APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GLENN W. BENNETT,

Petitioner,

vs. Case No.: 3:12-cv-468-J-32MCR

JULIE JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

Petitioner, an inmate of the Florida penal system, initially proceeded in this action pro se on a Petition (Doc. 1)[1] for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner challenges his June 2, 2000 state court (Duval County) conviction for robbery with a deadly weapon, for which he received a sentence of life imprisonment as a prison releasee reoffender pursuant to Florida Statute 775.082(9)(a). Petitioner raised two grounds for relief, to which Respondents responded (Doc. 19) and Petitioner replied. (Doc. 23). After considering the nature of the claims, this Court appointed counsel to represent Petitioner (Doc. 25), who filed a supplemental brief. (Doc. 26). Acting on an order from this Court (Doc. 28),

[1] References to docket entries in this civil § 2254 case are denoted as "Doc. ___." The Court refers to the exhibits submitted with Respondents' Habeas Corpus Checklist (Doc. 25) as "Ex." Unless otherwise noted, the Court cites the page number marked on the bottom-center of each page of the pertinent exhibit, or if there is no page number on the bottom-center of the page, the Court cites the page number marked on the upper-right corner of each page of the exhibit.

Respondent likewise filed a supplemental brief (Doc. 33), to which Petitioner replied. (Doc. 34). This case is ripe for review.[2]

I. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104–132, 110 Stat. 1214 ("AEDPA"),[3] this Court's review "is 'greatly circumscribed and highly deferential to the state courts.'" Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193, 1208 (11th Cir. 2007) (citing Crawford v. Head, 311 F.3d 1288, 1295 (11th Cir. 2002)). "The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, . . . [A]n unreasonable application is different from an incorrect one." Bell v. Cone, 535 U.S. 685, 694 (2002); "It is the objective reasonableness, not the correctness *per se*, of the state court decision that we are to decide." Brown v. Head, 272 F.3d 1308, 1313 (11th Cir. 2001).

> Under AEDPA, when a state court has adjudicated the petitioner's claim on the merits, a federal court may not grant habeas relief unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," id. § 2254(d)(2). A

[2] Respondents fully set forth the procedural history; therefore, the Court will not exhaustively repeat it. Doc. 19 at 1-3.

[3] "[T]he highest state court decision reaching the merits of a habeas petitioner's claim is the relevant state court decision." Newland v. Hall, 527 F.3d 1162, 1199 (11th Cir. 2008). In Harrington v. Richter, 562 U.S. 86, 100 (2011), the United States Supreme Court held that § 2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" The Court explained that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Id. at 784–85.

> state court's factual findings are presumed correct unless rebutted by clear and convincing evidence.[4] Id. § 2254(e)(1); Ferrell v. Hall, 640 F.3d 1199, 1223 (11th Cir. 2011).
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> AEDPA "imposes a highly deferential standard for evaluating state court rulings" and "demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766 [773] (2010) (internal quotation marks omitted). . . . "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id. (citing Lockyer v. Andrade, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)). The Supreme Court has repeatedly instructed lower federal courts that an unreasonable application of law requires more than mere error or even clear error.

Bishop v. Warden, GDCP, 726 F.3d 1243, 1253–54 (11th Cir. 2013).

II. Findings of Fact and Conclusions of Law

A. Ground One

Petitioner was convicted of robbery with a deadly weapon for holding up a Waffle House employee at knife-point and stealing several hundred dollars. (Ex. P at 87.) At trial, he attempted to negate the scienter element of the offense by putting forth the defense of voluntary intoxication.[5] Petitioner contends that the state trial court deprived him of due process when it erroneously instructed the jury regarding the affirmative defense. (Doc. 34 at 3–5).

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[4] "This presumption of correctness applies equally to factual determinations made by state trial and appellate courts." Bui v. Haley, 321 F.3d 1304, 1312 (11th Cir. 2003) (footnote omitted) (citing Sumner v. Mata, 449 U.S. 539, 547 (1981)).

[5] The robbery took place in November 1999. In October 1999, the Florida legislature eliminated the voluntary intoxication defense under Fla. Stat. § 775.051, except in cases involving lawfully prescribed medications. Here, the defendant's use of prescribed painkillers, coupled with the alleged consumption of several cans of beer, qualified under the § 775.051 exemption. Thus, the trial judge permitted the voluntary intoxication defense to proceed. (Ex. D at 36–38).

