

UNITED STATES DISTRICT COURT
COURT MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOE E. ROGERS,

Petitioner,

v.

CASE NO. 8:17-CV-02680-VCM-MAP

SECRETARY, DEPARTMENT OF
CORRECTIONS, et al.,

Respondents.

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RESPONSE TO PETITION

COME NOW the Respondents, by and through the undersigned counsel, pursuant to Rules 4, 5, and 11, Rules Governing Section 2254 Cases in the United States District Courts, and in response to the instant petition for writ of habeas corpus, and in response to this court's order to show cause, request this court dismiss the instant petition with prejudice and grant summary judgment.

FACTUAL STATEMENT

The State charged Petitioner with 125 counts of possession of child pornography. (Appendix A, p. 1-30). After discussion regarding a plea offer by the State, the trial court began the trial.

Catherine Schlaegel testified that she and Petitioner started dating while they resided in Tennessee in 2006. (Appendix B, C, p. 156, 159-161). When she became pregnant, they decided they would raise the child together while maintaining separate residences. (Appendix C, p. 162, 164). The child was born in March, 2007. (Appendix C, p. 163). Petitioner moved to Florida after he was offered a job by Progress Energy. (Appendix A, p. 166). He put the stuff from his garage into a storage shed in Tennessee, and several boxes in Schlaegel's garage in Tennessee. (Appendix A, p. 172). He took his electronics, including his computer, with him to Florida. (Appendix A, p. 171-172). He moved to Florida in April-May, 2007, and moved into a house where he lived without any furniture until June, 2007, when Schlaegel joined him. (Appendix C, p. 167-168).

A moving company handled the task of moving their belongings, including those in the storage shed. (Appendix C. p. 172, 227). As Schlaegel went through their personal effects in the moving process, she found some CDs in a little plastic boxes in Petitioner's bedroom closet and in Petitioner's laptop bag. (Appendix C, p. 187-188, 193, 227-228). When she inspected them on a computer, an image of child porn appeared. (Appendix C, p. 189). She marked it up and hid it in her closet. (Appendix C, p. 189-190). When she confronted Petitioner, he denied it, and explained how the pictures could have gotten there. (Appendix C, p. 190-191). Petitioner agreed to go to a therapist with her, and she told the

therapist about the photos. (Appendix C, p. 191-192).

On December 28, 2007, Schlaegal moved out of the house and to Homosassa Springs. (Appendix C, p. 174). In April, 2009, Petitioner, in response to Schlaegel's attempted suicide, filed a motion for emergency custody of their child. (Appendix C, p. 197, 221). Schlaegel turned the CDs over to the law enforcement in the same month. (Appendix C, p. 197, 199). Pursuant to a detective's request, Schlaegel recorded a conversation which was admitted into evidence and played to the jury with no objection from Petitioner. (Appendix C, p. 204-205). In the audiotaped conversation, there was much discussion regarding Schlaegel's fitness as a mother. (Appendix E, p. 383-387, 400-401, 430-435, 441-443). She expressed her anger regarding Petitioner's child pornography. (Appendix E, p. 402, 405-406, 426-427).

Detective Cornell testified that the child pornography was saved to a computer on various dates, and everything was moved to the disc on one date. (Appendix C, p. 327-328). The day before the disc was created, a video was downloaded showing a female child having intercourse. (Appendix C, p. 330). There was no indication that the dates had been tampered with, and changing the dates on all of these images would have been difficult and time-consuming. (Appendix C, p. 343-345). The detective identified 178 images of child pornography. (Appendix C, p. 329). Some had been selected to be saved as a thumbnail, which required input from the individual

accessing that file. (Appendix C, p. 292-294). The pictures were shown to the jury and described by the witness; they included pictures of children and infants engaged in sexual activity or posed in a sexually suggestive manner. (Appendix C, p. 292-327). The disc also contained adult pornography, and personal pictures of Petitioner's family, vacations, and possessions. (Appendix C, p. 277, 289). Approximately 20 to 30 percent of the disc contained child pornography. (Appendix C, p. 331-331).

The jury convicted Petitioner as charged. (Appendix A, p. 230-235). On counts 1-15, he was sentenced to five years each to be served consecutively for a composite 75-year prison sentence. (Appendix D). On counts 16-100, he was sentenced 5 years' probation concurrent with each other but consecutive to the prison sentence.

For counts 101-125, he was sentenced to 5 years' probation concurrent with each other but consecutive to the prison sentence and the other probation sentence.

