In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11910

KRISTY RICHARD,

Petitioner-Appellant,

versus

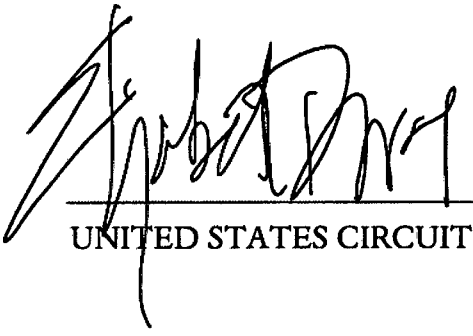
SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:22-cv-00083-WWB-PRL

ORDER:

Kristy Richard moves for a certificate of appealability in order to appeal the denial of her 28 U.S.C. § 2254 habeas corpus petition. Her motion is DENIED because she has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).



UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

KRISTY RICHARD,

Petitioner,

v. Case No. 5:22-cv-83-WWB-PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, and FLORIDA ATTORNEY GENERAL,

Respondents.
_____/

AMENDED ORDER[1]

THIS CAUSE is before the Court on Petitioner Kristy Richard's Petition for Writ of Habeas Corpus ("**Petition**," Doc. 1) filed under 28 U.S.C. § 2254. Respondents filed a Response to the Petition ("**Response**," Doc. 4) in compliance with this Court's instructions. Petitioner filed a Reply (Doc. 14) to the Response. For the following reasons, the Petition is denied.

I. PROCEDURAL HISTORY

Petitioner was charged by information with trafficking in methamphetamine (Count One), possession of fentanyl (Count Two), possession of morphine (Count Three), possession of tramadol (Count Four), possession of lorazepam (Count Five), possession of buprenorphine (Count Six), possession of cannabis (Count Seven), and possession of drug paraphernalia (Count Eight). (Doc. 5-1 at 84–86). A jury found Petitioner guilty as to

[1] This Amended Order amends and replaces the Order issued on February 20, 2024, insofar as that Order inadvertently stated the Petition was filed by Davion Shakeen Stewart.

all counts. (*Id.* at 150–57). The trial court adjudicated Petitioner guilty of the crimes and sentenced her to serve forty years in prison. (*Id.* at 203–05, 208–26). Florida's Fifth District Court of Appeal ("**Fifth DCA**") affirmed *per curiam*. (*Id.* at 595).

Petitioner filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, raising eleven claims. (*Id.* at 611–34). The trial court entered an order denying Claims Two, Three, Four, Five, Six, Seven, Eight, and Nine and reserving ruling on Claims One, Ten, and Eleven until an evidentiary hearing was held. (*Id.* at 636–56). After the evidentiary hearing, the trial court entered an order denying the remaining claims. (*Id.* at 744–53). The Fifth DCA affirmed *per curiam*. (*Id.* at 1020).

Petitioner then filed a petition for writ of habeas corpus, which the Fifth DCA denied. (*Id.* at 1044–84, 1123).

II. LEGAL STANDARDS

A. Standard Of Review Under The Antiterrorism Effective Death Penalty Act ("AEDPA")

Under 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 Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify 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). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

For claims adjudicated on the merits, "section 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

> 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.

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

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 is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de novo* only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief because his counsel provided ineffective assistance. 466 U.S. 668, 687–88 (1984). To prevail under *Strickland*, a petitioner must demonstrate "(1) that his trial 'counsel's performance was deficient' and (2) that it 'prejudiced [his] defense.'" *Whatley*, 927 F.3d at 1175 (quoting *Strickland*, 466 U.S. at 687).

Prejudice "requires showing that counsel's errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

III. ANALYSIS

A. Claim One

Petitioner argues that the trial court erred in denying her motion for judgment of acquittal. (Doc. 1 at 5). She claims she "was not found with drugs on her person or within ready reach. The drugs were not in plain view. The drugs were located in different common areas of the jointly occupied residences." (*Id.* at 6). This claim was raised in Petitioner's direct appeal and found to be without merit.

