRIS,

Petitioner,

v.

RICKY D. DIXON, SECRETARY
FLORIDA DEPARTMENT OF
CORRECTIONS,

Respondent.[1]
_____/

ORDER

THIS CAUSE came before the Court upon Hale Harris' ("Petitioner") *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, attacking the constitutionality of his convictions and sentences entered in Palm Beach County Circuit Court Case No. 2012-CF-4901. ("Pet.") (ECF No. 1). Respondent Florida Department of Corrections ("State") filed a Response, ("Resp.") (ECF No. 7), to the Court's Order to Show Cause (ECF No. 3), along with a supporting appendix (ECF No. 8) and state court transcripts (ECF No. 9). Petitioner filed a Reply (ECF No. 14). The case is now ripe for review.

[1] The original Respondent in this case, Mark S. Inch, retired from his position as Secretary of the Florida Department of Corrections on November 19, 2021. Former Secretary Inch's successor, Ricky D. Dixon, has been automatically substituted as the Respondent. See Fed. R. Civ. P. 25(d) ("An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.").

I. BACKGROUND

On March 2, 2012, the State charged Petitioner by Information with Burglary of a Dwelling with a Battery (Count I), Strong Arm Robbery (Count II), and Felony Battery (prior conviction) (Count III). (ECF No. 8-1) at 7. Petitioner proceeded to trial. The State presented the following evidence at trial. The victim, Donald Anderson ("Anderson"), testified that he moved from New York to Florida in March 2012 to remodel a friend's apartment in Oakland Park. *Id.* at 216. The victim met Cara Carter ("Carter") on March 18, 2019, while he was stopped at a red light on his way to Verizon and Carter "pop[ped] up out of a side stoop" and asked Anderson for a ride. *Id.* at 218. Anderson initially declined, but then told Carter she could get in the car after hearing Petitioner yell at Carter. *Id.* Anderson and Carter drove to La Quinta Inn, where Anderson was staying for the weekend while drywall was being removed at the apartment he was staying at. *Id.* at 220. Anderson and Carter drank beers and had sex. *Id.* at 223–224. The next morning, on March 19, 2012, Anderson and Carter returned to Anderson's residence. *Id.* at 225. Anderson told Carter to call Petitioner to pick her up. *Id.* at 230. Petitioner drove to the BP gas station located two blocks from Anderson's residence. *Id.* at 230. Anderson met Petitioner at the BP to pick Carter up, but Petitioner's car would not start. *Id.* at 231. Anderson helped Petitioner try to start the car, but they were unsuccessful. *Id.* Petitioner called a tow truck. *Id.* Anderson testified that there was no animosity between Petitioner and him when they met. *Id.* at 232.

Anderson invited Petitioner to his residence while Petitioner was waiting for the tow truck to arrive. *Id.* Anderson, Petitioner, and Carter waited on Anderson's outside patio. *Id.* at 233. Petitioner and Carter "were arguing and [Petitioner] punched her in the crotch." *Id.* Anderson returned Petitioner to the BP gas station for his car. *Id.* at 234. Carter stayed at Anderson's

residence. *Id.* at 235. Petitioner returned to the residence "15 to 20 minutes later" and "tried to get [Carter] to leave and she wouldn't go." *Id.* at 236. Petitioner left. *Id.*

That evening, Carter fell asleep on the futon. *Id.* at 238. Around 10:00 p.m., Anderson laid down next to her and fell asleep. *Id.* Anderson testified that the next thing he remembered is hearing a loud noise outside and seeing "the front door opens up, here comes [Petitioner] right through the door." *Id.* at 239. Anderson testified that Petitioner punched and kicked him, and that his phone, keys, wallet, and cash were stolen. *Id.* The victim testified that "[Petitioner] was the ring leader." *Id.* at 246.

The jury also heard recordings of Petitioner's jailhouse phone conversations. (ECF No. 8-2) at 1–33. During these conversations, Petitioner attempted to get Carter to change her story and collaborate on a version of events that would exonerate Petitioner. *Id.* In one conversation, Petitioner tries to convince Carter to "put a rape report on [the victim]." *Id.* at 17.

The jury found Petitioner guilty of all counts. *Id.* at 11–14. The state trial court adjudicated Petitioner guilty and sentenced him to life in prison on Count I and 30 years in prison on Count II as a Habitual Offender with a 15-year minimum mandatory as a Prison Releasee Offender. *Id.* at 16–28. The court did not impose sentence as to Count III, Felony Battery, due to its belief that imposing a sentence would constitute double jeopardy based on the convictions and sentences under Counts I and II. (ECF No. 9-1) at 525.