Petitioner appealed. 5th DCA #5D10-3008. He raised the following three claims: 1) Whether the trial court properly denied his motion for judgment of acquittal and allowed the jury to determine whether he knowingly possessed child pornography, 2) Whether the State had an obligation to stop the prosecution from playing the audio recording and ask the parties to redact it, and 3) Whether his sentence was unconstitutional. (Appendix I, J, K). On July 6, 2012, the Fifth District Court of Appeal issued a written opinion

affirming the judgment and sentence; mandate issued on September 28, 2012. (Appendix L, M); Rogers v State, 96 So. 2d 922 (Fla. 5th DCA 2012).

On June 24, 2013, Petitioner filed a motion for post-conviction relief setting forth the following claim and sub claims: 1) Trial counsel was ineffective for failing to investigate the facts of the case and understand the applicable law (a) counsel advanced a defense strategy that was grounded on a misunderstanding of the law, (b) counsel employed conflicting defense strategies, (c) counsel conceded Petitioner's guilt and (d) counsel failed to permit Petitioner to testify in his own defense; 2) Trial counsel was ineffective for failing to move to suppress a CD containing images of child pornography; 3) Trial counsel was ineffective for failing to object to collateral crimes presented to the jury in a audiotaped recording between him and his former girlfriend; 4) Trial counsel was ineffective for failing to employ an expert witness to analyze the CD and determine if the prosecutor was correct; 5) Petitioner was not permitted to testify; and 6) Petitioner received vindictive sentence for exercising his right to trial; (Appendix N). On January 27, 2014, the circuit court summarily denied his motion with the exception that he was given leave to amend claim 4. (Appendix O).

On February 24, 2014, Petitioner filed an amended motion, and on March 2, 2014, he filed an amended pro se motion setting forth eleven claims. (Appendix P, Q). On May 2, 2014, the circuit court

summarily denied claim 4, and did not consider the claims set out in the amended pro se motion. (Appendix R).

On August 3, 2014, Petitioner filed a pro se initial brief arguing that the circuit court erred in 1) refusing to consider the claims raised in his pro se brief, 2) denying claim 4 as facially insufficient, and 3) summarily denying the remainder of the Petitioner's claims. (Appendix S, T, U); 5th DCA #5D14-1859). The Fifth District Court of Appeal remanded for an evidentiary hearing on claims 1)a) and 1)d). (Appendix V). After denying Petitioner's motion for rehearing, mandate issued on May 13, 2015. (Appendix W, X, Y); Rogers v State, 162 So. 3d 334 (Fla. 5th DCA 2014).

On August 13, 2015, the circuit court held an evidentiary hearing as mandated by the appellate court. (Appendix Z). On November 6, 2015, the circuit court entered an order denying Petitioner's two claims, and found that trial counsel was not deficient and/or Petitioner did not suffer any prejudice. (Appendix AA).

Petitioner appealed and argued the circuit court erred in finding that defense counsel was not ineffective because 1) The defense did not understand the elements of the charged crime which had to be proven by the State, 2) Defense counsel inappropriately conceded Petitioner's guilt, 3) Defense counsel misadvised Petitioner and caused him not to testify and 4) cumulative error. (Appendix BB); 5th DCA #5D15-4105. The State filed an answer brief and Petitioner filed a reply. (Appendix CC, DD). On December 27,

2016, the Fifth District Court of Appeal per curiam affirmed the lower court's denial of post-conviction relief. (Appendix EE); Rogers v State, 229 So. 3d 357 (Fla. 5th DCA 2016). After denial of Petitioner's motion for hearing, mandate issued on February 27, 2017. (Appendix FF, GG, HH).

On June 9, 2016, Petitioner filed a habeas petition alleging ineffective assistance of counsel. (Appendix II); 5th DCA #5D16-2059. On June 27, 2016, the Fifth District Court of Appeal dismissed the petition, and on August 1, 2016, denied Petitioner's motion for rehearing. (Appendix JJ, KK, LL).

On February 2, 2017, Petitioner filed a motion to correct an illegal sentence alleging a double jeopardy violation. (Appendix MM). On March 15, 2017, the trial court denied the motion. (Appendix NN). Petitioner appealed. (Appendix OO); 5th DCA #5D17-1449). On September 13, 2017, the Fifth District Court of Appeal per curiam affirmed the ruling. (Appendix PP); Rogers v State, 232 So. 3d 391 (Fla. 5th DCA 2017). On November 6, 2017, the mandate issued after the motion for rehearing was denied. (Appendix QQ, RR, SS).

