No. _____

OCTOBER TERM 2018

IN THE SUPREME COURT OF THE UNITED STATES

DAVID CURTIS SMITH,

Petitioner,

v.

JULIE JONES,
SECRETARY, FLORIDA DEP'T OF CORRECTIONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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April 22, 2019

QUESTION PRESENTED

Whether the Petitioner was prejudiced under the Sixth Amendment due to trial counsel's failure to object to a concededly erroneous jury instruction and whether the Eleventh Circuit failed to afford de *novo review* to the prejudice prong of *Strickland v. Washington*?

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The Petitioner, David Curtis Smith, an indigent Florida prisoner, was the Appellant in the courts below.

The Respondent, Julie Jones, the Secretary, Florida Dep't. of Corrections, was the Appellee in the courts below.

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Curtis Smith prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this cause is reported as *Smith v. Sec'y, Florida Dep't of Corr.,* 743 Fed. Appx. 386 (11th Cir. 2018), and attached as "Attachment A" to this Petition. The order denying panel rehearing and/or rehearing en banc is non-published and attached hereto as "Attachment B." The order denying relief in the federal district court is non-published and attached as "Attachment C." The Florida Fifth District Court of Appeals opinion affirming Petitioner's convictions is reported as *Smith v. State*, 842 So. 2d 131 (Fla. 5th DCA 2003), and attached hereto as "Attachment D."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit issued its opinion on Petitioner's appeal August 8, 2018. Petitioner filed a timely motion for rehearing *en banc*, which was denied on January 22, 2019. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Mr. Smith was arrested on June 25, 2001, by officers of the Marion County, Florida, Sheriff's Office as a result of incidents involving a minor child on June 23, 2001 (1 R 5-9). Mr. Smith was subsequently charged with four felony counts: (1) kidnapping an individual under the age of 13 with aggravated child abuse; (2) sexual battery on a child under the age of 12; (3) attempted first-degree murder; and (4) aggravated child abuse (1 R 11-13).

Mr. Smith proceeded to trial on June 17, 2002. He was convicted and sentenced on June 20, 2003, to life in prison on Count 1; life in prison on Count 2, to run concurrent with Count 1; 30 years for Count 3, to run consecutive to Counts 1 and 2; and 20 years for Count 4, to run consecutive to Count 3 (10 R 1085-86).

Mr. Smith filed a direct appeal with the Florida Fifth District Court of Appeal (Fifth DCA). The Fifth DCA affirmed Mr. Smith's convictions and sentences in a per curiam affirmance, *Smith v. State*, 842 So. 2d 131 (Fla. 5th DCA 2003), and mandate issued on or about April 15, 2003.

Pursuant to Fla. R. Crim. P. 3.800, Mr. Smith thereafter filed a Motion to Correct Illegal Sentence with the trial court in December 17, 2003. The trial court denied this motion on December 29, 2003, and Mr. Smith appealed to the Fifth DCA. On February 17, 2004, the Fifth DCA issued a per curiam affirmance of the trial court's decision, *Smith v. State*, 866 So. 2d 1230 (Fla. 5th DCA 2004), and issued its mandate on March 5, 2004.

On May 28, 2004, Mr. Smith filed a Petition for Writ of Habeas Corpus in the Fifth DCA; the petition was denied on July 26, 2004. Mr. Smith filed a motion for

rehearing, which was denied on August 31, 2004. He thereafter requested review of the Fifth DCA's decision from the Florida Supreme Court. The Florida Supreme Court disposed of Mr. Smith's request on September 24, 2004, *Smith v. State*, 885 So. 2d 388 (Fla. 2004), the Fifth DCA denied Certification of Cause on September 20, 2004, and rehearing was denied by the Florida Supreme Court. Mr. Smith also petitioned the Florida Supreme Court for a writ of mandamus with regard to the Fifth DCA's denial of his habeas corpus petition without affording him the ability to file a reply brief. The Florida Supreme Court denied to issue the writ and denied Mr. Smith's petition on June 7, 2005. *Smith v. State*, 906 So. 2d 1059 (Fla. 2005).

Mr. Smith filed an initial motion for postconviction relief pursuant to Fla. R. Crim. 3.850 motion on April 14, 2005, and thereafter filed an amendment thereto. In the amended motion, Mr. Smith alleged, *inter alia*, that his trial counsel was ineffective in failing to object to the capital sexual battery instruction.

The state trial court held a limited evidentiary hearing on grounds 5, 6, and 8 of the amended Rule 3.850 motion and denied the motion on August 5, 2010. The trial court failed to rule on any of the claims raised in Mr. Smith's initial Rule 3.850 motion.

Mr. Smith appealed the denial of his Rule 3.850 motions to the Fifth DCA. On January 17, 2012, the Fifth DCA issued a per curiam affirmance of the trial court's order denying Mr. Smith's Rule 3.850 motion. Mr. Smith filed a motion for rehearing, which was denied and mandate from the Fifth DCA issued on March 22, 2012.

Thereafter, Mr. Smith filed a timely Petition for Writ of Habeas Corpus in the

federal district court for the Middle District of Florida (DE:1). In the habeas petition the following claims for relief were raised: (1) Mr. Smith was denied a fair trial and his federal constitutional rights were violated by the introduction at trial of a 911 tape, over defense objection, because the tape constituted hearsay and was more prejudicial than probative; (2) Mr. Smith was denied a fair trial and his federal constitutional rights were violated by the trial court allowing the State, at trial, to publish various photographs of the victim which were not relevant to the charges and/or whose prejudicial value substantially outweighed any probative value; (3) the claims in Mr. Smith's original Rule 3.850 (4) trial counsel rendered prejudicially deficient performance, in violation of the Sixth Amendment, in failing to object to an erroneous sexual battery instruction; (5) trial counsel was ineffective in failing to object to improper prosecutorial argument during closing argument at trial, in violation of the Mr. Smith's right to the effective assistance of counsel as guaranteed by the Sixth Amendment; (6) trial counsel rendered prejudicially deficient performance in violation of the Sixth Amendment in failing to strike the foreperson of Mr. Smith's jury, or the State committed a violation of *Brady v. Maryland* regarding the juror's prior arrests and convictions, in violation of the Fifth and Fourteenth Amendments; (7) trial counsel rendered prejudicially deficient performance in failing to call Nora Choquette as a witness at trial, in violation of Mr. Smith's right to the effective assistance of counsel as guaranteed by the Sixth Amendment.

The State was ordered to file a response to Mr. Smith's habeas petition (DE:3),

and a response was thereafter filed (DE:9). Thereafter, upon motion by Mr. Smith, a supplemental pleading was filed to further flesh out the issues in Mr. Smith's case, including the appropriate standard of review applicable to his claims (DE10). The State was permitted to file a supplemental response (DE:13), and a Reply thereto was filed by Mr. Smith (DE:15).

