UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ISAIAH NAPOLI,

Petitioner,

v. **Case No: 6:15-cv-1372-Orl-41GJK**

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed under 28 U.S.C. § 2254 on August 18, 2015. In compliance with this Court's Order (Doc. 3), Respondents filed a Response to Petition ("Response to Petition," Doc. 10). Petitioner filed a Reply to Response to Petition ("Reply," Doc. 22). The Petition is now ripe for review. Petitioner raises three grounds for relief in his Petition. For the reasons set forth below, the Petition will be denied.

I. PROCEDURAL HISTORY

On March 28, 2011, the State Attorney's Office for the Eighteenth Judicial Circuit in and for Seminole County, Florida charged Petitioner by amended information with armed burglary of a dwelling (Count One) and possession of a firearm by a convicted felon (Count Two). (Doc. 11-1 at 5). Petitioner proceeded to trial on Count One only, and a jury found him guilty. (*Id.* at 390). Subsequently, the State filed a *nolle pros* as to Count Two. (*Id.* at 393). The trial court sentenced Petitioner to life in prison as a prison releasee reoffender. (*Id.* at 408-09). Florida's Fifth District

Court of Appeal ("Fifth DCA") affirmed Petitioner's conviction and sentence without a written opinion. (*Id.* at 455); *Napoli v. State*, 90 So. 3d 303 (Fla. 5th DCA 2012).

On July 30, 2013, Petitioner, through counsel, filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure ("Rule 3.850 Motion"). (Doc. 11-1 at 459). After holding an evidentiary hearing, the post-conviction court denied the sole claim raised in the Rule 3.850 Motion. (Doc. 11-1 at 548-51). On April 28, 2015, Florida's Fifth DCA affirmed *per curiam*. (Doc. 11-2 at 10); *Napoli v. State*, 166 So. 3d 808 (Fla. 5th DCA 2015).

II. LEGAL STANDARDS

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

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

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

28 U.S.C. § 2254(d). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014).

"Clearly established federal law" consists of the governing legal principles, rather than the *dicta*, set forth in the decisions of the United States Supreme Court at the time the state court issued its decision. *White*, 134 S. Ct. at 1702; *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor,* 529 U.S. 362, 412 (2000)). That said, the Supreme Court has also explained that "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from [the Supreme Court's] cases can

supply such law." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). State courts "must reasonably apply the rules 'squarely established' by [the Supreme] Court's holdings to the facts of each case." *White*, 134 S. Ct. at 1706 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). Notably, a state court's violation of state law is not sufficient to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010).

Even if there is clearly established federal law on point, habeas relief is only appropriate if the state court decision was "contrary to, or an unreasonable application of," federal law. 29 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). The petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *White*,

134 S. Ct. at 1702 (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)). Moreover, "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Knowles*, 556 U.S. at 122.

Even when the opinion of a lower state post-conviction court contains flawed reasoning, the federal court must give the last state court to adjudicate the prisoner's claim on the merits "the benefit of the doubt." *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1235 (11th Cir. 2016), *cert granted Wilson v. Sellers*, 137 S. Ct. 1203 (Feb. 27, 2017). A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits which warrants deference. *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). Therefore, to determine which theories could have supported the state appellate court's decision, the federal habeas court may look to a state post-conviction court's previous opinion as one example of a reasonable application of law or determination of fact; however, the federal court is not limited to assessing the reasoning of the lower court. *Wilson*, 834 F.3d at 1239.

Finally, when reviewing a claim under § 2254(d), a federal court must bear in mind that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1*)*; *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003) ("a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding") (dictum); *Burt v. Titlow*, 134 S. Ct. 10, 15-16 (2013) (same).

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 on the ground that his counsel rendered ineffective assistance. 466 U.S. 668, 687-88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 563 U.S. 170 (2011)).

The focus of inquiry under *Strickland*'s performance prong is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689. Indeed, the petitioner bears the heavy burden to "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690).