1. Post-Conviction Review

Petitioner raised this issue in his state motion for post-conviction relief, which he filed pursuant to Florida Rule of Criminal Procedure 3.850. (Ex. P at 5–7, 43–45). The state trial court denied post-conviction relief, relying on the State of Florida's "fundamental error" standard. The court's rationale, as well as its concise re-telling of the relevant facts, warrant quoting at length.

> Defendant asserts that the trial judge, the Honorable Judge Stetson, committed fundamental error when he gave an incorrect jury instruction for voluntary intoxication as a defense. Defendant alleges it is fundamental error based on two arguments: 1) the error related to an element of the charged offense which was a disputed issue in the case, and 2) the inaccurate and misleading instruction had the effect of negating Defendant's only defense.
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> ***
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> To be considered fundamental "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Prudent v. State, 974 So. 2d 1142, 1143-44 (Fla. 3d DCA 2008) (citing Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). Whether a failure to instruct the jury constitutes fundamental error depends upon the factual issues of the case. Id. at 1144 (citing Johnson v. State, 833 So. 2d 252, 254 (Fla. 4th DCA 2002)). "Fundamental error analysis requires an examination of: (1) each jury instruction in the context of the other jury instructions; (2) the arguments presented by counsel; and (3) the evidence presented during trial." Id. (citing Garzon v. State, 939 So. 2d 278, 283 (Fla. 4th DCA 2006)).[6]
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> During the jury charge conference, the following instruction concerning Defendant's defense of voluntary intoxication was agreed upon by the State and defense counsel:

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[6] In order to pass muster under 28 U.S.C. § 2254(d), a state court need not cite, or even be aware of, the Supreme Court's cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002).

> … if you find that the defendant was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to temporarily or permanently deprive Edith Gruhn and/or Greg Anderson and Waffle House of the money or other property then you should find the defendant not guilty.

(Exhibit "D," pages 249-50.)[7] (Emphasis added.)

During the final jury instructions, however, the trial judge misspoke and read the following instruction concerning Defendant's defense of voluntary intoxication as follows:

> … if you find from the evidence that the defendant was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to temporarily or permanently deprive Edith Gruhn and/or Greg Anderson and Waffle House of the money or other property, or if you have a reasonable doubt about it, then you should find the defendant guilty.

(Exhibit "D", page 311.)[8] (Emphasis added.)

The trial judge's error in the instant case does not constitute fundamental error because the error does not reach down into "the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Prudent, 974 So. 2d at 1143-44. There was sufficient argument and evidence presented by counsel to support the guilty verdict, despite the error. See id. The trial judge agreed to read the correct jury instruction for voluntary intoxication defense, but the trial judge made one single misstatement. However, the voluntary intoxication defense and instructions were expounded upon and clearly argued by defense counsel during the trial and correctly stated by both defense counsel and the State during their closing arguments. Furthermore, the Court correctly stated the instructions concerning the mental element of the crime prior to the single misstatement. For these reasons, which are discussed below, the trial judge's single misstatement in the voluntary intoxication defense does not constitute fundamental error.

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[7] Ex. D at 249–50.

[8] Id. at 311.

Defense counsel introduced the voluntary intoxication defense during his opening statement and argued in favor of this defense, as well as correctly stated the voluntary intoxication instruction, during his closing argument. During defense's opening statement counsel explained to the jury that the Defendant was taking pain medication for an injury he suffered, and on the day of the crime he had been drinking beer in the evening leading up to the crime. (Exhibit "C," pages 36-37.)[9] Counsel went on to say, "You're going to hear he did go into the Waffle House, but what you're also going to hear is that he was in no shape to form the mental state necessary to rob the Waffle House. You're going to hear testimony that he could not form that mental state to deprive the Waffle House of their money." (Exhibit "C," page 37).[10] Finally, counsel stated, "… we are confident you will agree that Mr. Bennett could not form the mental state necessary to commit the offense of robbery." (Exhibit "C," page 38.)[11]

Defense counsel then correctly cited the instructions for voluntary intoxication during the closing argument. It follows:

> Members of the jury, the Judge will instruct you on the law a little bit later today, about half an hour, and one of the things that he will tell you is that the law in Florida is that if you find from the evidence that the defendant was so intoxicated – and note that the word is intoxicated. Nowhere in the law does it say drunk, from the voluntary use of alcohol or drugs as to be incapable of forming the specific intent to commit the crime of armed robbery, or you have a reasonable doubt about it, you should find the defendant **not guilty**.