Almost three years later, the court entered an order on Mr. Smith's petition, denying all requested relief (DE:16). Thereafter, Mr. Smith timely filed a motion to alter or amend the Court's judgment (DE:19), which the court denied by order entered on September 19, 2016 (DE:20). On February 21, 2017, the district court denied Mr. Smith's application for a COA (DE28).

Upon application by Mr. Smith in the Eleventh Court, a COA was granted on two issues: (1) Whether the submission of a 911 tape at trial, over defense objection, rendered Mr. Smith's trial fundamentally unfair; and (2) Whether the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in denying Mr. Smith's claim of ineffective assistance of counsel at trial for failure to object to the sexual battery instruction that was given to the jury that permitted conviction under alternate theories of either penetration or sexual union, instead of a single theory of penetration charged in the indictment.

Following briefing, the Eleventh Circuit affirmed the denial of habeas relief, and thereafter denied a timely motion for rehearing. This Petition follows.

REASONS FOR GRANTING THE PETITION

The state courts unreasonably applied *Strickland v. Washington* in denying Mr. Smith's claim of ineffective assistance of counsel at trial for failure to object to the sexual battery instruction that was given to the jury that permitted conviction under alternate theories of either penetration or sexual union, instead of the single theory of penetration charged in the indictment. Certiorari review is warranted to examine the Eleventh Circuit's failure to disregard AEDPA's deference to the prejudice prong analysis.

In Claim IV of his habeas corpus petition, Mr. Smith alleged a denial of his Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Mr. Smith alleged that his trial counsel rendered prejudicially deficient performance, in violation of the Sixth Amendment, in failing to object to an erroneous sexual battery instruction. The district court determined that "the trial court erred by instructing the jury on an alternative theory of guilt—sexual union—that was not charged in the information" and thus presumably determined that counsel performed deficiently within the meaning of *Strickland*'s performance prong (DE16:12). The Eleventh Circuit, in affirming the district court's ruling, did not address the deficiency prong as there was no meaningful dispute that counsel failed to object to an erroneous instruction.

However, the district court rejected Mr. Smith's *Strickland* claim by employing a variety of tests for assessing the prejudice, none of which comports with the proper *Strickland* test. First, it determined that Mr. Smith "cannot show that this error rendered the trial fundamentally unfair" (DE16:13). Then it determined that "any error in the jury instruction did not result in a violation of due process." (*Id.*). And lastly, the district court determined that Mr. Smith "cannot demonstrate that

counsel's failure to object to the defective jury instruction resulted in prejudice." (*Id.*). From these three determinations the district court ultimately concluded that the state court's denial of relief[1] was neither contrary to, nor an unreasonable application of, *Strickland.* Without addressing the actual arguments Mr. Smith made as to the improper and erroneous prejudice tests applied by both the state courts and the district court, the Eleventh Circuit merely affirmed, concluding that the district court properly determined that the state court's application of Strickland was reasonable. *Smith*, 743 Fed. App. at 389-90.

The Trial Record

In state court, during Mr. Smith's postconviction proceedings, the State of Florida and the state trial court agreed that Mr. Smith's jury was erroneously instructed on alternative theories to establish sexual battery where only one theory (penetration) was listed in the information (2SR:212, 227). Both parties also conceded that as a general rule, "where an offense can be committed in more than one way, the trial court commits fundamental error when it instructs the jury on an alternate theory not charged in the information and the jury returns a general verdict without

[1] There was no evidentiary hearing afforded to Mr. Smith on this ground for relief in the state courts; rather, his claim that counsel was ineffective for failing to object to the sexual battery instruction was summarily denied. *See* DE9: 7. The summary denial was affirmed per curiam by the appellate court. Even though the appellate court failed to articulate its reasoning when affirming the denial of Mr. Smith's Rule 3.850 motion, "when 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." *Harrison v. Richter*, 131 S. Ct. 770, 785 (2011).

specifying the basis for the conviction" (2SR:211, 226).[2] The additional, erroneous instruction for sexual battery given in Mr. Smith's case, which informed the jury that it could find Mr. Smith guilty if it found that he merely had "union" with the victim, was fundamental error. "Union" was not a listed theory in the information and because of the general jury form used in Mr. Smith's case, it is impossible to determine whether the jury convicted Mr. Smith based on a "union" (an uncharged offense) or the more difficult theory of "penetration."

The charging document in Mr. Smith's case provided the following definition of capital sexual battery in Count One:

> [David Smith] did being a person of (18) years of age or older, unlawfully commit sexual battery upon [A.H.], date of birth 09/12/99, a person less than twelve (12) years of age, by causing his penis and/or another object to penetrate the vagina of the victim, or in an attempt to commit sexual battery upon [A.H.] injured her sexual organs, in violation of Florida Statute 794.011(a).

(1R:10). However, the jury was instructed it could find Mr. Smith guilty of a sexual battery under a person less than 12 years of age if any of the four alternate theories occurred:

> (a) David Curtis Smith committed an act upon [A.H.] in which the sexual organ of David Curtis Smith penetrated *or had*

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[2] *See Eaton v. State*, 908 So. 2d 1164, 1165 (Fla. 1st DCA 2005) ("We are constrained to conclude that the trial court committed fundamental error by instructing the jury on an alternative theory (sexual union) not charged in the first count of the information. Since the jury returned a general verdict of guilty as to that count, it is impossible to determine whether appellant was convicted of a charged or an uncharged offense. Accordingly, we reverse appellant's conviction as to the first count of the information and remand for a new trial on that count only"). *Accord Garzon v. State*, 939 So. 2d 278 (Fla. 4th DCA 2006); *Braggs v. State*, 789 So. 2d 1151 (Fla. 3d DCA 2001).

union with the vagina of [A.H.]; or

(b) David Curtis Smith committed an act upon [A.H.] in which the vagina of [A.H.] was penetrated by an object;

(c) David Curtis Smith injured the sexual organ of [A.H.] in an attempt to commit an act upon [A.H.] in which the sexual organ of David Curtis Smith would have penetrated *or would have had union with* the vagina of [A.H.]; or

(d)David Curtis Smith injured the sexual organ of [A.H.] in an attempt to commit an act upon [A.H.] in which the vagina of [A.H.] would be penetrated by an object.

(10R:1037-38)(2SR:229)(emphasis added). The trial court explained that "union" meant contact (10R:1038). The prosecutor's closing argument *twice* repeated the erroneous jury instruction to the jury in closing argument. First, the prosecutor argued:

> [Smith] committed an act upon [A.H.] in which the sexual organ of David Curtis Smith penetrated *or had union with* the vagina of [A.H.]; or David Curtis Smith committed an act upon [A.H.] in which the vagina of [A.H.] was penetrated by an object.