JUDICIAL ASSIGNMENT

The judge/magistrate assigned to this case has not been involved in any other proceedings related to the present case.

EVIDENTIARY HEARING

There has been an evidentiary hearing on some of Petitioner's claims, and no evidentiary hearing on the remaining claims. Respondents submit that no hearing needs to be held as the claims are either procedurally barred from federal habeas review or refuted by the record.

PETITIONER'S CLAIMS

Petitioner asserts that the following nine claims: 1) Trial counsel was ineffective for failing to move to suppress inadmissible evidence, to wit: the computer disk containing the images of child pornography; 2) Appellate counsel was ineffective for failing to raise the issue of non-unanimous verdict; 3) The State failed to prove all the elements of the charged crimes; 4) Trial counsel was ineffective for pursuing a defense based on a misunderstanding of the law and failing to investigate the facts of the case; 5) Trial counsel was ineffective for failing to object to irrelevant and prejudicial evidence; to wit: the audio recording of the conversation between Petitioner and Schlaegel; 6) Trial counsel was ineffective for failing to obtain an expert in computer forensics; 7) Trial counsel was ineffective for failing to allow Petitioner to testify and lying to the jury; 8) Petitioner's sentence was cruel and unusual and was vindictive and 9) Petitioners judgment and sentence violate

double jeopardy.

TIMELINESS OF PETITION

Title 28 U.S.C. §2244(d) was amended by section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA), which became effective on April 24, 1996. Section 2244(d)(1) specifically requires that a petition filed in federal court by a person in custody pursuant to a state conviction be filed within one year from the date the conviction became final. Section 2244(d)(2) provides that the time is tolled for any properly filed state collateral petitions or motions. The one year time limit may be tolled only for properly filed collateral relief. See Calderon v. United States District Court for the Central District of California, 112 F.3d 386, 389-390 (9th Cir. 1997) (Petitioner had until April 23, 1997, to timely file his petition); United States v. Jones, 963 F.Supp. 32, 34 (D.D.C. 1997) ("any prisoner whose conviction became final before enactment of the AEDPA must file his §2255 motion on or before April 23, 1997, or the motion is time barred under the ACT."); Burns v. Morten, 970 F.Supp. 373 (D.N.J. 1997)(granting a one year grace period for convictions that were final before effective date of the new legislation; thus, the last day for filing a habeas petition was April 23, 1997).

Petitioner's judgment and sentence became final on July 6, 2012. He is entitled to an additional 90 days in which to seek cert.

Therefore, for the purposes of the AEDPA, his one-year time period began to run on October 4, 2012. 263 days elapsed prior to Petitioner filing his motion for post-conviction relief. This tolled time while he pursued this motion until mandate issued on the appeal on February 27, 2017. On February 2, 2017, Petitioner filed a Rule 3.800 motion which continued the tolling until November 6, 2017. The present petition was filed on October 31, 2017. Therefore, the present petition is timely.

PROCEDURAL BARS; DEFAULT & EXHAUSTION

Claim 1: Trial counsel was ineffective for failing to move to suppress inadmissible evidence, to wit: the computer disk containing the images of child pornography. On federal habeas review, Petitioner argues that the search of the CD using "Forensic Tool Kit" was a violation of Appellant's Fourth Amendment rights and should have required a warrant. However, Petitioner argued that trial counsel should have moved to suppress the CD, but set forth a different basis for this claim. Petitioner argued that a warrant was required because Schlaegel was acting at the direction of and at the direction of the State. (Appendix O, p. 8). The trial court ruled:

Based on the testimony of Schlaegel, this Court finds that the CDs and the subsequent search of the contents of such, was not obtained in violation of the Defendant's protection against search and seizure under the Fourth Amendment.

Although a degree of State action was certainly present as the police knew of, acquiesced in, and encouraged Schlaegel to obtain evidence that would later be used against the Defendant, the record reflects that Schlaegel was acting to further her own interest permitting the search to retain its private character.

(Appendix O, p. 9).

A habeas petition should not be entertained unless the Petitioner has first exhausted his state remedies. Castilles v Peoples, 489 U.S. 346 (1989). The Florida courts must be given the opportunity to consider the Petitioner's legal theory of a federal constitutional deficiency and the factual basis for that theory. Picard v Conner, 404 U.S. 270, 277 (1971). Concerns of comity require that exhaustion cannot be satisfied by the mere statement of a federal claim in state court. Footman v Singletary, 978 F. 2d 1207, 1210-1211 (11th Cir. 1992). The Petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state claim. Snowdon v Singletary, 135 F. 3d 732, 735 (11th Cir. 1998).