(Exhibit "D," page 290-91.)[12] (Emphasis added)[.] Thereafter, defense counsel spent the remainder of his closing argument making the point that voluntary intoxication was available as a valid legal defense, and that it should be relied upon to find the Defendant not guilty. (Exhibit "D," pages 291-296).[13]

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[9] Id. at 36–37.

[10] Id. at 37.

[11] Id. at 38.

[12] Id. at 290–91.

[13] Id. at 291–96.

Additionally, during its closing argument the State argued against the Defendant's voluntary intoxication defense and correctly cited the instructions for voluntary intoxication. It follows:

> Now, I expect that when the defense attorney gets up here and speaks to you in a couple of moments that he's going to tell you that, hey, the defendant on that day used drugs, used the prescription drugs. He took some pain medication and he had some beers so I expect that Judge Stetson will read to you what's called a voluntary intoxication defense to this case that applies in this case.

(Exhibit "D," page 280)[14] (Emphasis added.) The State then stated the correct jury instructions for a voluntary intoxication defense. It follows:

> But Judge Stetson will go on and also tell you, however, where a certain mental state is an essential element of the crime. In other words, the defendant's intent to commit this crime. Where a certain mental state is an element of the crime and the defendant was so intoxicated that he was incapable of forming the mental state, the mental state did not exist and, therefore, that crime could not be committed. That's what Judge Stetson will tell you and he'll go on to say if you find from the evidence that the defendant was so intoxicated and that's the standard. If you find from the evidence that the defendant was so intoxicated from the voluntary use of alcohol or drugs as to be incapable of forming the intent to commit this crime, or you have a reasonable doubt about it, you should find the defendant **not guilty** of the armed robbery. So you have to find that he was so intoxicated that he could not form the intent to go in there and commit the crime.

(Exhibit "D," pages 282-83.)[15] (Emphasis added.)

Furthermore, defense counsel presented substantial evidence of Defendant's intoxication through cross examination of the State's witnesses and direct examination of Defendant, as well as arguing

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[14] Id. at 280.

[15] Id. at 282–83.

> Defendant's intoxication during closing argument. (Exhibit "D," pages 48-49, 95, 121, 175-176, 179-180; "E," pages 211-221, 290-296.)[16]
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> Finally, the trial judge read the correct instructions concerning Defendant's mental state to the jury prior to misspeaking. It follows:
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> > However, where a certain mental state is an essential element of the crime, and a person was so intoxicated that he was incapable of forming that mental state, then the mental state would not exist and, therefore, the crime could not be committed.
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> (Exhibit "D," page 310.)[17] The trial judge's error did not reach down into "the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error" because the voluntary intoxication jury instruction was correctly stated and sufficiently explained through defense counsel's opening statement, through defense counsel and the State's closing arguments, and through the mental state jury instruction. See Prudent, 974 So. 2d at 1143-44. Therefore, the trial judge's error is not fundamental and Defendant's first allegation of fundamental error under ground one is denied.
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> The Defendant makes a second claim for fundamental error under ground one. He alleges the incorrect jury instruction constitutes fundamental error because the inaccurate and misleading instruction had the effect of negating Defendant's only defense. "Where… a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant." Carter v. State, 469 So. 2d 194, 196 (Fla. 2d DCA 1985).
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> This Court cites to the reasons discussed supra to deny the second fundamental error allegation. *** Accordingly, ground one is denied.

(Ex. P at 392-96).

Petitioner appealed the denial of post-conviction relief, but the First District Court of Appeal "per curiam affirmed" the trial court without a written opinion. (Ex.

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[16] Id. at 48–49, 95, 121, 175–76, 179–80, 211–21, 290–96.