(9R:976) (emphasis added). The prosecutor continued by arguing alternative theories for sexual battery:

> *Or* you can find that David Curtis Smith injured the sexual organ of [A.H.] in an attempt to commit an act on [A.H.] in which the sexual organ of David Curtis Smith would have penetrated ***or would have had union with*** the vagina of [A.H.].

(9R:977) (emphasis added). The prosecutor then affirmatively suggested that union alone was sufficient to convict Mr. Smith of sexual battery:

> And isn't it reasonable to conclude that somewhere in the middle of *trying* to force himself into this baby that she began to bleed and that he panicked and that whatever

> urge overcame him to do this turned to panic and he never finished, at least not the sexual act?

(9R:978) (emphasis added).[3] The erroneous instruction given to the jury was compounded by the fact that the jury returned a general verdict for sexual battery without specifying the basis for its conviction (3R:367-70; 10R:1081-81).

As noted above, the district court determined that "the trial court erred by instructing the jury on an alternative theory of guilt—sexual union—that was not charged in the information" and thus presumably determined that counsel performed deficiently within the meaning of *Strickland*'s performance prong (DE16 at 12). Although there was no specific determination as to the deficiency prong, it can be assumed that counsel's performance was deficient given the acknowledgment by all parties and the court that the jury instruction given to Mr. Smith's jury was erroneous as a matter of law, and had long been so found by Florida courts. It is axiomatic that counsel performs deficiently in a criminal case under the *Strickland* standard when he or she fails to object to a jury instruction that had been previously determined to be erroneous. The real issue in Mr. Smith's case is the prejudice prong.

Mr. Smith argued to the district court and to the Eleventh Circuit that, in reviewing the prejudice prong, the courts were unencumbered by the AEDPA deference normally applicable. In rejecting Mr. Smith's claim in state court, the state

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[3] In *Gill v. State*, 586 So. 2d 471 (Fla. 4th DCA 1991), the appellate court reversed and remanded for a new trial, notwithstanding a specific instruction, because the court's direction to the jury, highlighted by the prosecutor's argument that union was an alternative to penetration, was fundamental error. *Accord Palazzo v. State*, 754 So. 2d 73 (Fla. 2d DCA 2000); *Holmes v. State*, 842 So. 2d 187 (Fla. 2d DCA 2003).

trial court did not even appear to rely on *Strickland*, much less apply its prejudice analysis in a manner that comports with *Strickland*. Although it recognized that Mr. Smith was alleging a Sixth Amendment violation under *Strickland*,[4] it wholly failed to adjudicate his claim under *Strickland*'s prejudice prong. Rather, it analyzed Mr. Smith's claim to determine if the giving of the erroneous jury instruction constituted "fundamental error." Likewise, the district court rested its denial on a "fundamental error" analysis rather than the proper prejudice analysis articulated in *Strickland* and its progeny.

However, under *Strickland*, Mr. Smith is and ***not*** required to show that the trial was rendered fundamentally unfair or that it resulted in a due process violation akin to a fundamental error determination. Rather, all that Mr. Smith is and was required to show is "'a probability sufficient to undermine confidence in [that] outcome." *Porter v. McCollum*, 130 S. Ct. 447, 455-56 (2009) (quoting *Strickland*, 466 U.S. at 693-94). A proper *Strickland* test does not require Mr. Smith to establish that the jury would have acquitted him or that the outcome would have changed or any other of the formulations set forth by the state trial court. Rather he need establish that "there is a reasonable probability that, but for counsel's unprofessional errors,

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[4] Specifically, the trial court's Order of March 29, 2010, in which this claim was summarily rejected without an evidentiary hearing, acknowledged: "In the first ground of Defendant's Motion, he alleges that trial counsel was ineffective for failing to object to the Court's instruction to the jury on Count 1 of the Information, Sexual Battery Upon a Person Less Than Twelve Years of Age. Defendant claims that because the Information alleged only penetration and the Court's instruction included penetration *or* "union," that the instruction was "fundamentally unsound" and counsel was deficient for failing to object."

the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "[I]t is sufficient that [Mr. Smith] must show only a reasonable probability that the outcome would have been different; he 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.'" *Brownlee v. Haley,* 306 F. 3d 1043, 1059-60 (11th Cir. 2002) (quoting *Strickland,* 466 U.S. at 693). *See also Wilson v. Mazzuca,* 570 F.3d 490, 507 (2d Cir. 2009) ("[T]he reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different") (citations omitted). "The *Strickland* test does not require certainty that the result would have been different" but rather only a "reasonable probability of a different outcome." *DeLuca v. Lord,* 77 F. 3d 578, 590 (2d Cir. 1996).

Because the state courts employed an erroneous prejudice analysis, Mr. Smith contended that the Eleventh Circuit must resolve the prejudice prong without the deference otherwise required under the AEDPA:

> When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in §2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires. *See Wiggins v. Smith,* 539 U.S. 510, 534 (2003) (performing analysis required under *Strickland*'s prejudice prong without deferring to the state court's decision because the state court's resolution of *Strickland*'s first prong involved an unreasonable application of law); *id.* at 527-29 (confirming that the state court's ultimate claim was based on the first prong and not the second); *see also Williams [v. Taylor,* 529 U.S. 362,] 395-97 [2000]; *Early v. Packer,* 537 U.S. 3, 8 (2002) (*per curiam*) (indicating that §2254 does not preclude relief if either "the reasoning [or] the result of the state-court decision contradicts [our cases]."

Panetti v. Quarterman, 127 S. Ct. 2842, 2858-59 (2007). In contravention of *Pannetti,* the Eleventh Circuit applied AEDPA's highly deferential standard.

Mr. Smith submits that certiorari review of the Eleventh Circuit's decision is warranted here. The issue of whether Mr. Smith committed a sexual battery was hotly contested at trial. The defense repeatedly argued that a younger boy, K.C., who resided with the victim, committed the crime (9R:969, 971, 973, 1017). Mr. Smith's defense was that he did not commit the crime as alleged in the information. There were no eyewitnesses and the victim did not testify. Even if the jury believed that K.C. penetrated the victim and thereby committed the injuries to the victim, it could still have found Mr. Smith guilty of capital sexual battery if it found that Mr. Smith touched the victim's vagina with his sexual organ.