As to the prejudice prong of the *Strickland* standard, Petitioner's burden to demonstrate prejudice is high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). 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 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." *Id.* At 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

C. Standard for Exhaustion and Procedural Default

The AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights[.]" *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary,* 135 F.3d 732 (11th Cir. 1998).

In addition, a federal habeas court is precluded from considering claims that are not exhausted and would clearly be barred if returned to state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (if a petitioner has failed to exhaust state remedies and the state court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims).

Finally, a federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman*, 501 U.S. at 750. If a petitioner attempts to raise a claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994).

A petitioner can avoid the application of procedural default by establishing objective cause for failing to properly raise the claim in state court and actual prejudice from the alleged constitutional violation. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179–80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Murray v. Carrier*, 477 U.S. 478 (1986). To show prejudice, a petitioner must demonstrate that there is a reasonable probability the outcome of the proceeding would have been different. *Crawford v. Head*, 311 F.3d 1288, 1327–28 (11th Cir. 2002).

A second exception, known as the fundamental miscarriage of justice, only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To be credible, a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

III. ANALYSIS

Petitioner raises three grounds of ineffective assistance of counsel in the Petition. He asserts that: (1) initial trial counsel Andrew Clark was ineffective for allowing the State's eighteen-year plea offer to expire; (2) either Clark or replacement counsel Wayne Culver was ineffective for failing to convey the State's subsequent twenty-year plea offer; and (3) Culver was ineffective for failing to object to Petitioner wearing shackles and jail identification during trial. (Doc. 1 at 5-19). Each ground will be addressed separately.

A. Ground One

Petitioner asserts that defense counsel Andrew Clark allowed a favorable eighteen-year plea offer from the State to expire. (Doc. 1 at 5-6). Specifically, he urges that the State made the offer—which had an expiration date of December 3, 2010—on November 4, 2010, but that Clark did not inform him of the offer until December 1, 2010. (*Id.* at 5). Petitioner asserts that he "expressed interest" in the offer on December 1, 2010, and that Clark told him he would stop by the jail later that day to discuss it. (*Id.*). However, Clark did not visit Petitioner until December 7, 2010, and by that time, the offer had expired. (*Id.* at 6). Clark told Petitioner that "better offers would be forthcoming." (*Id.*). On March 1, 2011, replacement defense counsel Wayne Culver told Petitioner that the State was willing to offer a twenty-two year prison sentence in exchange for a plea. (*Id.*). Petitioner refused the offer and told Culver that he wanted to take the eighteen-year offer instead. (*Id.*). However, the State refused to reoffer the eighteen-year deal. (*Id.*). Petitioner asserts that, had he been properly advised, he would have "accepted the eighteen-year plea agreement instead of going to trial and being sentenced to a mandatory life sentence." (*Id.* at 10).

Petitioner raised this claim in his Rule 3.850 motion. (Doc. 11-1 at 459-70). After holding an evidentiary hearing—during which Petitioner, Clark, and Culver testified—the post-conviction court denied the claim on both prongs of *Strickland*. (*Id.* at 549-50). The court found Clark's testimony to be more credible than Petitioner's testimony. (*Id.* at 550). The court further noted that Petitioner's refusal to accept the March 1, 2011 twenty-two-year offer suggested that he was not truly amendable to a plea, and as a result, did not suffer *Strickland* prejudice. (*Id.*). The court noted:

> [T]his subsequent rejection [of the twenty-two-year offer] clearly shows an unwillingness to accept any plea offer within the range of the original one. It is apparent to this Court that the Defendant knowingly rejected the plea offer because he mistakenly relied upon courthouse gossip that he could do better by waiting. The rejection

> of the offer was in no way based upon Attorney Clark's failure to effectively represent him.

(*Id.*). Florida's Fifth DCA affirmed *per curiam.* (Doc. 11-2 at 10). Accordingly, Ground One is exhausted. The silent affirmance of the post-conviction court's ruling is entitled to deference, and the Court must determine whether any arguments or theories could have supported the state appellate court's decision. *Wilson*, 834 F.3d at 1235.