[17] Id. at 310.

Q); Bennett v. State, 78 So. 3d 536 (Fla. 1st DCA 2011). Because the First District Court of Appeal affirmed without an opinion, this Court must assume that the appellate court's decision was based on the same grounds as the trial court's decision. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (establishing the presumption that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."). Thus, these are qualifying decisions under AEDPA from the state courts.

There is no doubt, as the state post-conviction court recognized, that the trial court erred when it misspoke and instructed the jury to find Petitioner guilty, as opposed to not guilty, if it found that he was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to commit robbery. However, it is equally clear that throughout the proceedings, from defense counsel's opening statement through both the State's and the defense's closing arguments and the judge's instructions, that voluntary intoxication was a defense which, if proven, would prevent Petitioner from being found guilty of the crime. See, e.g., Ex. P at 451–55 (featuring an extensive explanation of the voluntary intoxication defense by the assistant state attorney); id. at 345 (instructing the jury that if "a person was so intoxicated that he was incapable of forming that mental state, then the mental state would not exist and, therefore, the crime could not be committed"); Ex. D at 37–38 (entreating the jury to find Petitioner not guilty on voluntary intoxication grounds). Thus, although the trial court misadvised the jury at one point in the instructions,

"the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle, 502 U.S. at 72 (citing Cupp, 414 U.S. at 147). Because the rest of the trial record makes clear that voluntary intoxication would have been a defense to the charge, the trial judge's isolated misstatement did not "so infect[] the entire trial that the resulting conviction violates due process." Cupp, 414 U.S. at 147.

Under the AEDPA, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." Fry v. Pliler, 551 U.S. 112, 119. (emphasis original). The post-conviction court, in reviewing the record, was not unreasonable in rejecting Petitioner's claim. Indeed, the record is replete with possible rationales for the jury's finding, thus indicating that the misstatement did not "infect[] the entire trial." Cupp, 414 U.S. at 147. See, e.g., Ex. D at 221–36 (illustrating that Petitioner possessed the physical and mental capacity to procure a hunting knife, ask his girlfriend to drive them to the Waffle House, and then jump over the counter); Ex. P at 452 (featuring the contention by the state that multiple witnesses, police officers, and a 911 call all indicated that Petitioner's cognitive abilities were not significantly impaired). Thus, upon thorough review of the record and the applicable law, this Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an

unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

2. Boyde, Brecht, and Harmless Error

In considering erroneous jury instructions, the Supreme Court has applied both the AEDPA unreasonableness standard and a harmless error analysis. See, e.g., Davis v. Ayala, 135 S. Ct. 2187, 2193 (2015) (holding that an "error was harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993) and the Antiterrorism and Effective Death Penalty Act of 1996"); Penry v. Johnson, 532 U.S. 782, 792–96 (2001).

At the parties' urging, the Court will now consider the harmless error analysis. In this case, the post-conviction court's application of Florida's fundamental error test tracks closely with the harmless error analysis applied in federal courts. Although both Petitioner and Respondent dedicate significant attention to Boyde v. California's "reasonable likelihood" test,[18] Petitioner argues in the alternative that Brecht v. Abrahamson's "substantial and injurious effect" test holds sway.[19] (Doc. 27 at 19).

[18] Petitioner alleges that the post-conviction court applied a Boyde-like analysis. (Doc. 27 at 11). The post-conviction court, however, specifically referred to neither Boyde nor Brecht, but instead applied Florida's fundamental error analyses. (Ex. P at 396). This analysis is functionally similar to Brecht's harmless-error test in that, unlike Boyde, it examines the effects of the erroneous statement on the jury. See Calderon v. Coleman, 525 U.S. 141, 147 (1998) (holding that "[t]he *Boyde* analysis does not inquire into the actual effect of the error on the jury's verdict).

[19] The Brecht test comports strongly with the Supreme Court's long-held position that when a habeas petitioner seeks relief on the ground that the trial court's jury instructions were erroneous, the question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Middleton, 541 U.S. at 437 (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)). "[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional right]." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

Boyde v. California, 494 U.S. 370, 380 (1990); Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). In particular, Petitioner suggests that *ambiguous* instructions engender a Boyde analysis and *erroneous* instructions necessitate the Brecht standard. (Doc. 27 at 19; Doc. 34 at 4). Both tests, as well as the ambiguous/erroneous dichotomy, require a brief explanation.