The district court determined that Mr. Smith had not established prejudice because the prosecution argued a "penetration" theory in closing argument and did not "argue that Petitioner's penis or some object merely had union with the victim's vagina" (DE16:13). This is simply wrong (and unreasonable wrong) as a matter of fact. The State unquestionably *twice informed* the jury that it could find Mr. Smith guilty under either a penetration or union theory (9R:976), after which the prosecutor informed the jury that Mr. Smith should be convicted if he had mere union with the alleged victim:

> And isn't it reasonable to conclude that somewhere in the middle of *trying to force himself into this baby* that she began to bleed and that he panicked and that whatever urge overcame him to do this turned to panic and *he never finished, at least not the sexual act*?

(9R:978)(emphasis added). Then, to compound the impropriety of these arguments, the court's instruction provided two situations where Mr. Smith could be convicted by mere "union" with the victim (10R:1037-38; 2SR:229).

In determining there was a lack of prejudice, the district court also concluded that witness Nurse Talaga testified that the victim's vagina had been penetrated by a penis or other object (DE16:13). However, this description of Talaga's testimony overstates what she described. Talaga was a part time registered nurse, not a nurse practitioner or a doctor (8R:750). She did not indicate she had any training or specialized experience in pediatric gynecology (8R:750-52). She testified she examined over 800 child abuse cases but did not identify which, if any, involved sexual abuse (8R:752). Talaga did not conduct an internal examination of the victim's vagina to ascertain whether penetration had occurred (8R:767). If the child had been penetrated, there would have been internal lacerations, bleeding, and/or bruising. Although Talaga testified that they hymen was torn, she acknowledged that there is always an opening to the vagina, "even from birth," indicating that the opening she witnessed was not caused by penetration (8R:768).

Where the question as to whether penetration had occurred with Mr. Smith being the perpetrator was a hotly debated issue at trial and where mere "union" was much easier to establish, the failure by counsel to object to the unquestionably erroneous jury instruction was prejudicial. Because the issue of penetration was heavily debated at trial and because the jury returned a general verdict, it is impossible to ascertain whether the jury would have convicted Mr. Smith had it not

been informed by the State and the trial court that mere "union" was insufficient. Under the circumstances of Mr. Smith's case and on *de novo* review, he submits he has more than established prejudice under the *Strickland* standard; even under the more arduous AEDPA standard, Mr. Smith is entitled to relief. Trial counsel unreasonably failed to object to an admittedly erroneous sexual battery instruction, and Mr. Smith was unquestionably prejudiced. Because the Eleventh Circuit merely appeared to assume that AEDPA deference was warranted, certiorari review is warranted.

CONCLUSION

For the reasons stated herein, the Petitioner, David Curtis Smith, respectfully submits that this Court grant certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

/s/ Todd G. Scher

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April 22, 2019

ATTACHMENT A

743 Fed.Appx. 386
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

David Curtis SMITH, Petitioner-Appellant,
v.
SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS, Florida Attorney
General, Respondents-Appellees.

No. 16-16612
|
Non-Argument Calendar
|
(August 8, 2018)

Synopsis

Background: Petitioner sought federal habeas relief. The United States District Court for the Middle District of Florida, No. 5:12-cv-00191-WTH-PRL, denied petition. Petitioner appealed.

Holdings: The Court of Appeals held that:

state court's admission of 911 recording at trial was not objectively unreasonable, and

state post-conviction court's application of *Strickland* was not unreasonable.

Affirmed.

Attorneys and Law Firms

*387 Todd Gerald Scher, Law Office of Todd G. Scher, PL, Dania Beach, FL, Susanne K. Sichta, The Arnold Law Firm, Jacksonville, FL, for Petitioner-Appellant

Carmen F. Corrente, Pam Bondi, Attorney General's Office, Daytona Beach, FL, for Respondents-Appellees

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 5:12-cv-00191-WTH-PRL

Before MARTIN, JILL PRYOR, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

David Curtis Smith, a Florida prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 petition for writ of habeas corpus. **Smith** argues that the district court erred in rejecting his claim that the admission of a 911 recording at trial rendered his trial fundamentally unfair. He also argues that the district court erred in rejecting his claim that his counsel was ineffective for failing to object to an erroneous jury instruction that included an alternative theory of liability.

I.

We review a district court's denial of a § 2254 petition *de novo*. *Bester v. Warden*, 836 F.3d 1331, 1336 (11th Cir. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 819, 196 L.Ed.2d 605 (2017). In an appeal brought by an unsuccessful habeas petitioner, the scope of our review is limited to the issues specified in the certificate of appealability ("COA"). *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that, after a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Thus, while review of the district court's decision is *de novo*, the review of the state habeas court's decision is with deference. *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1239 (11th Cir. 2010). The 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,

130 S.Ct. 1855, 176 L.Ed.2d 678 (2010). This standard is difficult for a habeas petitioner to meet. *White v. Woodall*, 572 U.S. 415, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014).

***388** "Clearly established federal law" consists of the governing legal principles, rather than the *dicta*, set forth in the decisions of the Supreme Court at the time the state court issues its decision. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). 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 the Supreme Court case law or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Id.*

A state court decision involves an "unreasonable application" of the Supreme Court's precedents 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, 141, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005). The "unreasonable application" inquiry requires that the state court decision be more than incorrect or erroneous – it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Even if the federal court concludes that the state court applied federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Petitioner must show that the state court's ruling was so lacking justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *White*, 134 S.Ct. at 1702.

Florida law permits the admission of relevant evidence unless the law provides otherwise. Fla. Stat. Ann. § 90.402. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. *Id.* § 90.403. The unfair prejudice that section 90.403 attempts to eliminate relates to evidence that inflames the jury or appeals improperly to the jury's emotions. *State v. McClain*, 525 So.2d 420, 422 (Fla. 1988). Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. *Amoros v. State*, 531 So.2d 1256, 1260 (Fla. 1988). The burden is on the party attempting to exclude the evidence to make that showing. *State v. Gerry*, 855 So.2d 157, 159 (Fla. Dist. Ct. App. 2003).

Federal courts generally do not review a state court's admission of evidence in habeas corpus proceedings. *McCoy v. Newsome*, 953 F.2d 1252, 1265 (11th Cir. 1992). However, where a state court's ruling is claimed to have deprived a defendant of his right to due process, a federal court should inquire whether the error was of such magnitude that it denied fundamental fairness to the trial. *Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir. 1995). A denial of fundamental fairness occurs whenever the improper evidence is material in the sense of a crucial, critical, highly significant factor. *Id.* Evidence is not crucial, critical, or highly significant when other evidence of guilt is overwhelming. *McCoy*, 953 F.2d at 1265. Moreover, the court must defer to a state court's interpretation of its own rules of evidence and procedure. *Machin v. Wainwright*, 758 F.2d 1431, 1433 (11th Cir. 1985).