The standard of review in a federal habeas corpus proceeding when the claim is that the petitioner has been convicted on insufficient evidence was articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979), and described as follows:

> [W]hether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Id. at 319 (emphasis in original). Although the facts as they exist in the record may support opposing inferences, a federal habeas court must presume that the jury resolved such conflicts in favor of the prosecution and against the defendant. *See Heath v. Jones*, 863 F.2d 815, 820 (11th Cir. 1989).

At trial, Citrus County Sheriff's Office Sergeant Craig Callahan testified that he was part of the SWAT team that executed a search warrant at Petitioner's residence. (Doc. 5-1 at 336). Sgt. Callahan testified that, while they were announcing "Sheriff's Office" and counting down to breaching the door, Petitioner unlocked and opened the door. (*Id.* at 340). Sgt. Callahan testified that there were five people in the house. (*Id.* at 341).

Detective Aguilera, who also worked for the Citrus County Sheriff's Office, testified that he photographed the interior and exterior of Petitioner's residence before it was searched. (*Id.* at 346–47). Detective Aguilera testified that he found Petitioner's cellular telephone on the coffee table and a pink camouflage bag containing a "ton of narcotics," including methamphetamine. (*Id.* at 350–53). Detective Aguilera also found multiple syringes and a digital scale in Petitioner's bedroom. (*Id.* at 356–57). He noted that digital scales are "commonly used to weigh out narcotics, [and] syringes [are used] to ingest, uh, narcotics into your system." (*Id.* at 357).

Citrus County Sheriff's Detective Travis Parsons testified that he had multiple conversations with Petitioner after doing a walk-through of her residence. (*Id.* at 383). Detective Parsons testified that, during the first interview, Petitioner said she had just cleaned the house and that "they shouldn't find anything." (*Id.*). The State played a recording of Petitioner's interview. When asked why the officers were searching her home, Petitioner answered that a "guy" she rented a room to "had robbed someplace and that they're looking for him." (*Id.* at 388). Petitioner further stated, "[and] I was selling drugs. I kicked him out . . . . He just came back yesterday." (*Id.*).

During the search of Petitioner's bedroom, Detective Parsons found a box containing syringes and a small digital scale in her closet. (*Id.* at 393). Detective Parsons

testified that Petitioner identified her cellular telephone found on the coffee table, and she gave him permission to search it. (*Id.* at 396). When asked about the significant amount of narcotics found in the residence, Petitioner denied that the drugs belonged to her and indicated that, before the arrival of the Sheriff's Office, she had received a call from Sidney Benton saying he had left two ounces on the counter at her home. (*Id.* at 398).

Corey Allen, a civilian specialist in the High-Tech Crime Unit of the Citrus County Sheriff's Office, testified that he conducted a forensic analysis of Petitioner's cellular telephone. (*Id.* at 411). Allen extracted data from the cellular telephone, and he generated a report of the cellular telephone's call logs, text messages, MMS messages, and images that were requested. (*Id.* at 413–14). Allen identified text messages from his report. (*Id.* at 417).

Mark Dera, a bailiff with the Citrus County Sheriff's Office, identified a recording of statements made by Petitioner in open court. (*Id.* at 442). Petitioner stated:

> Yes. Was I doing drugs? Yes. Was I - I wasn't selling drugs like no (unintelligible) drugs, no - no – no things. But was I supporting my high? Was somebody coming over and I hooked them up with dope? Well, yes, so I can get high. Yes, I'm a crackhead and I use needles. You know what I'm saying?

(*Id.* at 443).

Sgt. Edward Blair, with the Citrus County Sheriff's Office, testified that the methamphetamine found in Petitioner's residence was in the form of "shard or ice." (*Id.* at 452–53). Sgt. Blair testified that shard or ice methamphetamine is typically produced in Mexico, not in the United States. (*Id.* at 453). Sgt. Blair was the on-scene supervisor during the search of Petitioner's residence, and, when he told Petitioner about the drugs

found in her residence, Petitioner stated that she sold crack to be able to use crack, but she did not sell methamphetamine. (*Id.* at 455).