In *Missouri v. Frye*, the United States Supreme Court recognized that defense counsel has a duty to communicate formal offers from the prosecution, and that counsel's failure to do so constitutes ineffective assistance. 566 U.S. 134, 145 (2012). In the instant case, there is no dispute that Clark communicated the state's eighteen-year offer to Petitioner. A December 1, 2011 letter from Clark to Petitioner explained the details of the offer. (Doc. 11-2 at 36). Nevertheless, in his reply, Petitioner urges that *Frye* controls because it is unclear from Clark's testimony at the evidentiary hearing that that he *effectively* explained to Petitioner that the eighteen-year offer was still viable on December 3, 2011. (Doc. 22). Petitioner asserts that he believed that the eighteen-year offer had expired, and that Clark told him that better offers would be coming. (Doc. 1 at 7).

At the evidentiary hearing on Petitioner's Rule 3.850 motion, Petitioner testified that when Clark met with him on December 7, 2011, he said that the eighteen-year offer had already expired. (Doc. 11-1 at 493-94, 521). Petitioner testified that he would have accepted the offer had he realized it was still open. (*Id.* at 494). In contrast to Petitioner's testimony, Clark testified that he accepted the offer on Petitioner's behalf so that it would not expire, and that the offer had "definitely not" expired when he met with Petitioner on December 7, 2011. (Doc. 11-1 at 501-02, 511-12).[1] He discussed the offer with Petitioner and explained to him that he was subject to a life

[1] Clark preemptively accepted the offer so that it would not expire on December 6, 2011. (Doc. 11-1 at 501-02). Clark could not meet with Petitioner prior to the offer's expiration, but he determined that Petitioner could reject the offer later if he wanted to reject the plea. (*Id.*).

sentence as a prisoner releasee reoffender if convicted at trial. (*Id.* at 503). Clark also testified that he discussed with Petitioner the strengths of the state's case. (*Id.*).

Substitute defense counsel Wayne Culver testified at the hearing that the state offered Petitioner a twenty-two-year plea after Culver took the case, but Petitioner rejected the offer, noting that the state "might as well take his whole life." (Doc. 11-1 at 517-18). Culver stated that he strenuously urged Petitioner to take the offer due to the "almost insurmountable" evidence against him. (*Id.* at 518-19, 520). Culver testified that Petitioner told him that he wanted to take the eighteen-year deal only after learning that the state was now offering twenty-two years, but that the state refused to reoffer the former deal. (*Id.* at 515, 518-19). Culver testified that Petitioner never told him that Clark had let the eighteen-year offer expire. (*Id.* at 518-19).

After hearing from Petitioner, Clark, and Carver, the post-conviction court expressed doubt about the veracity of Petitioner's testimony, noting that Clark would have to be a "sociopath" to have met with Petitioner merely to tell him that the offer had expired. (Doc. 11-1 at 540, 543). He specifically determined that Clark had preemptively accepted the eighteen-year offer from the state, as he testified, and that Petitioner's story was illogical. (*Id.* at 544). In his written order denying Petitioner's Rule 3.850 motion, the post-conviction court explicitly found counsels' testimony to be more credible than Petitioner's testimony. (Doc. 11-1 at 550).

Federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). Questions of the credibility and demeanor of a witness are questions of fact. *Freund v. Butterworth*, 165 F.3d 839, 862 (11th Cir. 1999). The AEDPA affords a presumption of correctness to a factual determination made by a state court, and the habeas petitioner has the burden of overcoming the presumption of correctness by clear and convincing evidence. 28 U.S.C.

§ 2254(e). Moreover, determining the credibility of a witness, "is the province and function of the state courts, not a federal court engaging in habeas review." *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011); *see also Gore v. Sec'y for Dep't of Corr.*, 492 F.3d 1273, 1300 (11th Cir. 2007) (recognizing that while reviewing court also gives a certain amount of deference to credibility determinations, that deference is heightened on habeas review) (citing *Rice v. Collins*, 546 U.S. 333, 341–42 (2006) ("[r]easonable minds reviewing the record might disagree about the [witness'] credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination")).