If a federal court determines that there has been a constitutional error, habeas relief still may not be warranted if the error was "harmless." *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). An error is harmless on collateral review if it did not have a substantial or injurious effect or influence on the jury's verdict. *Id.* at 637, 113 S.Ct. 1710.

***389** Because the 911 tape provided probative evidence tending to rebut Smith's argument that the family was fabricating the claim that he sexually assaulted the child, it is not at all clear that it was error for the state court to admit it into evidence. Because the error, if there was one, is not clear, Smith cannot carry his burden of showing that the state court's decision was objectively unreasonable. Fla. Stat. Ann. § 90.403; *Amoros*, 531 So.2d at 1260; *Gerry*, 855 So.2d at 159. Moreover, even if the admission of the 911 recording was error, Smith did not show that the error had a substantial effect on the jury's verdict, or that it was of such magnitude that it denied fundamental fairness to his trial. *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710; *Baxter*, 45 F.3d at 1509. Given the weight of evidence against Smith [1], the inclusion of the 911 tape was not material in the sense of a "crucial, critical, highly significant factor." *Baxter*, 45 F.3d at 1509.

1 Indeed, the evidence was overwhelming. Smith was found holding the naked and bleeding victim; a sexual assault examination concluded that the victim had been penetrated, and the victims DNA was found on Smith's shorts and underwear.

II.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner must establish that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Id.*

Under the prejudice prong, 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. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. That is, the 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, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The petitioner must show more than that the errors had some conceivable effect on the outcome of the proceeding. *Id.* at 693, 104 S.Ct. 2052. The petitioner must affirmatively prove prejudice by demonstrating that the unprofessional errors were so egregious as to render the trial unfair and the verdict suspect. *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001). However, the petitioner need not show that counsel's conduct more likely than not altered the outcome in the case. *Brownlee v. Haley*, 306 F.3d 1043, 1059-60 (11th Cir. 2002).

For an ineffective-assistance claim raised in a § 2254 petition, the inquiry turns upon whether the relevant state court decision was contrary to, or an unreasonable application of, *Strickland*. *See Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). Because judicial review of a *Strickland* claim already must be "highly deferential," a federal habeas court's review of a state court decision denying a *Strickland* claim is "doubly deferential." *Id.* at 190, 131 S.Ct. 1388. The question is whether the state court's determination under *Strickland* was reasonable. *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009).

Here, the district court properly determined that the state post-conviction court's application of *Strickland* was reasonable, as Smith failed to meet his high burden to show that he was prejudiced by ***390** his counsel's failure to object to the erroneous jury instruction.

AFFIRMED.

All Citations

743 Fed.Appx. 386

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ATTACHMENT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16612-CC

DAVID CURTIS SMITH,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

ATTACHMENT C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DAVID CURTIS SMITH,

Petitioner,

v. CASE NO. 5:12-cv-191-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

This cause is before the Court upon a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1) and supplemental brief (Doc. 10) filed, through counsel, by David Curtis Smith ("Petitioner"). Respondents filed a response to the petition (Doc. 8) and a supplemental response (Doc. 13). Petitioner filed a reply (Doc. 15).

Petitioner raises seven claims in his petition. Upon due consideration of the record, the Court concludes that the petition must be denied.

I. Background and Procedural History

Petitioner was charged by information with sexual battery upon a person less than twelve years of age (count one), kidnapping of a child under the age of thirteen (count two), attempted first degree murder (count three), and aggravated child abuse (count four) (App. A at 12-13).[1] After a jury trial, Petitioner was convicted as charged. *Id.* at 367-70. The trial court sentenced Petitioner to concurrent terms of life in prison on counts one and two and

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[1]Unless otherwise noted, citations to appendices (App. ___ at ___) refer to the exhibits contained in Respondents' Appendix to the Response filed on September 12, 2012 (Doc. 14).

consecutive thirty-year terms of imprisonment for counts three and four. *Id.* at 373-80. Petitioner appealed (App. C), and the Florida Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam* (App. F).

Petitioner filed a motion to correct illegal sentence pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure (App. G). The trial court denied the motion. *Id.* Petitioner appealed, and the Fifth DCA affirmed *per curiam*. *Id.* Petitioner then filed a petition for writ of habeas corpus with the Fifth DCA alleging ineffective assistance of appellate counsel (App. H). After filing a supplement to the petition (App. I), the Fifth DCA denied the petition without discussion (App. K).

Petitioner subsequently filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (App. L at 1-26). Petitioner filed an amended Rule 3.850 motion, and the trial court denied five of Petitioner's claims and determined an evidentiary hearing was warranted on three claims. *Id.* at 159-92, 225-34. The trial court held an evidentiary hearing (App. M-1), after which it denied Petitioner's remaining claims (App. L at 334-38). Petitioner appealed (App. N), and the Fifth DCA affirmed *per curiam* (App. Q).

II. Governing Legal Principles

A. 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). 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).

"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 issues 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)). A decision is "contrary to" clearly established federal law if the state court either (1) applied a rule that contradicts the governing law set for by the 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) (internal quotations and citation omitted); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents 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 "unreasonable application" inquiry "requires the state court

decision to be more than incorrect or erroneous"; it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-77 (2003) (citation omitted); *Mitchell*, 540 U.S. at 17-18; *Ward*, 592 F.3d at 1155. Petitioner must show that the state court's ruling was "so lacking justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 134 S. Ct. at 1702 (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)).

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 reasonable and that the deficient performance prejudiced the defense. *Id.* This is a doubly deferential standard. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayanze*, 129 S. Ct. 1411, 1420 (2009) (citing *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003)).

The focus of inquiry under *Strickland's* performance prong is "reasonableness under prevailing professional norms." 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 profession 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. 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." *Id.*

III. Analysis[2]

A. Claim One

Petitioner alleges the trial court erred by allowing the 911 audiotape to be played at trial (Doc. 1 at 10). In support of this claim, Petitioner argues that the trial court failed to consider whether the probative value of the audiotape outweighed the prejudicial nature of the recording. *Id.* at 13. Petitioner contends that the audiotape was extremely prejudicial, was not helpful in determining guilt, and was cumulative. *Id.* at 13-15. Petitioner raised this claim on direct appeal (App. C). The Fifth DCA *per curiam* affirmed (App. F).

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[2]Petitioner relies on *Shelton v. Sec'y, Dep't of Corr.*, 802 F. Supp. 2d 1289 (M.D. Fla. 2011) for the proposition that a *per curiam* affirmance does not amount to a ruling on the merits of a claim (Doc. 10 at 3). Petitioner states that the Court must review his claims *de novo*. *Id.* However, the decision cited by Petitioner was overturned by the Eleventh Circuit Court of Appeals in *Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348 (11th Cir. 2012). The Court concluded that a *per curiam* affirmance is an adjudication on the merits that is entitled to deference under § 2254. *Id.* at 1353. Therefore, Petitioner has not shown that he is entitled to *de novo* review of his claims.