Petitioner filed a direct appeal in Florida's Fourth District Court of Appeal ("Fourth DCA"). (ECF No. 8-1) at 30–61. The Fourth DCA *per curiam* affirmed the convictions and sentences and ordered the state trial court to impose a sentence as to Count III. *See Harris v. State*, 190 So.3d 88 (Fla. 4th DCA 2015).[2] The state trial court imposed a sentence of 100.875 months'

[2] Mandate issued on June 19, 2015. (ECF No. 8-1) at 98.

imprisonment as to Count III, to run concurrent with Petitioner's other sentences. (ECF No. 9-1) at 100.

Next, Petitioner filed a motion for postconviction relief in the state trial court pursuant to Fla. R. Crim. P. 3.850. (ECF No. 8-1) at 104–24. Petitioner raised the same claims that he raises in the instant proceedings: ineffective assistance of plea counsel for failure to inform Petitioner of the State's plea offer (*id.* at 109); ineffective assistance of counsel for failing to object to the State bolstering witness' credibility (*id.* at 117); and ineffective assistance for failing to object after a witness gave opinion testimony about the victim's credibility (*id.* at 122). The State agreed to an evidentiary hearing on Claim One pertaining to plea counsel's failure to tender a 15-year plea offer. *Id.* at 149. On December 5, 2016, the state trial court held an evidentiary hearing on Claim One and vacated Petitioner's sentence. (ECF No. 9-2) at 1–9. On January 17, 2017, the state trial court held a sentencing hearing and reinstated Petitioner's original sentence of life imprisonment on Count I and 30 years on Count II. (ECF No. 9-3) at 14.

Petitioner appealed the ruling to the Fourth DCA. (ECF No. 8-3) at 61–82. The Fourth DCA *per curiam* affirmed the state trial court's ruling. *See Harris v. State*, 246 So.3d 1246 (Fla. Dist. Ct. App. 2018). Petitioner filed a motion for rehearing, which was denied. (ECF No. 8-3) at 111–19. Petitioner filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court. *Id.* at 123. On April 15, 2019, the Florida Supreme Court denied the petition. *Id.* at 125.

On January 14, 2019, Petitioner filed a motion for post-conviction relief and, on May 17, 2019, a supplemental motion for post-conviction relief. *Id.* at 127–133. On June 17, 2021, the Fourth DCA *per curiam* affirmed the state court ruling. *Harris v. State*, 321 So.3d 222, 2021 WL 2472763 (Fla. Dist. Ct. App. June 17, 2021). Mandate issued on July 16, 2021. (ECF No. 7) at 4.

On March 5, 2019, Petitioner filed the instant Petition. *See* Pet. Construing the Petition liberally, consistent with *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), Petitioner presents the following claims for relief:

1. The state trial court erred in re-imposing the original life and thirty-year sentences at re-sentencing instead of imposing a fifteen year sentence ("Claim One"). Pet. at 4–14.
2. Ineffective assistance of trial counsel for failing to object or move for a mistrial when the prosecutor improperly bolstered the credibility of state witnesses during closing arguments ("Claim Two"). *Id.* at 14–16.
3. Ineffective assistance of trial counsel for failing to object or move for a mistrial after a state's witness gave improper opinion testimony concerning the victim's credibility ("Claim Three"). *Id.* at 16–18.

II. STATUTE OF LIMITATIONS AND EXHAUSTION

To begin, the State concedes that the Petition is timely but asserts that Petitioner failed to properly exhaust Claim One. (ECF No. 7) at 8. "Before seeking a writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citation and internal quotation marks omitted). "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court . . ., thereby alerting that court to the federal nature of the claim." *Id.* (citations omitted). "A claim is procedurally defaulted for purposes of federal habeas review if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present [the claim] in order to meet the exhaustion requirement would now find the

claim[] procedurally barred." *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 956–57 (11th Cir. 2016) (alterations in original) (citation and internal quotation marks omitted).