Petitioner has not shown by clear and convincing evidence that the post-conviction court unreasonably determined that his testimony was not credible. Therefore, the post-conviction court's conclusion that Clark informed Petitioner of the eighteen-year offer prior to its expiration and that Petitioner rejected the offer—not because he did not understand it—but because he hoped for a better one is presumptively correct. Accordingly, Ground One does not fall within the purview of *Missouri v. Frye*, and Petitioner has not shown that Clark's performance was deficient. Petitioner has not satisfied the first prong of *Strickland*, and he is not entitled to federal habeas relief on Ground One. 28 U.S.C. § 2254(d); *Strickland*, 466 U.S. at 697 (Because the petitioner bears the burden of satisfying both prongs of the test, the Court need not "address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

B. Ground Two

Petitioner asserts that trial counsel was ineffective for failing to convey a twenty-year plea offer that was made at some point between the eighteen-year and the twenty-two-year offers from the state. (Doc. 1 at 13). Petitioner directs the Court's attention to a March 1, 2011 letter to defense counsel Culver stating:

> The earlier plea offer involving 20 years as a habitual felony offender has expired and considerable time and work has been expended since the deadline date. I shall soon be amending the information so that upon conviction, the Court will be obligated to impose a life sentence as a Prison Releasee Reoffender.
>
> Before doing so, I shall give your client one final opportunity to avoid that exposure. It is our policy in the Career Criminal Division not to permit a plea to an earlier rejected or expired offer and, absent some unforeseen circumstance, to make any subsequent offer less favorable to the defendant.
>
> Accordingly the defendant may enter a plea of guilty in the attached offer.
>
> If Mr. Napoli fails to accept and plead and be sentenced to this offer on or before March 18, 2011, it will be deemed rejected and once the information is amended and Prison Releasee Reoffender notice filed, it would be my intention to make no further offers. Please speak with your client and advise me how you wish to proceed.

(Doc. 1-1 at 1). The letter included an attachment advising Petitioner of the twenty-two-year offer. (*Id.* at 2).

Respondent urges that this claim was not raised in state court, and as a result, it is unexhausted and procedurally defaulted. (Doc. 10 at 6). Petitioner concedes that he did not raise this claim in state court, but argues that his failure to do so is excused by the United States Supreme Court's ruling in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (Doc. 1 at 15-16). The *Martinez* Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320. Under *Martinez*, a petitioner must establish that his underlying ineffective assistance claim is "substantial" — that is, that it has "some merit" — before the procedural default can be excused. *Id*. at 1318-19.

Respondent argues that the letter at issue "clearly contains a typographical error" because the testimony adduced at the evidentiary hearing on Petitioner's Rule 3.850 motion clarified that Petitioner was extended only two plea offers—one for eighteen years and the other for twenty-two years. (Doc. 10 at 9). Indeed, a review of Culver's testimony suggests that only two plea offers were made by the state. (Doc. 11-1 at 514-20). However, it is unnecessary for this Court to determine whether a twenty-year offer was actually made because Petitioner cannot demonstrate *Strickland* prejudice.