Petitioner permitted the search of her cellular telephone. (*Id.* at 456). Sgt. Blair looked through the cellular telephone and found text messages that appeared to be drug related. (*Id.*). Sgt. Blair identified one text message, sent the day before the search warrant was executed, that read "I'm coming. My ride is on the way. I need $10 boi if you have it. If not, I'll take work." (*Id.* at 457). Based on his training and experience, Sgt. Blair knew that boi referred to heroin and that work referred to methamphetamine. (*Id.* at 457–58). Petitioner's response to the text message was a thumbs up. (*Id.* at 458). Sgt. Blair identified a text message "you have any blues?" (*Id.* at 459). Sgt. Blair then testified that "blues" referred to blue 30 milligram oxycodone pills. (*Id.*). Sgt. Blair also identified a text message sent by Petitioner minutes before the search that stated, "I just woke up, already getting high." (*Id.* at 460). Sgt. Blair testified that there was no record of the telephone call Petitioner claimed to have received from Sidney Benton. (*Id.* at 466–67).

The search of Petitioner's residence and belongings revealed a "ton of narcotics," including methamphetamine. Moreover, Petitioner's incriminating statements and text messages demonstrated that she knew of the presence of the methamphetamine and other contraband and that she had control over these drugs.

Ample evidence supported the jury's verdict. The Court concludes that the evidence, when viewed in a light most favorable to the State and after resolving all conflicts in favor of the prosecution, mandates the denial of Petitioner's claim. *See Machin v. Wainwright*, 758 F.2d 1431, 1435 (11th Cir. 1991) (holding that the federal habeas court must presume that conflicting inferences to be drawn from the evidence were resolved by

the trier of fact in favor of the prosecution). The Court determines that a rational trier of fact could have found the essential elements of this crime beyond a reasonable doubt. Merely because the evidence provides some support to Petitioner's theory does not warrant granting habeas corpus relief. *See Wilcox v. Ford*, 813 F.2d 1140, 1143–44 (11th Cir. 1987); *Martin v. State of Ala.*, 730 F.2d 721, 724 (11th Cir. 1984) ("The simple fact that the evidence gives some support to the defendant does not demand acquittal.").

The Court concludes that the evidence, when viewed in a light most favorable to the State, and resolving all conflicts in favor of the prosecution, mandates the denial of this claim. *See Shaw v. Boney*, 695 F.2d 528, 531 n.6 (11th Cir. 1983). Under the *Jackson* standard, there was sufficient evidence to support the jury's verdict, and Claim One will be denied.[2]

B. Claim Two

Petitioner argues that counsel was ineffective for failing to have the drugs and paraphernalia tested for fingerprints. (Doc. 1 at 9). Petitioner contends that fingerprint evidence would have shown that her fingerprints "were not on drug contraband." (*Id.*). This claim was raised in Petitioner's Rule 3.850 motion and was denied because the evidence "against the Defendant [was] overwhelming" and there was no showing of prejudice. (Doc. 5-1 at 643–44).

As discussed above, the State's evidence against Petitioner was overwhelming.

---

[2] Further, relief must be denied based on § 2254(d). The claim was adjudicated on the merits by the state appellate court. Petitioner has failed to demonstrate that the adjudication of the claim 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. Petitioner also has not shown that the adjudication of the claim 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.

Counsel's failure to present fingerprint evidence was not unreasonable. Further, there has been no showing of prejudice.

Petitioner has failed to show that counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Two is denied.

C. Claims Three and Five

Petitioner argues that counsel was ineffective for failing to move to suppress the text messages (Claim Three) and the "trash pulls" (Claim Five). (Doc. 1 at 11, 19). Petitioner contends that the "text messages were not properly authenticated of authorship or could they be." (*Id.*). Petitioner also contends that she "lived in a home with a separate apartment. The fact [that] both units share [the] same trash receptacle to depose [sic] trash, Citrus County Sheriff's Office could not be certain which trash belong to which unit because trash was commingled." (*Id.* at 19). These claims were raised in Petitioner's Rule 3.850 motion and were denied. The trial court determined that based "on the Affidavit for Search Warrant and the items found during the trash pull trial counsel had no basis to file a motion to suppress." In addition, the search of the text messages was based on a search warrant. (Doc. 5-1 at 642–43).