Prior to trial, Petitioner filed a motion in limine to prevent the State from playing the 911 audiotape at trial (App. A at 114-16). The trial court admitted the audiotape over defense counsel's objection, finding the audiotape was admissible as an excited utterance (App. B at 101). The State later played the audiotape to the jury. *Id.* at 275.

During the 911 call, Karen Cook ("Karen"), the victim's aunt, asked for police to be dispatched to her home and described to the operator the events as they occurred on the night Petitioner was arrested. *Id.* at 276-87. Karen made statements that her mother, Christine Cook ("Christine"), entered the home screaming that the victim was outside with Petitioner.[3] *Id.* at 276. Karen also stated that Petitioner said, "Don't call the cops now, please don't call the cops now." *Id.* Karen further told the operator that she was told the victim had been in a trash bag in the backseat of Petitioner's vehicle. *Id.* at 278. Karen was heard telling Petitioner that what he did was wrong. *Id.* at 280. Karen also told the operator that Petitioner asked her sister, the victim's mother, not to press charges and to tell police that there were diapers in his vehicle. *Id.* at 285-87. Finally, Karen noted Christine said that Petitioner had tied the victim's hands. *Id.* at 286.

Federal courts generally do not review a state court's admission of evidence in habeas corpus proceedings. *See McCoy v. Newsome*, 953 F.2d 1252, 1265 (11th Cir. 1992). A federal court will not grant federal habeas corpus relief based upon an evidentiary ruling unless the ruling affects the fundamental fairness of the trial. *See Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir. 1995). "A denial of fundamental fairness occurs whenever the improper evidence 'is material in the sense of a crucial, critical, highly significant

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[3]The State alleged that Petitioner sexually battered the victim, who was approximately twenty-one months old (App. B at 393).

factor.'" *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir.1998) (quoting *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir.1983)). Moreover, this Court "must defer to a state court's interpretation of its own rules of evidence and procedure." *Machin v. Wainwright*, 758 F.2d 1431, 1433 (11th Cir.1985).

The record reflects that during the 911 call, Karen made statements describing the events in her home as she perceived them or while she was under the stress of excitement caused by the events. Therefore, the 911 tape was admissible under the excited utterance or spontaneous statement exceptions to the hearsay rule. *See* § 90.803(1) and (2), Fla. Stat.; *Stanley v. State,* 57 So.3d 944, 948 (Fla. 4th DCA 2011)*; Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997). Additionally, the Supreme Court of the United States has held that statements made in response to a 911 operators questions do not constitute testimonial hearsay, and thus, admission of such statements do not violate the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813 (2006). Moreover, the 911 audiotape was relevant to establish the circumstances of the crime. Therefore, Petitioner cannot demonstrate that the trial court erred by admitting the 911 audiotape.

However, even if the trial court's ruling was in error because the audiotape was cumulative or the danger of unfair prejudice outweighed the probative value, Petitioner cannot demonstrate that his trial was rendered fundamentally unfair. *See* § 90.403, Fla. Stat. (stating "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."). Each person heard on the 911 audiotape, with the exception of Petitioner, testified at trial to regarding the events that occurred that night and was subject to cross-examination (App. B at 299-371; 387-463; 469-509).

Furthermore, substantial evidence of Petitioner's guilt was presented at trial. Specifically, Timothy Petree ("Petree"), a serology and DNA analyst for the Florida Department of Law Enforcement ("FDLE"), testified that the victim's DNA was found on trash bags and Petitioner's shorts and underwear (App. B at 722-27). Elizabeth Talaga ("Talaga"), an advanced nurse practitioner, performed a sexual assault examination on the victim and opined the victim's injuries were consistent with her vagina being penetrated by a penis or other object. *Id.* at 750, 780. Therefore, any error committed by the trial court did not have a substantial or injurious effect or influence in determining the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993). Consequently, the Court concludes that the State court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.[4] Therefore, claim one is denied pursuant to § 2254(d).

B. Claim Two

Petitioner alleges that the trial court erred by allowing the State to publish photographs of the victim's injuries (Doc. 1 at 18). Petitioner argues that the photographs depicted injuries that were not the subject of the criminal information and essentially amounted to prior bad acts. *Id.* Petitioner contends that he did not receive proper notice

[4]To the extent Petitioner argues that the state court failed to consider and apply *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (determining the federal district court abused its discretion in admitting evidence in violation of 403 of the Federal Rules of Evidence), the Court notes that *Old Chief* discussed a federal court's evidentiary ruling under Rule 403 of the Federal Rules of Evidence. *See Hartge v. McDonough*, 210 F. App'x 940, 943 (11th Cir. 2006). Consequently, there is no indication the state court unreasonably applied clearly established federal law as determined by the Supreme Court of the United States.

of this *Williams*[5] Rule evidence. *Id.* Finally, Petitioner claims that the photographs had minimal probative value and their admission resulted in unfair prejudice. *Id.* Petitioner raised this claim in his initial brief on direct appeal (App. C). The Fifth DCA affirmed *per curiam* (App. F).

Petitioner filed a motion in limine to prohibit the State from presenting pictures depicting injuries that occurred to the victim prior to the crime (App. A at 64-66). The trial court held a hearing on the motion and noted that several of the photographs depicted injuries to the victim's left ear, upper forehead, left eye, and buttocks (App. A at 312). Defense counsel argued that the victim had sustained this bruising prior to the offense. *Id.* at 313, 316. Defense counsel also contended that the photographs were highly prejudicial to Petitioner. *Id.* at 314. The prosecutor argued the injuries occurred on the date the crimes were committed with the exception of the bruise to the victim's left ear. *Id.* at 315-18. The trial court denied the motion with regard to the majority of the photographs. *Id.* at 318-19. However, the trial court granted the motion with regard to the photographs depicting bruises on the victim's left ear. *Id.* Defense counsel renewed his motion on the morning of trial, and the trial court denied the motion (App. B at 114-18).

Petitioner was charged with aggravated child abuse (App. A at 12-13). Therefore, the photographs depicting bruises to the victim's face and buttocks were relevant to this charge. § 90.402, Fla. Stat. (noting that all relevant evidence is admissible except where provided by law). Although Petitioner contends that the injuries occurred prior to the

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[5]*Williams v. State*, 110 So. 2d 654 (Fla. 1959) (holding that evidence of the fact that defendant committed another or separate crime is admissible at trial if relevant to prove anything other than the bad character of the defendant or his propensity to commit the charged crime). This rule is codified at section 90.404(2), Florida Statutes.

charged crimes, the State argued at trial that Petitioner inflicted these injuries. Christine testified that the only injury the victim had prior to the night of the crimes was a bruise to her left ear (App. B at 820). Therefore, Petitioner has not demonstrated that the danger of unfair prejudice outweighed the photographs' probative value. § 90.403, Fla. Stat. The admission of this evidence did not render Petitioner's trial fundamentally unfair.