Prejudice, in the context of a lapsed or rejected plea offer, requires the movant to show "a reasonable probability [he] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel." *Frye*, 566 U.S. at 147. Petitioner cannot make this showing. Even if a twenty-year offer was extended by the state, the record demonstrates that Petitioner rejected an earlier eighteen-year offer and a subsequent twenty-two-year offer. The twenty-two-year offer was extended by the state only three months after the original eighteen-year offer. Culver testified that he "leaned on" Petitioner to take the twenty-two-year offer, but that Petitioner felt that twenty-two-years was his "whole life." (Doc. 11-1 at 517-19). Culver believed that Petitioner wanted a trial at that point. (*Id.*). Petitioner's rejections of two very similar offers within a three month period—even after defense counsel explained that the evidence against him was "almost insurmountable"—defeats Petitioner's current assertion that he would have accepted a twenty-year offer almost immediately after rejecting an eighteen-year offer. Petitioner cannot meet his burden of showing *Strickland* prejudice. *See United States v. Watson*, 766 F.3d 1219, 1227 (10th Cir. 2014) (noting that the habeas petitioner "bears the burden of 'affirmatively prov[ing]' that there is a reasonable probability that he would have accepted the plea.") (citing *Strickland*, 466 U.S. at 693; *Frye*, 132 S. Ct. 1410, *Lafler v. Cooper*, 566 U.S. 156 (2012)).

Ground Two's ineffective assistance claim is unexhausted because it is not "substantial" and does not fall within *Martinez*' equitable exception to the procedural bar. 132 S. Ct. at 1318-20. Petitioner has not presented new, reliable evidence demonstrating a fundamental miscarriage of justice. Ground Two is dismissed as unexhausted.

C. Ground Three

Petitioner asserts that defense counsel was ineffective for failing to object to Petitioner wearing shackles and a red jail identification band during trial. (Doc. 1 at 17). He argues that the red wristband and shackles were "inherently prejudicial where the red band and shackles marked him as a dangerous character, affecting his presumption of innocence and the right to a fair trial." (*Id.*). Petitioner further argues that, had he not been shackled, "there is a reasonable probability that he would have been acquitted of all charges." (*Id.* at 19).

Respondent urges that this claim is unexhausted, and is not "substantial" so as to excuse Petitioner's failure to exhaust under *Martinez*. (Doc. 10 at 9). Petitioner counters that shackles are presumptively prejudicial, and that an evidentiary hearing is required to determine whether he is entitled to habeas corpus relief. (Doc. 22 at 23). Petitioner cites *Deck v. Missouri*, 544 U.S. 622 (2005) in support of Ground Three. (*Id.*). To the extent Petitioner urges that *Deck*, not *Strickland*, controls his Sixth Amendment ineffective assistance claim, he is mistaken. *Deck* did not involve a Sixth Amendment claim. Rather, *Deck* dealt with a direct appeal where trial counsel objected to shackling before the jury. In *Marquard v. Sec'y for the Dep't of Corr.*, 429 F.3d 1278 (11th Cir. 2005), the Eleventh Circuit explained:

> While *Deck* shifted the burden to the state on direct appeal to prove that routine shackling without a specific-needs inquiry did not contribute to the verdict, *Deck* did not address, much less alter, the burden and different required prejudice showing on Marquard's [ineffective-assistance] shackling claim. After *Deck*, Marquard still has the burden in his [ineffective-assistance] shackling claim to

> establish a reasonable probability that, but for his trial counsel's failure to object to [the] shackling, the result of his sentencing would have been different.

Id. at 1313-14 (citation and footnote omitted). In other words, *Deck* does not alter Petitioner's burden to establish actual prejudice under *Strickland*.

Even if the jurors noticed that Petitioner was shackled and wore a jail identification band during trial, there is no probability that, absent the shackles or identification, they would have acquitted him because the evidence establishing Petitioner's guilt was overwhelming. At trial, Christopher Steepy testified that he hired Petitioner to do some work at the victims' home. (Doc. 11-1 at 150). During the job, the victims' guns and prescription medications were visible to Petitioner. (*Id.* at 154-55). One of the victims testified that, a few days after Petitioner was in her home, two men broke into the house while she and her husband were asleep, and began beating them. (*Id.* at 149-50). The men demanded guns, jewelry, and money. (*Id.* at 150). The robbers took guns, medication, and jewelry from the home. (*Id.* at 152).