Here, the State claims Petitioner procedurally defaulted Claim One because he "did not raise this claim in any of his previous state post conviction motions . . . ." (ECF No. 7) at 13. The State is incorrect. The record reflects that Petitioner did present the federal claim contained in Claim One to the state courts as required. *Baldwin*, 541 U.S. at 29. In his first Rule 3.850 motion, Petitioner asserted as Ground One ineffective assistance of counsel for failing to inform Petitioner of the State's plea offer One. (ECF No. 8-1) at 104–24. The state trial court granted Ground One, held a sentencing hearing, and reinstated Petitioner's original sentence. (ECF No. 9-3) at 14. Petitioner appealed this ruling to the Fourth DCA. (ECF No. 8-3) at 61–82. Under "Point One" in his appeal brief, Petitioner alerted the Fourth DCA to the federal nature of his claim by arguing that the postconviction court erred when resentencing Petitioner because "the remedy afforded for his constitutional violation failed to neutralize the taint of the constitutional violation." (ECF No. 8-3) at 75 (citing *Strickland v. Washington*, 466 U.S. 668 (1984), *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Alcorn v. State*, 121 So.3d 419 (2013)).

The State asserts that "[t]hough Petitioner did raise this issue in his appeal [ ] it was raised below as an ineffective assistance claim." (ECF No. 7) at 13. The Court finds the State presents a distinction without a difference. Claim One as presented in the instant Petition is based on the same legal and factual foundation as Ground One was presented to the Fourth DCA.[3] (ECF No.

[3] In his appellate brief to the Fourth DCA, Petitioner argued that he "sufficiently demonstrated prejudice by showing that it is reasonably probable that the outcome of the proceedings would have been different but for the deficient performance of counsel. Because the prongs of *Alcorn*, *Lafler*, and *Strickland* have been satisfied, [Petitioner's] resulting life sentence and 30-year sentence rests upon a violation of the Sixth Amendment . . . ." (ECF No. 8-3) at 75 (internal citations omitted).

8-3) at 75. "[A]n issue is exhausted if 'the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation' to be the same as it was presented in state court." *Pope v. Sec'y, Fla. Dep't of Corr.*, 680 F.3d 1271, 1286 (11th Cir. 2012) (quoting *Kelley v. Sec'y, Fla. Dep't of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004). Here, the claim as pled in Petitioner's federal habeas petition that the 'trial-court-erred-in-finding-no-prejudice' is based on the same factual circumstance as the issue presented to the Fourth DCA—the state trial court's resentencing Petitioner to the same sentence he received after trial. While the Petition expands on the topics raised earlier in state court, the Court cannot ignore that they involve the same issues raised there. Accordingly, Claim One is not procedurally barred.

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. 104B132, 110 Stat. 1214 (1996). "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,[4] as determined by the Supreme Court of the United States;" 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.*

[4] "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).

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.

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

1. Claim One

Under Claim One, Petitioner argues that the state trial court violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when it resentenced Petitioner to life in prison on Count I and 30 years on Count II. (ECF No. 1) at 12; (ECF No. 8-3) at 55. According to Petitioner, the state trial court's "factual finding that 'the Court would reject that plea deal [for 15 years]' was objectively unreasonable." (ECF No. 1) at 7. Petitioner adds that the state trial court's decision was "contrary to clearly established law." (ECF No. 1) at 12 (citing *Strickland*, 466 U.S. 668; *Missouri v. Frye*, 566 U.S. 134 (2012); and *Lafler*, 566 U.S. 156).

The State argues first that Claim One is not cognizable under 28 U.S.C. § 2254, characterizing it as an attack on "trial court error regarding sentencing" which "would ordinarily not be cognizable" in a. § 2254 petition. (ECF No. 7) at 13 (citing *Estelle v. McGuire*, 502 U.S. 62 (1991); *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Branan v. Booth*, 861 F.2d 1507 (11th Cir. 1988). Petitioner responds that the State's argument "[i]s contrary to the holdings in *Lafler*[, 566 U.S. 156] . . . and *Frye*[, 566 U.S. 134] . . . that dealt with the exact issue at bar." (ECF No. 14) at 3.

It is well-settled that "federal habeas corpus relief does not lie for errors of state law[.]" *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (citation omitted); *see also Estelle*, 502 U.S. at 67 ("we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Indeed, when a claim is couched in terms of due process, if the claim actually involves state-law issues, it is not cognizable in a federal habeas proceeding. *Branan*, 861 F.2d at 1508. In *Branan*, the habeas petitioner alleged that his due process and equal protection rights were violated when the trial judge "misinterpreted Florida law regarding departure from recommended guidelines for sentencing." *Id.* The Eleventh Circuit affirmed the

district court's dismissal, finding "[a]lthough petitioner alleges violations of federal law, it is clear that this petition is based exclusively on state law issues which are merely 'couched in terms of equal protection and due process.'" *Id.* (quoting *Willeford v. Estelle*, 538 F.2d 1194, 1196–98 (5th Cir. 1976)).