Even assuming the admission of the photographs was improper, the error was harmless. As noted in claim one, *supra*, the State presented other evidence of Petitioner's guilt. Therefore, the Court cannot conclude that the alleged error had a substantial or injurious effect or influence in determining the jury's verdict. *See Brecht*, 507 U.S. at 622. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim two is denied pursuant to § 2254(d).

C. Claim Three

Petitioner alleges that the post-conviction court erred when it failed to rule on the claims raised in his initial Rule 3.850 motion (Doc. 1 at 23). Petitioner raised this claim on appeal from the denial of his amended Rule 3.850 motion (App. N). The Fifth DCA *per curiam* affirmed (App. Q).

Petitioner's claim does not implicate federal constitutional law and thus is not subject to federal habeas review. The Eleventh Circuit Court of Appeals has held that "where a petitioner's claim goes to issues unrelated to the cause of petitioner's detention, that claim does not state a basis for habeas relief." *Quince v. Crosby*, 360 F.3d 1259, 1261 (11th Cir. 2004) (citations omitted). Claims asserting alleged errors or defects in a collateral proceeding are unrelated to the cause of a petitioner's detention and do not state a basis

for habeas relief. *Id.* (citing *Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987); *Carroll v. Sec'y Dep't of Corr.*, 574 F.3d 1354 (11th Cir. 2009) (finding federal habeas corpus relief is not available to address an alleged defect in a collateral proceeding).

Petitioner's claim merely asserts an error in the manner in which the post-conviction court conducted Petitioner's Rule 3.850 proceedings. This error in the state post-conviction process is not a cognizable claim for federal habeas relief. *See Herron v. Sec'y, Dep't of Corr.*, No. 8:11-cv-1483-T-27TGW, 2014 WL 4540257, at *7 (M.D. Fla. Sept. 11, 2014). Accordingly, claim three is denied.

D. Claim Four

Petitioner alleges that trial counsel was ineffective for failing to object to an erroneous sexual battery jury instruction (Doc. 1 at 28). Petitioner maintains that the trial court instructed the jury on an alternative basis for conviction that was not charged in the information. *Id.* Petitioner raised this claim in his Amended Rule 3.850 motion (App. L at 161). The trial court summarily denied this claim pursuant to *Strickland*, noting that the State only prosecuted the case on the theory of penetration and not union, thus, any error contained in the jury instruction was harmless. *Id.* at 226-27. The Fifth DCA affirmed *per curiam* (App. Q).

The jury instruction stated the following:

> Before you can find the Defendant guilty of sexual battery upon a person less than 12 years of age as charged in the information, the State must prove the following elements beyond a reasonable doubt:
> One, [the victim] was less than 12 years of age;
>
> Two, (a), David Curtis Smith committed an upon . . . [the victim] in which the sexual organ of David Curtis Smith **penetrated or had union with** the vagina of . . . [the victim];

> Or, (b) David Curtis Smith committed an act upon . . . [the victim] in which the vagina of . . . [the victim] was penetrated by an object;
>
> Or (c), David Curtis Smith injured the sexual organ of . . . [the victim] in an attempt to commit an act upon . . . [the victim] in which the sexual organ of David Curtis Smith would have **penetrated or would have had union** with the vagina of . . . [the victim];

(App. A at 229; App. B at 1037) (emphasis added). The information charged Petitioner with sexual battery on a person under the age of twelve "by causing his penis and/or other object to penetrate the vagina of the victim . . . ." (App. A at 12).

Florida law is "well[-]settled . . . that where an offense can be committed in more than one way, the trial court commits fundamental error when it instructs the jury on an alternate theory not charged in the information." *Eaton v. State*, 90 So. 2d 1164, 1165 (Fla. 1st DCA 2005) (citations omitted). Therefore, the trial court erred by instructing the jury on an alternative theory of guilt—sexual union—that was not charged in the information.

However, federal habeas relief is not available where a claim is merely that a given jury instruction was incorrect under state law. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). "An error in instructing the jury cannot constitute a basis for habeas relief unless the error so infected the entire trial that the resulting conviction violates due process." *Jacobs v. Singletary*, 952 F.2d 1282, 1290 (11th Cir. 1992) (quotation omitted). "It is not sufficient that the instruction was undesirable, erroneous, or even universally condemned." *Id.* (quotation omitted); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Consequently, alleged errors in a state court's jury instructions form no basis for federal habeas corpus relief unless they are so prejudicial as to render the trial fundamentally unfair. *Jones v. Kemp*, 794 F.2d 1536, 1540 (11th Cir. 1986).

Although the trial court gave an incorrect jury instruction which included the "or had

union with" language, Petitioner cannot show that this error rendered the trial fundamentally unfair. Talaga testified that the victim's vagina had been penetrated by an penis or other object (App. B at 780-84). In its closing argument, the State referred to the "or had union with" language when it read the jury instruction to the jury. *Id.* at 976. Despite referring to the "union" language, the prosecutor argued that the victim's vagina had been penetrated by an object. *Id.* at 977. The State did not argue that Petitioner's penis or some object merely had union with the victim's vagina. Therefore, any error in the jury instruction did not result in a violation of due process. Consequently, Petitioner cannot demonstrate that counsel's failure to object to the defective jury instruction resulted in prejudice.

The state court's denial of this claim was neither contrary to, nor an unreasonable application of, *Strickland*. Accordingly, claim four is denied pursuant to § 2254(d).

E. Claim Five

Petitioner asserts that trial counsel was ineffective for failing to object to improper comments made by the prosecutor during closing argument (Doc. 1 at 40). Petitioner first alleges that the following statements improperly commented on his right to remain silent:

> This is a difficult case. The evidence is shocking and painful to listen to. The reality is that someone could commit such an unspeakable act on a little baby girl is impossible to understand.
>
> And I cannot tell you why and I can't explain for you why he chose the path he chose. I can only show you that he did.

(App. B at 1001). Petitioner also states that the prosecutor improperly shifted the burden of proof when he said, "Now, based on the testimony, whatever happened to [the victim] had to have happened at least on the 22nd. I mean, he can't even get anybody to show the injury to her sexual organ back to the previous day." *Id.* at 994.

Petitioner raised this claim in his amended Rule 3.850 motion (App. L at 165). The trial court denied the claim, concluding that the prosecutor's second comment was not improper. *Id.* at 227-28. The trial court failed to address the first comment. *Id.* The Fifth DCA affirmed *per curiam* (App. Q).