There are two prerequisites to federal habeas default: (1) "the applicant must have fairly apprized the highest court of his state with the appropriate jurisdiction of the federal rights which allegedly were violated," and (2) "the applicant must have presented his claims in state court in a procedurally correct manner." Upshaw v Singletary, 70 F. 3d 576, 578-579 (11th Cir. 1995). This means

that “a state prison seeking federal habeas corpus relief, who fails to raise his federal constitutional claim in state court, or who attempts to raise it in a manner not permitted by state procedural rules, is barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default.”

Alderman v Zant, 22 F. 3d 1541, 1549 (1994). A petitioner’s pro se status does not alone amount to good cause. Harmon v Barton, 894 F. 2d 1268 (11th Cir.), cert. denied, 498 U.S. 832 (1990).

Moreover, the federal habeas Court is precluded from considering such claims if they would be procedurally defaulted if Petitioner returned to state court. Smith v Secretary, DOC, 572 F. 3d 1327, 1342 (11th Cir. 2009) (Citing Snowden v Singletary, 135 F. 3d 732, 736 (11th Cir. 1998) (“[W]hen it is obvious that the unexhausted claim would be procedurally barred in state court due to state law procedural default, we can forego the needless “judicial ping pong” and just treat those claims now barred by state law as no basis for federal relief.”)).

Presently, Petitioner argues counsel was ineffective for failing to suppress the CD. However, he argues a different basis for suppressing the CD than he did in state court. Therefore, this claim has never been presented to the State court. Further, he is time-barred by state procedural rules from returning to state court and raising this claim now. This claim is not exhausted and is procedural defaulted, and therefore, not cognizable on federal habeas review.

Claim 2: Appellate counsel was ineffective for failing to raise the

issue of non-unanimous verdict. Similar to Petitioner's first claim, it appears that Petitioner has not exhausted this claim in state court, and is procedurally barred from doing so. This claim is not cognizable on habeas review.

Claim 5) Trial counsel was ineffective for failing to object to irrelevant and prejudicial evidence; to wit: the audio recording of the conversation between Petitioner and Schlaegel. Petitioner makes numerous claims as to why defense counsel should have objected to the audiotape from coming into evidence. However, it appears that the only two claims presented to the trial court were allegations of collateral evidence in that Petitioner admitted an addiction to adult pornography and mentioned a drug addiction. Respondents submit that these are the only claims that have been permitted to the State courts. Any of Petitioner's other federal habeas allegations regarding this audiotape have not been presented to the state court, and thus, are not cognizable on federal habeas review.

Claim 9) Petitioners judgment and sentence violate double jeopardy. Petitioner alleges that the information failed to charge each count with the sufficient specificity to prosecute, punish and sentence Petitioner separately and consecutively. This claim was raised in Petitioner's Rule 3.800(a) motion. The state court found that it was not cognizable under this motion. Therefore, it was found procedurally barred. The Fifth District Court of Appeal per curiam affirmed the lower court's ruling. Therefore, this claim has not

been presented to state court, and Petitioner has not exhausted state remedies. However, he is procedurally barred from doing so now. Therefore, this claim is not exhausted and procedurally barred, it is not cognizable on federal habeas review.

Finally, Petitioner's failure to adequately assert the foregoing claims may not be excused. Neither of the exceptions to procedural bar are presently applicable.

First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both 'cause' for the default and actual 'prejudice' resulting from the default. "To establish 'cause' for procedural default, 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). To establish 'prejudice', a petition must show that there is at least a reasonable probability that the result of the proceeding would have been different. Henderson v Campbell, 353 F. 3d 880, 892 (11th. Cir. 2003).

The second exception, known as 'fundamental miscarriage of justice,' only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v Carrier, 477 U.S. 478, 496 (1986). Actual innocence in this context means factual innocence, not legal insufficiency. Bousley v United States, 523 U.S. 614, 623 (1988). To meet this standard, a petition must "show that it is more than likely than not that no reasonable juror would

have convicted him” of the underlying offense. Presently, Petitioner has not shown that either of these exceptions exist to excuse the procedural default.