The Supreme Court in Boyde considered the constitutionality of an ambiguous jury instruction that allegedly did not allow the jury to consider mitigating evidence of the defendant's character and background. Boyde, 494 U.S. at 375. In response, the Court formulated the Boyde test, which asks "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

Conversely, the Brecht test (alternatively known as the Kotteakos test) asks "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. at 673 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). "Under this standard," the Brecht Court continued, "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Id., quoting United States v. Lane, 474 U.S. 438, 449 (1986).[20]

[20] The Court in Brecht considered whether a prosecution's use of a petitioner's post-Miranda silence for impeachment purposes violated due process. Such impeachment, the Court declared, was erroneous and subject to harmless-error analysis. Applying the Kotteakos standard to the facts in Brecht, the Court found that discussions about the impeaching silence at trial did not have a substantial and injurious effect because "State's references to petitioner's post-Miranda silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case. . . . Moreover, the

Although similar in that they both further "the strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation" (Calderon v. Coleman, 525 U.S. 141, 146 (1998)), the Boyde and Brecht analyses are distinct. The Boyde test, the Supreme Court wrote, "is not a substitute for the Brecht harmless-error test. The Boyde analysis does not inquire into the actual effect of the error on the jury's verdict; it merely asks whether constitutional error has occurred." The Court further explained that Boyde

> is not a harmless-error test at all. It is, rather, the test for determining, in the first instance, whether constitutional error occurred when the jury was given an ambiguous instruction that it might have interpreted to prevent consideration of constitutionally relevant evidence. In such cases, constitutional error exists only if there is a reasonable likelihood that the jury so interpreted the instruction.

Calderon, 525 U.S. at 146. (internal citation omitted). Simply stated, Boyde asks whether an error occurred, and Brecht assumes the presence of error and weighs the extent to which it was prejudicial.[21]

Although the Boyde Court appeared poised to differentiate ambiguity from error, the Court's intertwined use of the terms in Middleton v. McNeil demonstrated

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State's evidence of guilt was, if not overwhelming, certainly weighty." Brecht, 507 U.S. at 639.

[21] Because one test detects the presence of errors and the other weighs their degree of harm, nothing necessarily precludes the application of both tests, presuming that a Boyde analysis first uncovers a constitutional error. In Penry v. Johnson, 532 U.S. 782 (2001), the Supreme Court applied Brecht to a Fifth Amendment claim and Boyde to an Eight Amendment claim, yet it has never applied both tests to the same issue. Id. at 795, 800.

no apparent distinction.[22] Middleton v. McNeil, 541 U.S. 433, 439 (2004). Fourteen years after Boyde, Middleton examined the constitutionality of a jury instruction that included incorrect, defense-negating language. Id. Throughout its analysis, the Court referred to the problem instruction as an "error" or "erroneous" three separate times[23] before concluding that "[t]he instructions were *at worst ambiguous* because they were internally inconsistent." Id. at 438. (emphasis added). Further disavowing any possible distinction, the Court noted that "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is 'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" Id. at 437. (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991). The Supreme Court's conflation of ambiguity and error suggests that the former is less a concretely defined term of art than a general reference to a mixture of erroneous and correct statements. See Middleton, 541 U.S.

[22] The Boyde Court wrote that the instruction "is not concededly erroneous, nor found so by a court. . . . The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation." Boyde, 494 U.S. at 380. The Court then moved on to discuss the appropriate standard in such cases; it never, in Boyde or any other decision, suggested any actual distinction between error and ambiguity. The Petitioner relies on Weeks v. Angelone for the proposition that a difference exists. (Doc. 34 at 4). This reliance is unfounded, however, as the Weeks Court simply applied the Boyde test to ascertain the presence of error. The Court neither explicitly stated nor implicitly suggested a functional distinction. Weeks v. Angelone, 528 U.S. 225, 233 (2000).