Unlike the petitioner in *Branan*, the Petitioner here does not simply make state law arguments "couched in" constitutional terms. *Branan*, 861 F.2d at 1508. The petitioner in *Branan* argued that the state court misapplied Florida sentencing guidelines, while our Petitioner asserts that the state trial court misapplied *Lafler* and *Frye*. (ECF No. 1) at 7. Accordingly, Claim One is cognizable because it does not claim error in state law. *Cf. Estelle*, 502 U.S. at 67.

The Court now turns to the merits of Claim One. As a reminder, the state trial court granted Claim One of Petitioner's Rule 3.850 motion and vacated Petitioner's sentences. (ECF No. 9-2) at 1–9. In so ruling, the state trial court found that Petitioner's plea counsel performed ineffectively. *Id.* Where a defendant rejected a plea offer due to ineffective assistance and receives a greater sentence at trial, "'the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the [State] offered in the plea, the sentence he received at trial, or something in between.'" *Alcorn*, 121 So.3d at 428 (quoting *Lafler*, 566 U.S. at 1389).

At the resentencing hearing on January 17, 2017, counsel for Petitioner stated "we are back to pretrial. The plea offer is made. My client wants to accept it. We ask you to accept the negotiated 15 years." (ECF No. 9-3) at 8–9. The state trial court said that it was not accepting the plea. *Id.* at 13. In the instant Petition, Petitioner asserts that "the state postconviction court's factual finding that 'the Court would reject that plea deal' was objectively unreasonable." (ECF No. 1) at 7.

The key question presented in Claim One, then, is whether the state trial court unreasonably applied federal law, or unreasonably determined the facts in light of the evidence presented, by

refusing to accept the plea agreement. *See* 28 U.S.C. § 2254(d). The answer is "No." Florida law allows a judge to not accept a plea agreement. *Alcorn*, 121 So.3d at 430.[5] Petitioner does not show that the postconviction court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Richter*, 565 U.S. at 24. The postconviction court did not unreasonably apply existing federal law because, under *Lafler*, the court had discretion to reject the plea and leave the convictions and sentences that Petitioner received after trial undisturbed. *Lafler*, 566 U.S. at 1389.

Nor does Petitioner show by "clear and convincing evidence" that the postconviction court unreasonably determined the facts in light of the evidence. 28 U.S.C. § 2254(e)(1). The postconviction court's determination that the trial could would not have accepted a plea offer for 15 years' incarceration was reasonable [DE 9-3 at 13–14]. Specifically, the postconviction court stated at resentencing that Petitioner had "15 or 16 [prior convictions] that existed at the time [the plea was offered], many of which are considered violent felonies. I would not, under any of those circumstances, have accepted the plea" [*id.* at 13]. Because the postconviction court did not unreasonably apply clearly existing federal law, or unreasonably determine the facts in light of the evidence presented, it is entitled to deference. *See* 28 U.S.C. § 2254(d)(1)–2). Accordingly, Ground One is DENIED.

2. Claim Two

Under Claim Two, Petitioner argues that trial counsel was ineffective by failing to object when the prosecutor "improperly" bolstered the credibility of state witnesses during closing

[5] Fl. R. Crim. P. 3.172(g) provides that "[n]o plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule."

arguments. (ECF No. 1) at 14. The specific language from the State's closing that Petitioner challenges is as follows:

> Because, the State submits, that somebody that has been convicted of [a] felony or a crime involving dishonesty and false statement, is not truthful. Did you ever hear of one witness in this the State's case that's been convicted of a felony? No. Has the victim ever been convicted of a crime involving dishonesty? No. Any of the officers ever hear anything that they have ever been convicted of a felony or a crime involving dishonesty or false statement? No. Who took the stand yesterday? Was the defendant himself. And the defendant told you, I have been convicted 16 times.
>
> (ECF No. 9-1) at 424.

Petitioner raised this issue in his first post-conviction motion. (ECF No. 8-1) at 117–22. The state trial court denied the claim and the Fourth DCA affirmed the denial; neither decision is accompanied by an explanation. *Harris*, 190 So.3d. at 89. "Where 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. Petitioner cannot show that the Fourth DCA's rejection of Claim Two was contrary to or an unreasonable application of federal constitutional principles. *See Williams*, 529 U.S. at 413.