The state trial court issued a search warrant on July 25, 2018, for Petitioner's residence and the contents of the residence. (*Id.* at 657–60). The search warrant was supported by Detective Parsons' Affidavit For A Search Warrant, which was based on approximately five "cover trash pull investigation[s]." (*Id.* at 647–56). Detective Parsons

discussed the items found during the trash pull. The Court finds there was probable cause to issue the search warrant. *See State v. Colitto*, 929 So. 2d 654, 656 (Fla. 4th DCA 2006) (holding that an anonymous tip and the two trash pulls revealing cannabis residue, seeds, and stems within two weeks of issuing the warrant provided probable cause). Thus, there was no basis to file a motion to suppress.

The record demonstrates that the state trial court issued a search warrant on August 16, 2018, for Petitioner's cellular telephone. (*Id.* at 670–74). The search warrant was supported by Detective Parsons' Affidavit For A Search Warrant. (*Id.* at 661–69). Detective Parsons discussed that the cellular telephone was found during the search of the residence and that it was believed to contain evidence of certain crimes. The Court finds there was probable cause to issue the search warrant. Thus, there was no basis to file a motion to suppress. Further, Petitioner's counsel filed a motion in limine, and, during the hearing on the motion, attempted to limit introduction of the text messages. (*Id.* at 303–10).

Petitioner has failed to show that counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claims Three and Five are denied.

D. Claim Four

Petitioner alleges that counsel was ineffective for failing to call Kevin Allen as a witness. (Doc. 1 at 15). This claim was raised in Petitioner's Rule 3.850 motion and was denied. The trial court determined that Allen was available and willing to testify, that

Petitioner made the decision not to call Allen, and that Allen's testimony would not have changed the outcome. (Doc. 5-1 at 752).

Petitioner's counsel, Susan Falardeau, testified at the evidentiary hearing that Allen's "testimony would have put [Petitioner] sitting on the couch within arm's reach of the drugs." (*Id.* at 840). Falardeau and Petitioner "discussed that that would prejudice--it would be weighed with what his -- it would have said it would have given the State the control element that they would have needed for constructive possession. So we decided not to call him." (*Id.*). Petitioner made the "ultimate decision not to call Kevin Allen as a witness." (*Id.*). Falardeau was planning on calling Allen as a witness if Petitioner wanted her to do so. (*Id.*). But Falardeau did not believe calling Allen as a witness would have helped Petitioner's case. (*Id.* at 841). Petitioner made the decision not to call Allen as a witness. (*Id.* at 841–42).

As discussed by the trial court,

> the evidence presented at the hearing showed that Mr. Allen was available and willing to testify. The Defendant after consultation with her trial counsel made the decision not to call the witness. Mr. Allen's testimony would not have changed the outcome of the case. Instead, his testimony may have damaged the Defendant's case by calling her home a "drug house" and placing her within arms-reach of the drugs.

(*Id.* at 752).

Petitioner has failed to show that counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Four is denied.

E. Claims of Ineffective Assistance of Appellate Counsel

1. Legal Standard

It is well established that a defendant has the right to effective counsel on appeal. *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). The standard for analyzing ineffective assistance claims is the same for trial and appellate counsel. *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). The Eleventh Circuit has applied the Supreme Court's test for ineffective assistance at trial to guide its analysis of ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991).