Claim 8) Petitioner’s sentence was cruel and unusual and was vindictive. Petitioner’s bases this claim on Wilson v State, 845 So. 2d 142 (Fla. 2003). This is actually a claim of misapplication of Florida law. The Supreme Court has often held that federal habeas relief does not lie for errors of state court. It is not the province of a trial court to reexamine state-court determinations on issues of state law. See Estelle v McGuire, 502 U.S. 62 (1991). “This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is ‘couched in terms of equal protection and due process.’” Branan v Booth, 861 F. 2d 1507, 1508 (11th Cir. 1988)(quoting Willeford v Estelle, 538 F.2d 1134 (5th Cir. 1976). Therefore, Respondents assert that this claim is not cognizable on federal habeas review, and must be denied.

STANDARD OF REVIEW

Pursuant to the Antiterrorism Effective Death Penalty Act (AEDPA), a federal court may not grant federal habeas relief 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

28 U.S.C. Sec. 2254(d). The phrase “clearly established “Federal law,” encompasses only the holdings of the United States Supreme Court “as of the time of the relevant state-court decision.” Williams v Taylor, 529 U.S. 362, 412 (2000).

“[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the ‘contrary to’ and ‘unreasonable application’ clauses articulate independent considerations a federal court must consider.” Maharaj v Secretary, D.O.C., 432 F. 3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in Parker v Head, 244 F. 3d 31, 835 (11th Cir. 2001):

Under the “contrary to” clause, a federal court may grant the writ if the state court arrives at a conclusion opposite 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] decision but unreasonably applies that principle to the facts of the prisoner’s case. *Id.* (quoting *Williams*, 259 U.S. 412-413). Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that

application was “objectively unreasonable.”.

A federal court may grant the writ of habeas if the state’s court decision is based on an unreasonable determination in light of the evidence presented at in the state court proceeding. However, the state court’s determination of a factual issues shall be presumed correct and the habeas petition bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. Sec. 2254(1)(e). In considering the unreasonable application inquiry, the state’s court’s decision must be assessed in light of the record before the state court. Holland v Jackson, 542 U.S. 649, 652 (2004).

MERITS

Claim 3) The State failed to prove all the elements of the charged crimes. This claim was presented on direct appeal. This is actually an argument of error on the part of the trial court failing to grant Petitioner’s motion for judgment of acquittal. Under Florida law, a motion for judgment of acquittal challenges the legal sufficiency of the evidence. State v Odom, 862 So. 2d 56, 59 (Fla. 2nd DCA 2003). The trial court should grant a judgment of acquittal if the State fails to present legally sufficient evidence to establish each element of the crime charged. Id.

On federal habeas review, the question for this Court concerning the sufficiency of evidence in a state court proceeding

is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v Virginia, 443 U.S. 307, 309 (1979). For a judgment of acquittal to be properly denied, it is not necessary that all the facts favor the prosecution. “The simple fact that the evidence gives some support to the defendant does not demand acquittal.” Cosby v Jones, 682 So. 2d 1373, 1383 n. 21 (11th Cir. 1982).

Constructive possession exists where a defendant does not have actual, physical possession of the contraband, but knows of its presence on or about the premises, and has the ability to exercise and maintain control over the contraband. State v Odom, 56 So. 3d 46 (Fla. 5th DCA 2011). The trial transcript demonstrates the State established this.

Catherine Schlaegel testified that she discovered the CD either in the Petitioner’s closet or in his laptop bag. (Appendix C, p. 187-188). It included not just pornography, but pictures of his family and vacations. (Appendix C, p. 200, 289). Further, he admitted downloading the pornography, albeit accidentally, and placing all of his pornography on his discs. (Appendix C, p. 403-409). Thus, the State adduced sufficient evidence from which a jury could properly conclude that he exercised dominion and control over the disc.

The State also presented sufficient evidence from which the

jury could reasonably conclude that he had knowledge of the images on the CD. The record reflects that he knew he was downloading child pornography during the course of downloading massive amounts of pornography. (Appendix C, p. 404-405). Nonetheless, he chose to move all of these items from his computer's hard drive to a disc and take that disc with him to Florida. (Appendix C, p. 404, 408).

The detective who analyzed the disc testified that the child pornography was downloaded on various dates, not all at once, although the disc itself was burned on one day. (Appendix C, p. 327-329). It included 178 pictures of children engaged in sexual activities or posed in a sexually suggestive manner. (Appendix C, p. 329). It also included a video of a child having intercourse, downloaded the day before the disc was burned. (Appendix C, p. 329-330). Of the pornography on the disc, 20 to 30 percent was child pornography. (Appendix C, p. 331-332).

Presently, the State adduced sufficient evidence for the jury to convict Petitioner. The verdict is fully supported by the evidence. The Fifth District Court of Appeal affirmed judgment and conviction. Petitioner is not entitled to any federal habeas relief on this issue.