Petitioner's claim is without legal basis because the prosecutor's statements were not improper bolstering. Improper bolstering occurs when a prosecutor makes "personal assurances of the witness' veracity, or the prosecutor implicitly vouches for the witness' veracity by indicating that information not presented to the jury supports the testimony." *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991). Here, the prosecutor neither made personal assurances about the victim nor implicitly vouched for the victim's credibility.

Nor were the prosecutor's statements otherwise objectionable. "An attorney is allowed to argue . . . credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." *Miller v. State*, 926 So.2d 1243, 1254-55 (Fla. 2006) This Court agrees with the State that the comments in question *were* based on the evidence; the jury did *not* hear that the

State's witnesses had been convicted of a felony or a crime of dishonesty, because they had not. (ECF No. 7) at 25. In contrast, Petitioner had an extensive felony history—a fact that he does not dispute in the Petition and that was communicated without objection to the jury. Because the State did not improperly bolster witness testimony, Petitioner's trial counsel did not act deficiently by failing to object or move for a mistrial during closing. *See, e.g., Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("it is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance.")

In any event, Petitioner fails to show prejudice. Petitioner claims that "[t]he prosecutor's comments regarding the victim's lack of a prior record was dispositive on the outcome of the jury's verdict because the credibility of the victim was a critical issue argued at trial." [ECF No. 1 at p. 15] (citing *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991)). However, Petitioner does not put forward specific factual support to show "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. There was overwhelming evidence presented at trial of Petitioner's guilt, including Petitioner's recorded jail phone calls where he made numerous statements inculpating him in the crimes. For example, Petitioner said the following on the recorded line: "And the problem is that could be considered, you know, Burglary or home invasion because I was inside his house. I walked in his house." (ECF No. 8-2) at 287:14–17. "Do you want to say – do you want to say that Mike did it; I was outside?" (ECF No. 8-2) at 4:11–13. "Uh, so I am wondering what to – what to tell them. What to tell the sheriffs when they come call on me." (ECF No. 8-2) at 9:12–14. "Okay. I can still be an accomplice just because I went with them." (ECF No. 8-2) at 10:16–17. "Listen, you might – you might have to take – put a rape report on him." (ECF No. 8-2) at 17:14–16.

In sum, Petitioner cannot show prejudice from the prosecutor's comments because he has not shown, nor even alleged, a reasonable likelihood of being acquitted or convicted of a lesser offense had the comments been objected to. *Strickland*, 466 U.S. at 694. Therefore, Claim 2 is DENIED.

3. Claim Three

In Claim Three, Petitioner claims defense counsel performed ineffectively by failing to object or move for a mistrial after Sergeant McGregor gave opinion testimony about the victim's credibility. (ECF No. 1) at 16. Petitioner takes the position that Sergeant McGregor "offered that the victim's story might be credible and in doing so invaded the province of the jury by bolstering the victim[']s credibility bringing legitimacy to his allegations." (ECF No. 14) at 7. Petitioner states "this issue must be viewed cumulatively with ground two and all argument and case law is [sic] reiterated and applied the same herein." *Id.*[6]

Petitioner raised this issue in his first post-conviction motion. (ECF No. 8-1) at 122–24. The state trial court's denial of the claim was affirmed by the Fourth DCA. *Harris*, 190 So.3d. at 89. Petitioner cannot show that the state court's decision was contrary to or an unreasonable application of federal constitutional principles. *See Williams*, 529 U.S. at 413.

"Generally, testimony is admissible on redirect which tends to qualify, explain, or limit cross-examination testimony." *Tompkins v. State*, 502 So.2d 415, 419 (1986) (internal citation omitted) (noting cross-examination's "scope and limitation lies within the sound discretion of the

[6] The Court finds this is not a case of cumulative effect. *Cf Johns v. State*, 832 So.2d 959, 963 (Fla. 2d DCA 2002) (finding reversible error from cumulative improper arguments where the prosecutor vouched for a witness' credibility, requested the jury to show sympathy for the victim, implied that the State only charges those that are guilty, and disparaged the defendant for exercising his right to go to trial). Petitioner has not alleged cumulative errors. Neither Petitioner nor the State made arguments in closing related to Sergeant McGregor's assessment of the victim's credibility.

trial court . . . ."). Latitude is given for cross-examination "'questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony.'" *McCrae v. State*, 395 So.2d 1145, 1152 (1980) (internal quotation omitted).