2. Claims Six, Seven, and Eight

Petitioner alleges in Claim Six that appellate counsel was ineffective for failing "to challenge the search warrant that was used to obtain evidence against [her] and for failing to file a motion to suppress." (Doc. 1 at 22). This claim involved the "trash pulls." Petitioner alleges in Claim Seven that appellate counsel was ineffective for failing to argue on direct appeal that the trial court "abused its discretion in admitting text messages presented by [the] State into evidence without authenticating them." (*Id.* at 25). Petitioner alleges in Claim Eight that appellate counsel was ineffective for failing to argue on direct appeal that her Fourth Amendment rights were violated by the "illegal trash pulls." (*Id.* at 28). These claims were raised in Petitioner's state petition for writ of habeas corpus and were denied.

As discussed regarding Claims Three and Five, there was no basis to file a motion to suppress as to the text messages or the trash pulls. Consequently, Petitioner has failed to show that appellate counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established

federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claims Six, Seven, and Eight are denied.

3. Claim Nine

Petitioner alleges that appellate counsel was ineffective for failing to argue on direct appeal that the "State failed to meet its burden to prove Defendant possessed the necessary weight of the substance to support the trafficking conviction." (Doc. 1 at 31). Petitioner claims that the evidence had been tampered with and was not admissible. (*Id.*). This claim was raised in Petitioner's state petition for writ of habeas corpus and was denied.

Petitioner provides no record support that this claim had been made in the trial court or that the alleged tampering was apparent on the face of the record. Appellate counsel cannot be deemed ineffective for failing to raise a claim which was not preserved for review and which does not present a question of fundamental error. *See Downs v. Moore*, 801 So. 2d 906, 910 (Fla. 2001). Further, Petitioner's allegations of tampering are speculative and have no factual support.

Petitioner has failed to show that appellate counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Nine is denied.

4. Claim Twelve

Petitioner alleges that appellate counsel was ineffective for failing to argue on direct appeal "trial counsel's failure to object to speculative statements by State Witness

which was subsequently allowed to be admitted into evidence for the jury to consider." (Doc. 1 at 42). Petitioner argues that Detective Blair's statement that the methamphetamine was made in Mexico was speculative and misleading. (*Id.*). This claim was raised in Petitioner's state petition for writ of habeas corpus and was denied.

As will be discussed in Claim Ten below, the trial court recognized Detective Blair as an expert in narcotics, narcotics sales, and activities. Petitioner has failed to show that there was any basis to raise an objection to the statements made by Detective Blair.

Petitioner has failed to show that appellate counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Twelve is denied.

5. Claim Fifteen

Petitioner alleges that appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred by imposing both consecutive and concurrent sentences. (Doc. 1 at 51). This claim was raised in Petitioner's state petition for writ of habeas corpus and was denied.

Petitioner argued in her state petition for writ of habeas corpus that "[p]ursuant to Florida Statute 921.16(1), a defendant convicted of two or more offenses charged in the same information must serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively." (Doc. 5-1 at 1081). Here, Petitioner was convicted of two or more offenses, and Count Two (the first sentence) was ordered to be served consecutively to Count One (the second sentence).

Therefore, two or more sentences were ordered to be served consecutively.

Petitioner has failed to show that appellate counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Fifteen is denied.

6. Claim Sixteen

Petitioner alleges that appellate counsel was ineffective for failing to argue on direct appeal that her "clarification and sentence as a habitual felony offender (HFO) is illegal . . . ." (Doc. 1 at 53). She argues that a defendant cannot be sentenced as a habitual felony offender for violating § 893.13, Florida Statutes. (*Id.*). This claim was raised in Petitioner's state petition for writ of habeas corpus and was denied.

Contrary to Petitioner's argument, "[o]nly drug offenses relating to the purchase or the possession of controlled substances are exempt from habitualization; defendants sentenced for offenses relating to the sale of narcotics do not enjoy the benefit of this statutory exemption." *Roberts v. State*, 753 So. 2d 136, 137 (Fla. 2d DCA 2000). Thus, the habitual offender "statute forbids habitualization only if the subject offense is a violation of section 893.13 relating to the purchase or the possession of a controlled substance. § 775.084(1)(a) 3, Fla. Stat. (Supp.1996)." *Woods v. State*, 807 So. 2d 727, 729 (Fla. 1st DCA 2002). Here, Petitioner was sentenced as a habitual felony offender under Count One, which was trafficking in methamphetamine.