4) Trial counsel was ineffective for pursuing a defense based on a misunderstanding of the law and failing to investigate the facts

of the case. Petitioner asserts that defense counsel began with a particular defense strategy, and made statements during opening arguments that conceded Petitioner's guilt. He then attempted to change his tactical theory which was inapposite to his original defense. He also convinced Petitioner not to testify.

This claim was raised in Petitioner's motion for post-conviction relief as Claim 1(a). The trial court conducted an evidentiary hearing, and then denied the claim. The Fifth District Court of Appeal per curiam affirmed the lower court's ruling.

The State court applied the correct federal law as established by the United States Supreme Court. Strickland v Washington, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance of counsel: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.¹ Id. at 687-688. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689-90. "Thus,

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

a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Id. at 690; Gates v Zant, 863 F. 2d 1492, 1497 (11th Cir. 1989).

The post-conviction court found there was no legal misunderstanding by trial counsel. (Appendix AA). The Information charged Petitioner with unlawfully and knowingly possessing child pornography in the State of Florida on or about June 1, 2007, through December 28, 2007. (Appendix AA, p. 4). The trial court summarized the trial testimony regarding the time frames:

The testimony is that the Defendant took a job with Progress Energy and move to Florida from Tennessee at the end of April, first of May, 2007. Catherine Schlaegel was not sure of the exact date the Defendant moved into the Florida residence. Catherine Schleagal came down later, she sold her home in Tennessee in June, 2007, and moved to Florida shortly thereafter sometime in June. The Defendant was already in Florida. Catherine a was also not sure of the exact date in June, 2007, that she moved into the Florida residence.

She lived in the Spring Hill home in Hernando County from sometime in June, 2007, to December, 2007, and found the C in July or August, 2007. They moved to Homosassa in Citrus County, Florida, on December 28, 2007. He moved out May, 2008.

(Record cites omitted, Appendix AA, p. 4-5). The images were all burned to the CD in April, 2001. (Appendix AA, p. 5). The post-conviction court also set forth defense counsel's argument

regarding the date window made at trial.

The post-conviction court found that defense counsel's argument was, in fact, proper, "The State later conceded during trial argument, during State's closing argument, and during post-conviction evidentiary hearing argument that the defense argument on the law related to the time period in the information was not improper and was jurisdictionally relevant." (Appendix AA, p. 6). In fact, this was "a simple jurisdictional issue put forth by the defense. (Appendix AA, p. 7).

The post-conviction court also found that defense counsel did not use conflicting defense strategies. The court reviewed the evidence and argument presented at trial. (Appendix AA, p. 7-9). It observed:

Multiple theories of defense or an alternative theory of defense are not prohibited. Jury trial are by nature often very fluid as the progress. Strategy decisions are often made during the course of a trial that are different than as originally intended or hoped for. Attorney Vaughn made several and alternative defense arguments in closing based upon the facts.

(Appendix AA, p. 9). The court observed that while the jury did not accept the defense, it was the argument made to be "as reasonable of an argument as could possibly be made by defense counsel under the total factual circumstances at the time." (Appendix AA, p. 10). The court observed that the gap of June, 2007, was a crucial bad

fact when it was combined with other evidence, but, "Sometimes you simply cannot make a silk purse out of a sow's ear or chicken salad out of chicken manure." (Appendix AA, p 11).

The post-conviction court also rejected Petitioner's contention that defense counsel conceded his guilt. It found that the statements made during opening arguments were based on the evidence expected by the defense. The court again noted that trials are fluid, and defense counsel adapted his trial strategy to the evidence as it developed. (Appendix AA, p. 13).

Finally, the post-conviction court rejected Petitioner's contention that he was not permitted to testify. The court referenced his afterlunch decision not to testify. (Appendix AA, p. 14). Further, Petitioner had been told several times by defense counsel not to talk to authorities, and yet spoke with law enforcement and Catherine Schlaegel against his attorney's advice. (Appendix AA, p. 14). At the evidentiary hearing, defense counsel explained that he believed the State's case would only get stronger if Petitioner testified because he would he would be subject to cross-examination as to these statements as well as the exculpatory statements he made on the audiotape. (Appendix AA, p. 14). Thus, defense counsel did not prevent Petitioner from testify. It was his own decision based on the very reasonable strategic advice of his attorney. The post-conviction court held:

An advice not to testify was reasonable under the circumstances, Defendant's testimony would have had a speculate effect not having a reasonable probability on the outcome of the trial, and not testifying was Defendant's own decision.