Petitioner's argument is refuted by the record. As the State points out, "the 'door was opened' by Petitioner's counsel" to discuss the victim's credibility. (ECF No. 7) at 38. Petitioner's trial counsel asked Sergeant McGregor the following on cross-examination:

> Q: And the reason that you felt that he was extremely intoxicated was that at least at that time, he was stumbling. He was staggering and he [was] slurring; am I correct in all of that?
>
> A: Yes.
>
> Q: And in fact, as he was trying to explain some story to you, he is rambling and not making sense to the point that you didn't believe him; right?
>
> A: That's true.

(ECF No. 8-1) at 272:8–16.

On redirect, the state prosecutor asked a single question.

> Q: You stated that you initially didn't believe, then when you saw the bruises, what did you think?"
>
> A: That his story might be credible.

(ECF No. 8-1) at 273:12–15.

It was wholly proper for the State to ask this question to rebut the inference elicited by Petitioner on cross-examination that the victim was not credible. *Tompkins*, 502 So.2d at 419. The State never asked Sergeant McGregor about the victim's credibility. Instead, it was Petitioner who asked McGregor about the victim's credibility. After Petitioner's questions on cross-

examination, "the door was opened for the state's questions which clarified the testimony elicited by the [Petitioner]." *Wright v. State*, 582 So.2d 774, 775 (Fla. 2d DCA 1991).

Because there was no basis for defense counsel to object or move for a mistrial, Petitioner cannot establish deficient performance on Claim Three. *Bolender*, 16 F.3d.

Petitioner also fails to demonstrate prejudice under Claim Three. Claim Three consists of conclusory allegations of prejudice without specifics. For example, Petitioner claims "it was especially harmful for a police officer to testify to the credibility of the victim because of the greater weight that is placed on the officer's testimony." (ECF No. 1) at 16. Petitioner does not present specific factual allegations supporting his general conclusion, and therefore Claim Three fails to show prejudice. *Boyd*, 697 F.3d at 1333 (holding that conclusory allegations of ineffective assistance are insufficient to satisfy *Strickland* test).

More importantly, there is not a reasonable probability that the outcome would have been different had defense counsel objected or moved for mistrial because the overwhelming evidence adduced at trial established Petitioner's guilt. *See e.g., Thomas v. United States*, 596 F. App'x 808, 810 (11th Cir. 2015) (internal citations omitted) ("And, in any event, even if counsel performed deficiently by failing to object to the credibility-bolstering testimony, [petitioner] did not demonstrate that his defense was prejudiced by that failure because the government presented strong evidence of his guilt."). The jury heard testimony from the victim that Petitioner entered his house without permission, punched and kicked him, and stole his keys, wallet, and phone. (ECF No. 8-1) at 239–244. The jury also heard Petitioner's recorded jail calls which, as described above in Claim Two, was strong evidence of Petitioner's guilt. Therefore, Claim Three is DENIED.

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.[7] 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, and no certificate of appealability

[7] 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.

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 13th day of June, 2023.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: Hale R. Harris
#394715
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Inmate Mail/Parcels
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EXHIBIT C

HALE HARRIS, Appellant, v. STATE OF FLORIDA, Appellee.
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
321 So. 3d 222; 2021 Fla. App. LEXIS 8968
No. 4D20-2256
June 17, 2021, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, Judge; L.T. Case No. 12-4901CF10A.Harris v. **State**, 190 So. 3d 88, 2015 Fla. App. LEXIS 3908 (Fla. Dist. Ct. App. 4th Dist., Mar. 18, 2015)

Counsel **Hale Harris**, Wewahitchka, pro se.

Ashley Moody, Attorney General, Tallahassee, and Mitchell A. Egber, Assistant Attorney General, West Palm Beach, for appellee.

Judges: LEVINE, C.J., GERBER and CONNER, JJ., concur.

Opinion

Per Curiam.

Affirmed.

Levine, C.J., Gerber and Conner, JJ., concur.