Petitioner has failed to show that appellate counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's

decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Sixteen is denied.

F. Claim Ten

Petitioner alleges that counsel was ineffective "for stipulating to the prejudicial and improper testimony of Detective Blair as an expert witness." (Doc. 1 at 34). This claim was raised in Petitioner's Rule 3.850 motion and was denied because there was "no basis to object to Detective Blair testifying as an expert" and because there was no showing of prejudice. (Doc. 5-1 at 645).

Detective Edward Blair testified as to his job functions, experience and training; he also testified he was previously qualified as an expert witness ["]at least five to six times in this court." (*Id.* at 450). The trial court inquired whether there was "[a]ny *voir dire* or objections," and defense counsel replied "[n]o, sir." (*Id.*). The trial court recognized Detective Blair to be an expert in "narcotics, narcotics sales and activities." (*Id.*). The trial court also advised the jurors that it is "still up to you to determine his expertise . . . ." (*Id.*). Thereafter, Detective Blair testified regarding the appearance of methamphetamines, how they are packaged, the price of certain drugs, the "street value" of heroin, the appearance of fentanyl and heroin, and the effects of certain drugs. (*Id.* at 450–65). Detective Blair further testified regarding information found in Petitioner's cellular telephone, and he identified certain text messages as being related to drug transactions. (*Id.* at 456–60). Detective Blair opined that the text messages "in their totality show that [Petitioner] is—has knowledge of drugs and is possibly involved in the possession and transactions of drugs." (*Id.* at 460).

"Whether a witness is qualified as an expert is largely a matter of discretion for the trial court." *Smith v. State*, 7 So. 3d 473, 496 (Fla. 2009); *see also Ramirez v. State*, 542 So. 2d 352, 355 (Fla. 1989) ("The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error."). Here, Petitioner has demonstrated no basis to object to Detective Blair testifying as an expert witness.

Petitioner has failed to show that counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Ten is denied.

G. Claim Eleven

Petitioner alleges that her counsel was ineffective for failing to object to "inappropriate and prejudicial statements made by Judge Howard during trial and at sentencing and failing to file a motion to recuse Judge due to prejudice." (Doc. 1 at 38). This claim was raised in Petitioner's Rule 3.850 motion and was denied because the trial judge's statements did "not amount to actual prejudice or bias and trial counsel had no basis to object to the statements." (Doc. 5-1 at 641).

Petitioner identifies several statements made and questions asked by the trial judge, including: "How is she on the radar screen of drug dealers in this community?"; "There was barely a year that you weren't in . . . jail on something up and through until today"; "You know why [your kids] weren't here, don't you?"; "So you got a golf ball amount of methamphetamine, cartel quality"; "Ms. Richard, at some point even the seemingly

unlimited assets of the State of Florida are not enough to get you square"; "if this was China, you wouldn't even be here. You don't even know what I'm talking about. Because you'd be a career criminal and they would shoot you. That just happens. That's just the way they do it in China"; and "So you've already missed most of your life being a drug addict." (*Id.* at 257, 266, 280–81, 283).

A motion for disqualification must allege facts that "would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Pugliese v. Deluca*, 207 So. 3d 974, 976 (Fla. 4th DCA 2016) (citation and quotation omitted). The Court has reviewed the statements identified by Petitioner and cannot conclude that the comments would place a reasonably prudent person in Petitioner's position in fear of not receiving a fair and impartial trial. Nothing said by the trial judge indicated that Petitioner's sentence was based on anything but the facts of her case and her criminal history. The trial judge's statements did not amount to actual prejudice or bias, and trial counsel had no basis to raise an objection to the statements.

Petitioner has failed to show that counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Eleven is denied.

H. Claim Thirteen

Petitioner alleges that counsel was ineffective "for failing to file a motion to dismiss based on vindictive prosecution." (Doc. 1 at 45). She alleges that her prosecution was "a direct retaliation because of the internal affairs investigation against Petitioner and a

Citrus County detective." (*Id.*). This claim was raised in Petitioner's Rule 3.850 motion and was denied because "trial counsel had no legal basis to file a motion to dismiss." (Doc. 5-1 at 645).