(Appendix AA, p. 15).

In sum, the post-conviction state court properly applied federal law, and its interpretation of the facts is not unreasonable in light of that law. It found that all of trial counsel's strategic decisions were reasonable. Trial counsel was not deficient, and Petitioner was not prejudiced. Therefore, he is not entitled to any relief on this claim on federal habeas review.

5) Trial counsel was ineffective for failing to object to irrelevant and prejudicial evidence; to wit: the audio recording of the conversation between Petitioner and Schlaegel. This was presented as Claim 3 in Petition's motion for post-conviction relief, and summarily denied. The essence of this claim is that the CD consisted primarily of Scheagel saying horrible things about Petitioner, including that she was scared he would become sexually attracted to their daughter, and that he admitted he was addicted to adult pornography.

In state court, Petitioner's argument was limited to the admission of several supposed collateral crimes. He did not make any argument as to Schlaegel's comments. Thus, this is the only

issue that may be presented on federal habeas review.

As to the claim that his admission that he was addicted to adult pornography constituted a bad act, part of Petitioner's defense was that he legally possessed adult pornography. (Appendix 00, p. 10).

The post-conviction court stated:

Because the evidence of "collateral crimes" in which the Defendant complains of, includes information that the defense had already admitted to the jury and was consistent with the case put on by the defense, the Defendant cannot now argue that the presentation of the audio, which recites these facts, was highly prejudicial. Accordingly, the court finds that the Defendant has failed to establish that counsel's failure to object or move to exclude evidence of the Defendant's history with pornography, amounts to deficient performance under Strickland.

(Appendix 0, p. 11). The state court applied the correct federal law and its application of that law to the present facts is not unreasonable.

6) Trial counsel was ineffective for failing to obtain an expert in computer forensics. This was raised as Claim 4 in Petitioner's motion for post-conviction relief, and the post-conviction court conducted an evidentiary hearing on this claim. Petitioner alleged that defense counsel was ineffective for failing to hire an expert to explore and/or put forth a fabrication defense. (Appendix AA, p. 15).

In the audiotaped conversation, Petitioner stated he did not know the child pornography was on the computer. He acknowledged several times that he was aware of the existence of the CD. (Appendix AA, p. 16). He admitted to accidentally downloading child porn as he downloaded batches of adult pornography. (Appendix AA, p. 16). The post-conviction court observed this was consistent with defense counsel's evidentiary hearing testimony that Petitioner admitted to him that he possessed child pornography. (Appendix AA, p. 16). Further, against defense counsel's advice, Petitioner made statements to law enforcement officers volunteering to help shut down child pornography sites. The post-conviction court found this was a reasonable explanation for why defense counsel did not retain an expert analyzing the dates on the CD, "Attorney Vaughn testified that the Defendant had let the "cat out of the bag" and there was no reason to hire an expert to testify that the Defendant had not done something to which he had already made inculpatory admissions to." (Appendix AA, p. 17). The court stated:

Attorney Vaughn testified that the Defendant destroyed his own defense by not following his advice and that the possible defense with expert testimony of fabrication of the CD would not be beneficial as a result of the Defendant's exculpatory admissions to law enforcement and to Catherine Schlaegel. To have hired an expert would have been inconsistent and futile based on the Defendant's actions.

(Appendix AA, p. 17-18).

The post-conviction court, relying on the evidence adduced at trial and at the evidentiary hearing, found neither deficient performance nor resulting prejudice based on defense counsel's failure to hire an expert. The post-conviction court also noted that Petitioner abandoned any fabrication defense at the evidentiary hearing when he stated that was satisfied that the CD had not been fabricated. (Appendix AA, p. 17). Petitioner is unable to show that the state court misapplied federal law or that its interpretation of the facts was unreasonable in light of that law. Therefore, Petitioner is not entitled to any federal habeas relief on this issue.

7) Trial counsel was ineffective for failing to allow Petitioner to testify and lying to the jury. This claim was raised in Petitioner's motion for post-conviction relief, and the state court conducted an evidentiary hearing on it. This issue was discussed in Claim 4 above.

Petitioner's claim is refuted by trial transcript where Petitioner initially intended to testify, but then changed his mind after lunch. (Appendix C, p. 356-359, 360-362). At the evidentiary hearing, defense counsel explained why he advised Petitioner not to testify. Petitioner had gone against the advice of his attorney, and continued to speak with Schlaegel and law enforcement, and defense counsel was very concerned about cross-examination. It was his

opinion that if Appellant testified, it would only make the State's case stronger and weaken Petitioner's defense. (Appendix Z, p. 73, 80, 97).