EXHIBIT D

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	)	CASE NO.: 12-004901 CF10A
	)	
Plaintiff,	)	JUDGE: PAUL L. BACKMAN
v.	)	
	)	DIVISION: FX
HALE HARRIS,	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE comes before this Court upon the Defendant's Motion for Post-Conviction Relief. Having considered the Defendant's motion, the State response, the record, all applicable law and being otherwise fully advised in the premises, this Court finds and decides as follows:

An evidentiary hearing was held on this matter on December 5, 2016. The State conceded error as to Claim One. The State informed this Court that she (the Assistant State Attorney) tried numerous times to contact the Defendant's trial counsel (Ms. Kelly Murdoch). Ms. Murdoch no longer resides in Florida; however, the State located her and left numerous messages for her at her current place of employment. All of the messages went unanswered. The State then asked Ms. Murdoch's former supervisor, Mr. Jim Wells, from the Public Defender's Office to contact Ms. Murdoch. He did so and said that Ms. Murdoch "had no recollection" of the Defendant's case. Mr. Wells then looked at the Defendant's file. Upon his review of Ms. Murdoch's file, there was no evidence of a plea offer made to the Defendant. For the foregoing reasons, the State conceded error and agreed to a re-sentencing hearing.

The Defendant's sentence imposed on September 17, 2013, is vacated. The Defendant shall be resentenced on January 17, 2017, at 2:00 p.m.

The State may present transcripts from the pretrial status held on August 19, 2013, at the sentencing hearing. Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Defendant's post-conviction motion is **GRANTED** for the reasons set forth above.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 6th day of December, 2016.

Paul L. Backman
PAUL L. BACKMAN, Circuit Court Judge
A True Copy

Copies furnished to:

Janet Roberts, Esq., Assistant State Attorney

Michael Heise, Esq., Attorney for the Defendant

EXHIBIT E

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10767

HALE R. HARRIS,

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. 0:21-cv-61371-KMM

Before WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Hale Harris has filed a motion for reconsideration of this Court's order dated October 18, 2024, denying his motions for a certificate of appealability and to appeal *in forma pauperis*.[1] Because Harris has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, this motion for reconsideration is DENIED.

---

[1] Harris's motion for leave to file the reconsideration motion out of time is GRANTED. *See* Fed. R. App. P. 26(b).

EXHIBIT F

EVIDENTIARY HEARING ON 3.850 GROUND 1

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 12-4901 CF10A
JUDGE BACKMAN

STATE OF FLORIDA,

Plaintiff,

vs.

ORIGINAL

HALE HARRIS,

Defendant.

Fort Lauderdale, Florida
December 5, 2016
8:30 a.m.

APPEARANCES:

JANET ROBERTS, ESQ.,
appearing on behalf of the plaintiff;

MICHAEL HEISS, ESQ.
appearing on behalf of the defendant.

The above-styled cause came on for a hearing before the HON. PAUL L. BACKMAN, as Judge of the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida, at 201 SE 6th Street, Room 5780, Ft. Lauderdale, Florida, on December 5, 2016, commencing at 9:30 a.m.

H E A R I N G

THEREUPON, the following proceedings were had:

MS. ROBERTS: This is on Hale Harris, 12-4901 CF 10A.

MR. HEISS: Michael Heiss.

THE COURT: All right. What are we doing?

MR. HEISS: Mr. Harris is present.

MS. ROBERTS: Janet Roberts for the State.

The State is going to concede error for the following reasons.

There are two lawyers involved. Mr. Lewis and Kelly Murdock.

MR. HEISS: Trial counsel.

MS. ROBERTS: Kelly Murdock was the first lawyer in the transcript and confirmed with Heather Henricksen, claimed she had made an offer of 15 years to both counsel.

If either counsel had made such an offer or conveyed it to the defendant, that would resolve it.

I attempted to talk with Kelly Murdock.

I traced her to Colorado, in her law firm.

She left two different law firms.

The last law firm, she was there, present, on the day I called.

Did not take my call. Actually, she came after I called, gave her my number. She didn't call me back.

I have sent multiple E-mails through the Internet. They did not come back. They are on her Colorado law bar. I spoke with Mr. Wells. He spoke with Kelly Murdock.

She didn't have a clear recollection, except what would be in her transfer memo, where she clearly states that the defendant would not take an offer more than a year and a day. The State wouldn't offer that. Doesn't mention what the offer is.

At this point, that memo is a hearsay document.

Mr. Wells doesn't have a recollection. It is not his habit. He hasn't had the misfortune to not convey a legal offer.