[23] The three references are as follows: (1) The jury instructions "were apparently included in error." Middleton, 541 U.S. at 435. (2) "The California Court of Appeal acknowledged the error." Id. (3) "The Ninth Circuit held that the erroneous imminent-peril instruction . . . unreasonably applied federal law." Id. at 437.

at 437–38 (suggesting that an error in one part of an instruction, coupled with a correct instruction elsewhere, is ambiguous overall).

In this case, quibblings over the discrepancy between ambiguity and error constitute a terminological distinction without a practical difference. This Court does not second-guess the findings of the post-conviction court that the instruction was constitutionally erroneous. See Ex. P at 392-96 (referring to the instruction as an "error" five different times). A Brecht, harmless-error analysis is therefore necessary.[24] See Calderon, 525 at 146 ("[O]nce the Court of Appeals determined that the . . . instruction was constitutional error, it was bound to apply the harmless-error analysis mandated by Brecht."). See also Fry v. Pliler, 551 U.S. 112, 117 ("The opinion in Brecht clearly assumed that the Kotteakos ['substantial and injurious effect'] standard would apply in virtually all § 2254 cases").

In a related vein, "[c]onstitutional errors fall into two categories: trial error and structural error. Trial error happens during the presentation of the case to the jury and may therefore be quantitatively assessed in the context of other evidence." United States v. Roy, 855 F.3d 1133, 1211, (11th Cir. 2017). (internal citations omitted). "At the other end of the spectrum of constitutional errors lie structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.

[24] The Supreme Court has also noted that "[w]hile there are some errors to which harmless error analysis does not apply, they are the exception rather than the rule." Hedgpeth v. Pulido, 555 U.S. 57, 61 (2008). The most notable exception is when the reviewing federal judge possesses "*grave doubt* about whether or not that error is harmless." O'Neal v. McAninch, 513 U.S. 432, 435. (emphasis original). Such grave doubt is not present in this case.

. . . Such defects—deprivation of the right to counsel, for example—requires automatic reversal of the conviction because they infect the entire trial process." Brecht, 507 U.S. at 629–30.

The Supreme Court has "concluded that various forms of instructional error are not structural but instead trial errors subject to harmless-error review." Hedgpeth v. Pulido, 555 U.S. 57, 60 (2008) (citing Neder v. United States, 527 U.S. 1 (1999) (omission of an element of an offense); California v. Roy, 519 U.S. 2 (1996) (per curiam) (erroneous aider and abettor instruction); Pope v. Illinois, 481 U.S. 497 (1987) (misstatement of an element of an offense); Rose v. Clark, 478 U.S. 570 (1986) (erroneous burden-shifting as to an element of an offense)). "[H]armless-error analysis applies to instructional errors so long as the error at issue does not categorically vitiat[e] *all* the jury's findings." Hedgpeth, 555 U.S. at 61 (citing Neder, 527 U.S. at 11) (internal quotation marks omitted, emphasis in original). "When trial error occurs, we evaluate it by determining whether the government has proven that the error was harmless. . . . Most constitutional errors fall into the category of trial error." Roy, 855 F.3d at 1211.

The instant case is no exception. See Brecht, 507 U.S. at 638 ("The Kotteakos harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type."). The issue is whether the flawed jury instruction "had [a] substantial and injurious effect or influence in determining the jury's verdict." See Hedgpeth, 555 U.S. at 61–62 (quoting Brecht,

507 U.S. at 623). The Brecht test is highly deferential, the Supreme Court wrote, and for collateral review situations such as this one, the standard

> reflects the presumption of finality and legality that attaches to a conviction at the conclusion of direct review. It protects the State's sovereign interest in punishing offenders and its good-faith attempts to honor constitutional rights while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged. The social costs of retrial or resentencing are significant, and the attendant difficulties are acute in cases . . . where the original sentencing hearing took place . . . years ago. The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.
> Calderon, 525 U.S. at 146–47 (internal citations omitted).

Here, the Petitioner contends that the context of the erroneous instruction evinces a finding of constitutional error. (Doc. 27 at 12–17). In particular, he points to the following instructions—and others like them—that the trial judge spoke to the jury right before deliberations: "you must follow the law as set out in the instructions that I've given you throughout the trial," and "[i]t is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply in this case." Id. at 13, 14 (quoting Ex. D at 311, 318). These "repeated instances," the Petitioner contends, "in which the trial court instructed the jury that it was its duty to follow the court's instructions—and only the court's instructions . . . leads to the conclusion that . . . the jury in the [Petitioner's] case applied the erroneous voluntary intoxication instruction in a way that violated the constitution." Id. at 14–15.