"A vindictive prosecution claim arises when the government pursues prosecution in retaliation for the exercise of a protected statutory or constitutional right." *United States v. Falcon*, 347 F.3d 1000, 1004 (7th Cir. 2003). Aside from vague and conclusory allegations, Petitioner fails to demonstrate that the State pursued prosecution in retaliation for exercising a protected statutory or constitutional right. Petitioner's bald assertions are inadequate to overcome the presumption that counsel acted reasonably. *Matura v. United States*, 875 F. Supp. 235, 237 (S.D.N.Y.1995); *see also United States v. Cranshaw*, 817 F. Supp. 723, 728 (N.D. Ill. 1993) (holding that the petitioner's "failure to specify his allegations does not meet the requirement of *Strickland*").

Petitioner has failed to show that counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Thirteen is denied.

I. Claim Fourteen

Petitioner alleges that her counsel was ineffective for failing to file a motion for change of venue. (Doc. 1 at 48). Petitioner claims she "had a well grounded fear she would not receive a fair trial due to influence of Citrus County Sheriff's Office," and "her case was highly publicized on [the] front page of Citrus County newspaper for several months as well as social media . . . ." (*Id.*). This claim was raised in Petitioner's Rule 3.850

motion and was denied based on the following: "There was no evidence that the case had 'notoriety' or it was highly publicized. Additionally, the case did not involve an extreme or unusual situation. The Defendant merely alleges there was pre-trial publicity without providing evidence to support her arguments." (Doc. 5-1 at 639).

Under Florida law,

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Anderson v. State, 18 So. 3d 501, 521 (Fla. 2009) (citations and quotation omitted). Here, Petitioner provides no evidence that a change of venue would have altered the results of her convictions. Further, she offers no evidence of juror bias or any other indication that the venue played a role in the result. Considering that no evidence supports a motion to change venue, counsel's decision not to move for such a change is entitled to deference. Counsel is not required to file frivolous motions or make frivolous objections.

Petitioner has failed to show that counsel acted deficiently or that she sustained prejudice. In addition, Petitioner has failed to demonstrate that the state court's decision rejecting her claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Fourteen is denied.

J. Claim Seventeen

Petitioner argues that she is entitled to habeas relief based on the "cumulative error and effect of the various grounds" raised in the Petition. (Doc. 1 at 56).

None of Petitioner's individual claims of error or prejudice has any merit, and, therefore, the Court has nothing to accumulate. The Eleventh Circuit Court of Appeals has made clear that when "[t]here [is] no error in any of the [trial] court's rulings, the argument that cumulative trial error requires that this Court reverse [the defendant's] convictions is without merit." *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012). Moreover, the Court has considered the cumulative effect of Petitioner's ineffective assistance claims and concludes that she cannot demonstrate cumulative error sufficient to entitle her to habeas relief. Claim Seventeen is denied.[3]

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).

---

[3] Any allegations not specifically addressed have been found to be without merit.

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

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

1. The Petition for Writ of Habeas Corpus (Doc. 1) 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 accordingly and close this case.

DONE and **ORDERED** in Orlando, Florida on February 21, 2024.

WENDY W. BERGER
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-11910

KRISTY RICHARD,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:22-cv-00083-WWB-PRL

Before JILL PRYOR and BRANCH, Circuit Judges.

Appendix C

BY THE COURT:

Kristy Richard moves for leave to file a motion for reconsideration out of time and for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2. She is seeking reconsideration of this Court's January 21, 2025, order denying a certificate of appealability, leave to proceed on appeal *in forma pauperis*, and appointment of counsel in her 28 U.S.C. § 2254 habeas corpus proceedings.

Richard's motion for leave to file out of time is GRANTED. However, upon review, her motion for reconsideration is DENIED because she has offered no new evidence or arguments of merit to warrant relief.