However, it was not documented in the file. He did do a search of his file. Because of the clear statement by Ms. Henricksen, without conceding there is a fault on either part of the two attorneys, the State is going to go ahead, concede error, under Alcorn, on lost plea. That leaves the State in a resentencing,

where Your Honor can either give him the 15 years or the term that you gave after the trial or somewhere in between. But he's entitled to counsel and a resentencing hearing.

That's something that will be done by the trial unit.

At this point, I am conceding and requesting a date.

THE COURT: I can tell you where the plea offer is. It is on the transcript that nobody ever bothers to call, to look at. It would be on the day before the trial, because I always --

MS. ROBERTS: In this case, I know you do. I went through the trial transcript.

THE COURT: It wouldn't be in that. It would be on my status, calendar call the day before trial started.

MS. ROBERTS: All right.

THE COURT: But you can do what you want. I don't have a problem if you go through a sentencing hearing.

MS. ROBERTS: If you give me a small continuance?

THE COURT: How about tomorrow?

MS. ROBERTS: I'll have to order the transcript.

MR. HEISS: I think we have the final hearing. As far as I am concerned, the State has investigated this case. Both lawyers cannot testify a plea offer was ever conveyed. The record doesn't support it. They don't have an independent recollection of it. Nothing to refute the defendant's claim he was not offered the plea offer, which was 15 years.

He testified he would have taken that.

We're asking the Court to accept --

THE COURT: I'll do a new sentencing.

I have no problem with that.

MR. HEISS: We ask to accept the concession by the state, vacate the sentence.

THE COURT: Sure.

MS. ROBERTS: Not ever having done a trial with you before, I didn't know you did a status before. I would ask you consider to give me leeway to get that particular transcript.

THE COURT: I can refer you to about a hundred lawyers in this building that would tell you how it is done, right Mr. Wells? All the way from the days in county court.

MS. ROBERTS: Whichever way you need to.

THE COURT: How much time do you need to prepare for resentencing?

MR. HEISS: My impression is the plea off should be back on the table. He's ready to take it. We are ready to proceed now, with the plea offer that should have been offered to him, never conveyed by the prior counsels.

THE COURT: I don't think there is case law that supports that.

MS. ROBERTS: No.

I'll set forth in Alcorn in detail in the motion, starting on page 5 through 8 that is not how post conviction is handled.

THE COURT: If in fact there is a claim a plea offer was not made --

MR. HEISS: Not conveyed.

THE COURT: Subsequently, they find there is and the defendant claims he would have taken it, that just vacates the sentence. It doesn't put anything back on the record, in terms of a plea offer.

That's up to the prosecutor.

MS. ROBERTS: Up to the Court whether he decides to accept the State's plea offer as the

bottom of the plea offer.

THE COURT: We don't know that. Don't have a record that shows it one way or the other.

MS. ROBERTS: At a future hearing.

You can take 15, what you gave him or anywhere in between.

THE COURT: I have no idea what I gave him. I don't need to know. If we have a sentencing hearing, I'll know the maximum I could give him is whatever the sentence was.

I recognize that.

If you are conceding error, do you know when the sentencing was?

MR. HEISS: I have it --

DEFENDANT: September 19, 2013.

MS. ROBERTS: I think it was September 17.

MR. HEISS: September 17, 2013.

THE COURT: I'll vacate the sentence. The judgment still stands.

He was adjudicated.

He was adjudicated right after trial.

MS. ROBERTS: Right. I'll order the transcript.

THE COURT: You can do whatever you want.

How much time do you need for a sentencing

hearing?

MS. ROBERTS: If we can get into mid January?

THE COURT: I'm gone after this week.

MR. HEISS: The only window I won't have is January 6th through the 10th.

THE COURT: How long do we need, time wise?

MR. HEISS: Do you have family that will testify?

DEFENDANT: No.

MR. HEISS: On the defense side, about 15 minutes.

THE COURT: How about January 9th you are good?

MR. HEISS: Out from January 6th through the 10th.

THE COURT: 1:30 on January 17th for half an hour.

MR. HEISS: Want me to do a short order?

MS. ROBERTS: Without prejudice from the State to present a transcript?

THE COURT: We're moving it to 2 o'clock on the 19th.

MR. HEISS: Yes.

MS. ROBERTS: Okay.

THE COURT: Thank you.

(Said proceedings conclude.)

****

CERTIFICATE

STATE OF FLORIDA
COUNTY OF BROWARD

I, VIVIAN ROCK, certify that I was authorized to and did stenographically report the foregoing proceedings and that this transcript is a true record.

Dated this 3rd day of April, 2017.