Petitioner rightly asserts that context is important. Yet it does not follow that the context of the error in this case constituted a constitutional violation. It is true that "arguments of counsel generally carry less weight with a jury than do instructions from the court." Boyde, 494 U.S. at 384. Yet it is equally true that in weighing the erroneous instruction's possible prejudicial effect on the jury, the instruction must be contemplated within the framework of the entirety of the trial—including statements by counsel. Under either Boyde or Brecht, the Supreme Court is abundantly clear on this point, as "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146–47 (1973). This is because, the Court explained, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process." Furthermore, "the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." Boyde at 381–82, 385. Applying the Brecht standard to an incorrect jury instruction in Calderon v. Coleman, the Supreme Court held that "[t]he court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict." Calderon, 525 U.S. at 147.

Looking at this erroneous jury instruction in light of the entire case, the Petitioner contends that the fact that the trial judge, defense counsel and prosecutor all accurately described the voluntary intoxication defense to the jury cannot make

the judge's erroneous instruction harmless. (Doc. 27 at 12–19). Yet the Supreme Court has said that a state court may "assum[e] that counsel's arguments clarified an ambiguous jury charge. This assumption is particularly apt when it is the prosecutor's argument that resolves an ambiguity in favor of the defendant." Middleton, 541 U.S. at 438 (emphasis in original). That is precisely what happened here, where the prosecution advised the jury that

> [i]f you find from the evidence that the defendant was so intoxicated from the voluntary use of alcohol or drugs as to be incapable of forming the intent to commit this crime, or you have a reasonable doubt about it, you should find the defendant not guilty of the armed robbery.

(Ex. D at 282–83).

As the post-conviction court also noted, the extensive discussion about the voluntary intoxication defense coming from both attorneys and the judge indicates that a single misstatement—although said at an inopportune time just prior to deliberations—did not unduly prejudice the jury. Petitioner and Respondent both recognize that the entire case hinged on the voluntary intoxication defense. See Doc. 27 at 8 ("[voluntary intoxication] was the lone element of the offense at issue in his trial, as defense counsel conceded that Mr. Bennett was the person who entered the Waffle House in question armed with a knife and who left with several hundred dollars"); Doc. 33 at 8–9 ("The whole case boiled down to whether the jury would excuse his behavior because he was too intoxicated"). This Court finds it improbable that the jury—led by the judge and both attorneys to fixate on the voluntary intoxication defense throughout the entire trial—were led astray upon hearing the isolated erroneous instruction which was not repeated. Indeed, the Supreme Court

stated that jurors synthesize all they have seen, with a "commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." Boyde, 494 U.S. at 381–82.

In view of the entire record, the jury surely did not retire to deliberate with the impression that if they found voluntary intoxication, they should nevertheless find the defendant guilty. Thus, the trial judge's single error did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623. Accordingly, Petitioner is not entitled to relief on Ground One.

B. Ground Two

On Ground Two, Petitioner contends that trial counsel gave ineffective assistance by not objecting or requesting a curative instruction in response to the errant instruction discussed above. (Doc. 27 at 23–25).

To prevail on a claim of ineffective assistance of counsel, Petitioner "must meet both the deficient performance and prejudice prongs of Strickland." Wong v. Belmontes, 558 U.S. 15, 16 (2009) (per curiam) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." A court considering a claim of ineffective assistance must apply a "strong presumption"[25] that counsel's representation was within the "wide range" of reasonable professional assistance. The challenger's burden is to show "that counsel made

[25] A court begins "with the 'strong presumption' that counsel's conduct was reasonable, Strickland, 104 S.Ct. at 2065; and that presumption is even stronger when we examine the performance of experienced counsel." Walls v. Buss, 658 F.3d 1274, 1279 (11th Cir. 2011) (per curiam) (citing Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc)).

> errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."
>
> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Harrington v. Richter, 562 U.S. 86, 104 (2011) (internal citations omitted). Since both prongs of the two-part Strickland test must be satisfied to show a Sixth Amendment violation, "a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa." Ward v. Hall, 592 F.3d 1144, 1163 (11th Cir.2010) (citation omitted).

A state court's adjudication of an ineffectiveness claim is accorded great deference.

> The question "is not whether a federal court believes the state court's determination" under the Strickland standard "was incorrect but whether that determination was unreasonable-a substantially higher threshold." Schriro, [550 U.S. at 473]. And, because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. See Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). Thus, the standards created by Strickland and § 2254(d) are both highly deferential, "and when the two apply in tandem, review is 'doubly' so." Harrington, 562 U.S. at 105 (quoting Knowles, 556 U.S. at 123).

Petitioner raised this issue in his state motion for post-conviction relief. (Ex. P at 8–11, 46–51). The state post-conviction court denied relief on this claim, explaining as follows:

> As discussed supra under ground one, the trial judge's single misstatement of the voluntary intoxication defense was error, but was not fundamental error. Furthermore, defense counsel's failure to object to the misstatement or request a curative instruction was error. Strickland, 466 U.S. at 668. However, for the same reasons discussed supra under ground one, chiefly that defense counsel and the State explained the voluntary intoxication defense thoroughly throughout the trial and stated the jury instructions correctly during closing arguments, this Court finds that there was no prejudice. [Id.] There is no reasonable probability that the outcome of the proceeding would have been different absent counsel's failure to object to the misstatement or request a curative instruction. Id. Therefore, ground two is denied.

(Ex. P at 396-97). The First District Court of Appeal affirmed the decision without a written opinion, (Ex. Q); Bennett v. State, 78 So. 3d 536 (Fla. 1st DCA 2011), so this Court must assume that the appellate court relied on the same grounds as those articulated by the lower court. Ylst, 501 U.S. at 803.

Thus, these are qualifying decisions under AEDPA from the state courts. This Court must consider only whether the decision was "contrary to" or an "unreasonable application of" clearly established federal law, as determined by the Supreme Court, or whether the decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

The state court correctly identified Strickland as the governing standard, and it concluded that trial counsel performed deficiently by neither objecting to the erroneous jury instruction nor requesting a curative instruction. (Ex. P at 396). However, applying Strickland's prejudice prong, it found there was "no reasonable

probability that the outcome of the proceeding would have been different absent counsel's failure to object to the misstatement or request a curative instruction." (Ex. P at 397). That conclusion rested on the same facts as in Ground One: that throughout the trial, both defense counsel and the State had accurately advised the jury of the voluntary intoxication defense. (See, e.g., Ex. D at 36–38, 280, 282–83, 290–96). Furthermore, the trial judge correctly stated that if the defendant was so intoxicated that he could not form the mental state necessary to commit the crime, then the mens rea element was not satisfied and the defendant did not commit the offense. (Ex. D at 310). It would have been reasonable to conclude, in light of the entire record, that one uncorrected misinstruction did not cause the jury to erroneously convict Petitioner or disregard his voluntary intoxication defense. The state post-conviction court's decision was not based on an unreasonable application of clearly established federal law or an unreasonable determination of the facts. Accordingly, Petitioner is not entitled to relief on Ground Two.

Therefore, it is now

ORDERED AND ADJUDGED:

1. The Petition (Doc. 1) is **DENIED** and this case is **DISMISSED WITH PREJUDICE**.
2. The **Clerk of the Court** shall enter judgment accordingly.

3. If Petitioner appeals this Order, the Court denies a certificate of appealability.[26] Because this Court has determined that a certificate of appealability is not warranted, the **Clerk of the Court** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.
4. The **Clerk of the Court** shall close this case.

DONE AND ORDERED at Jacksonville, Florida this 4th day of April, 2018.

TIMOTHY J. CORRIGAN
United States District Judge

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Copies:

Counsel of record

[26] If the Petitioner appeals the dismissal of the Petition, the undersigned opines that a certificate of appealability is not warranted. This Court should issue a 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 this substantial showing, the Petitioner "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 v. Cockrell, 537 U.S. 322, 335–36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Here, after consideration of the record as a whole, this Court will deny a certificate of appealability.