The post-conviction court found that this was reasonable trial strategy:

Under the circumstances, the Court finds this to have been a reasonable trial strategy at the time. The issue was weighed and considered by the Defendant, the Court inquired of the Defendant, and the Defendant understood and agreed that not testifying had been his own decision.

(Appendix AA, p. 15. The state court found neither deficient performance nor resulting prejudice based on what it deemed to be a very reasonable trial strategy:

Any advice not to testify was reasonable under the circumstances, Defendant's testimony would have had a speculative effect not having a reasonable probability of affecting the outcome of the trial, and not testifying was Defendant's own decision.

(Appendix AA, p. 15).

Petitioner has not demonstrated that the state court misapplied United States Supreme Court law, or that its interpretation of the facts as adduced in the state court is unreasonable in light of that law. Petitioner is not entitled to any federal habeas relief on this claim.

8) Petitioner's sentence was cruel and unusual and was vindictive.

This claim was raised as claim 6 in Petitioner motion for post-conviction relief and was summarily denied by the state post-conviction court.

Petitioner asserts that he was punished by the trial court for not accepting the State's plea offer, and exercising his right to a jury trial. The state court rejected this claim:

The Defendant's allegations fail to rise to the presumption of vindictiveness, and the Defendant fails to sustain the burden of proving actual vindictiveness. The trial judge did not play an active role in plea discussion or negotiations with the Defendant, nor did he depart from his role as impartial arbitrator. Although the Defendant points to the Judge's statement regarding the fact that the Defendant was running out of time to control his own destiny, the Judge did not encourage or discourage the Defendant to take or reject the plea, nor did he threaten the Defendant with a harsher sentence if he failed to accept the plea. The Judge merely explained to the Defendant that if he did not make up his mind soon, he would lose the opportunity to accept the plea and he would immediately proceed to trial.

(Appendix O, p. 14). The trial transcript supports this conclusion.

Further, the prosecutor offered a plea deal of three consecutive five year terms of probation (for a total of 15 years' probation), and to dismiss/merge the remaining 122 counts. (Appendix C, p. 4). Petitioner knew that each count carried a five-year sentence, and that they could be ordered to run consecutively for a total of 600 years. He decided to proceed to trial. The post-conviction court

ruled, "Taking into consideration that the Defendant faced punishment on 125 counts, rather than only three (3), the Court finds that the Defendant's sentence is not vindictive. (Appendix O, p. 15).

In resentencing after a new trial, the United States Supreme Court noted there is a presumption of vindictiveness when a judge imposes a more severe sentence upon a defendant after a new trial. U.S. v Goodwin, 457 U.S. 368 (Fla. 1982). As observed by Petitioner, the Florida Supreme Court has extended this concept to initial sentences where the sentencing judge was involved in plea offers that the defendant rejects, and then imposes a harsher sentence after trial. Wilson v State, 845 So. 2d 142 (Fla. 2003).² Petitioner has not identified any federal law which would be presently applicable. Further, even under Wilson, Petitioner has not shown that the trial court initiated discussions or left the role of neutral arbitrator. Consistent with the state court's ruling, there is no reasonable likelihood that the trial court imposed a harsher sentence on Petitioner in retaliation for refusing the State's plea offer.

² This is a state case applicable to Florida law, and therefore, does not provide a foundation for federal habeas relief.

CONCLUSION

WHEREFORE, Respondents have not addressed the merits of the claims which are procedurally barred or defaulted (Claims or parts of claims 1, 2, 5, 8 & 9), but request the opportunity to do so if this Court disagrees. Based upon the above, Respondents request that this court dismiss the instant petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed this Response with the Clerk of the Court by using the CM/ECF system. I further certify that a true and correct copy of the Response have been furnished to Rachel Bushey, Attorney for Petitioner, via e-mail to reb@markjobrien.com and via U. S. Mail to 511 W. Bay St., Ste. 330, Tampa, FL, 33606-3533 this 26th day of April, 2018.

/s ALLISON LEIGH MORRIS
ALLISON LEIGH MORRIS

Of Counsel

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOE E. ROGERS,

Petitioner,

v.

CASE NO. 8:17-CV-02680-VCM-MAP

SECRETARY, DEPARTMENT OF
CORRECTIONS, et al.,

Respondents.

_____ /

APPENDIX

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