Witness Ashley Laufer testified that she, Petitioner, Briana Eiland, Jason Glasco, and a person called "Q" went for a ride in Glasco's truck on the night of the robbery (*Id.* at 67-68). Q directed Glasco to a house, and he and Petitioner left the truck while the others waited. Petitioner and Q went into the house for "a long time" and returned with items wrapped in blankets. (*Id.* at 69-70). They then went to Petitioner's brother's apartment, and Laufer saw Petitioner give his brother a gun and jewelry. (*Id.* at 71). Laufer testified that Petitioner took the other guns to a nearby Quality Inn and stored them under a bed. (*Id.* at 73). Soon thereafter, Laufer saw the report about the robbery on television and called Crime Line to report that the guns from the robbery were under a bed at the Quality Inn (*Id.* at 76, 85).

Petitioner's girlfriend, Briana Eiland, testified that she went for a ride with Petitioner, Q, Jason Glasco, and Laufer on the night of the robbery. (Doc. 11-1 at 91). When they arrived at the

victims' house, Petitioner and Q left the truck, and after a while, they returned carrying three long guns and some bags. (*Id.* at 92-93). They drove to the apartment of Petitioner's brother and Eiland saw Petitioner give his brother some jewelry. (*Id.* at 94). Afterwards, they went to a hotel and left the guns under a bed. (*Id.* at 96). Petitioner told Eiland that he and Q had gone into the victims' house while they were sleeping, that there was an "altercation," and that he and Q had taken things from the victims' safe. (*Id.* at 100).

Jason Glasco testified that, on the night of the robbery, Petitioner asked Glasco to give him a ride to a friend's house. (Doc. 11-1 at 116). Thereafter, he, Petitioner, Laufer, Eiland, and Q drove Glasco's mother's truck to the victims' house. (*Id.* at 114). Petitioner and Q entered the victims' home, and later returned with long guns and a bag. (*Id.* at 117). During the ride back, Petitioner told Glasco that he had pushed some guy's head into a wall. (*Id.* at 119). Glasco testified that he took Petitioner to a hotel and rented a room for him. (*Id.* at 124-25).

Detective Amanda Brunscheen testified that during her investigation of the robbery, she recovered the victim's pearl necklace from Petitioner's brother and recovered the victims' guns from underneath a bed at the Quality Inn. (Doc. 11-1 at 168-69, 170, 178-79).

Given the strong evidence of Petitioner's guilt, there is no reasonable probability that the shackling or the jail identification band had an impact on the jury's verdict. Accordingly, Petitioner cannot demonstrate *Strickland* prejudice. The ineffective assistance claim raised in Ground Three is not "substantial," and *Martinez* does not excuse Petitioner's procedural default of the claim. Nor has Petitioner presented new, reliable evidence showing a fundamental miscarriage of justice. Ground Three is dismissed as unexhausted.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit. Because the Petition is resolved on the record, an evidentiary hearing is not

warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

IV. Certificate of Appealability

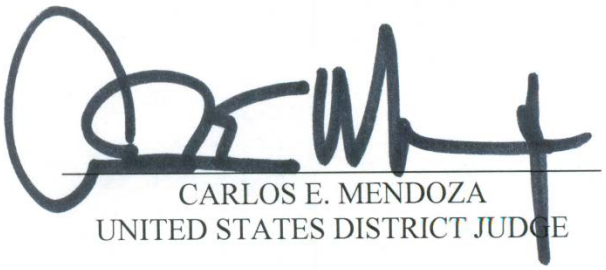
A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Lawson must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller–El*, 537 U.S. at 335–36. Lawson has not made the requisite showing in these circumstances.

Because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis.*

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

1. This case is **DISMISSED.**
    a. Ground One of the 28 U.S.C. § 2254 petition for habeas corpus relief filed by Isaiah Napoli is **DENIED**.
    b. Grounds Two and Three are **DISMISSED with prejudice** as unexhausted.
2. Petitioner is **DENIED** a certificate of appealability.
3. The **Clerk of Court** shall terminate any pending motions, enter judgment accordingly, and close this case.

DONE and **ORDERED** in Orlando, Florida on October 20, 2017.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record