Claims based on the statements of a prosecutor are assessed using a two-pronged analysis: first, a court must determine whether the comments at issue were improper, and, second, whether any comment found to be improper was so prejudicial as to render the entire trial fundamentally unfair. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1182 (11th Cir. 2010); *see also Cargill v. Turpin*, 120 F.3d 1366, 1379 (11th Cir.1997). A trial is rendered fundamentally unfair only where there is a reasonable probability that the outcome of the trial would have been different or a probability sufficient to undermine confidence in the outcome. *Spencer*, 609 F.3d at 1182; *Williams v. Kemp*, 846 F.2d 1276, 1283 (11th Cir. 1988).

The prosecutor's comments were not improper nor did they render the trial fundamentally unfair. With regard to the first comment, the prosecutor's statement cannot be read as an improper comment on Petitioner's right to remain silent. The prosecutor did not reference Petitioner's failure to testify or give a statement. Further, Florida courts allow attorneys wide latitude during closing arguments. *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). The Florida Supreme Court has stated that "[l]ogical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." *Id.* The prosecutor was making an inference from the evidence that Petitioner committed the crime.

Additionally, the prosecutor's second comment did not amount to an improper shift

of the burden of proof. Federal courts have held that prosecutor must "refrain from make burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence." *See United States v. Sosa*, 208 F. App'x 752, 756-57 (11th Cir. 2006) (quotation omitted); *Cook v. Schriro*, 538 F.3d 1000, 1020 (9th Cir. 2008) ("Prosecutors may comment on the failure of the defense to produce evidence to support an affirmative defense so long as it does not directly comment on the defendant's failure to testify."); *Duncan v. Stynchombe*, 704 F.2d 1213, 1215-16 (11th Cir. 1983) (comments made by a prosecutor in an attempt to point out to the jury the lack of evidence and failure of the defense, as opposed to the failure of the defendant, is not an improper shift of the burden of proof). The State did not suggest that Petitioner was required to produce evidence or prove his innocence.

However, even if the statement was improper, the trial court instructed the jury on the burden of proof, noting that the State was required to prove Petitioner's guilt beyond a reasonable doubt (App. B at 1037-55). It is generally presumed that jurors follow their instructions. *See Ruiz v. Sec'y, Dep't of Corr.*, 439 F. App'x 831, 834 (11th Cir. 2011); *Puiatti v. McNeil*, 626 F.3d 1283, 1314-15 (11th Cir. 2010). Thus, there is no indication that the comment impermissibly shifted the burden of proof to the defense.

Petitioner cannot show, in light of the evidence presented, that there is a reasonable probability that the outcome of the trial would have been different absent these comments. As such, Petitioner has not demonstrated that the state court's denial of this claim was contrary to, or resulted in an unreasonable application of, federal law. Therefore, claim five is denied.

F. Claim Six

Petitioner alleges that trial counsel was ineffective for failing to strike the foreperson of the jury, Kathy Hilligus ("Hilligus") (Doc. 1 at 45). Petitioner asserts that Hilligus failed to disclose her criminal history, and counsel should have stricken her based on the fact that she had previously been convicted of a crime of dishonesty. *Id.* at 47-48. Petitioner also contends that counsel failed to strike this juror due to the fact that she stated she had been a victim of abuse. *Id.* at 48. Alternatively, Petitioner alleges that the State committed a *Brady*[6] violation when it failed to inform defense counsel that Hilligus lied under oath when she failed to report her criminal history. *Id.* at 45, 49-50.

Petitioner raised this claim in his Amended Rule 3.850 motion (App. L at 168-74). The trial court summarily denied this claim pursuant to *Strickland*. *Id.* at 228-30. The trial court also stated that Petitioner had not met his burden of demonstrating that a *Brady* violation occurred. *Id.* The Fifth DCA affirmed *per curiam* (App. Q).

As an initial matter, the Court notes that Petitioner's claim that Hilligus failed to disclose her criminal history is speculative. Petitioner has not provided the Court with any evidence that this juror had a criminal history which she failed to disclose. Instead, Petitioner states "[i]t is common knowledge that a defense attorney is routinely provided with copies of the criminal backgrounds of each potential juror prior to jury selection by the state in a criminal case. The 3.850 motion submitted to the trial court demonstrated that the foreperson of . . . [Petitioner's] jury did not disclose her three prior arrests and convictions during trial" (Doc. 1 at 47). The Rule 3.850 motion did not contain any

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[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

attachments which established that Hilligus had three prior arrests or convictions which she failed to disclose (App. L). There is no indication that counsel was aware that juror Hilligus failed to disclose information. Thus, counsel did not act deficiently in this matter. Petitioner's unsupported allegation does not warrant relief. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991).

Petitioner also alleges that counsel was ineffective for failing to move to strike Hilligus based on her alleged bias. During voir dire, Hilligus indicated that she had been a victim of domestic violence or physical abuse (App. B at 181-83). However, Hilligus stated that her experience would not affect her ability to be a juror. *Id.* at 183. Hilligus also stated that despite her experience she could remain impartial. *Id.* at 183-84.

The test for determining juror competency in Florida is "whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). A party seeking to strike a potential juror for cause must show that "there is a basis for any reasonable doubt" that the juror had a "state of mind which w[ould] enable him to render an impartial verdict. . . ." *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007) (quotation omitted). In light of Hilligus' statement that she could remain impartial, Petitioner cannot demonstrate that any challenge for cause would have been successful.

Additionally, Petitioner alleges that counsel should have used a peremptory challenge to strike Hilligus from the jury. However, prospective jurors are presumed impartial; the challenger to that presumption bears the burden of proving bias, and a conclusory statement that the jurors were biased is insufficient. "To maintain a claim that a biased juror prejudiced him, a petitioner must show that the juror was actually biased

against him." *Diaz v. Sec'y for Dept. of Corr.*, No. 00-cv-4815, 2006 WL 3469522, at *4 (S.D. Fla. Sept. 18, 2006) (citing *Smith v. Phillips*, 455 U.S. 209 (1982)); *Souza v. Sec'y for Dept. of Corr.*, No. 6:07-cv-22, 2008 WL 4826086, at *7 (M.D. Fla. Nov. 4, 2008). Petitioner has not shown that Hilligus was actually biased against him. Therefore, counsel's failure to move to strike Hilligus did not result in prejudice.

The state court's determination is neither contrary to, nor an unreasonable application of, federal law. *See, e.g., Babb v. Crosby*, 197 F. App'x 885, 887 (11th Cir. 2006) (concluding that state court's determination that counsel was not ineffective for failing to strike a juror who was arguably biased was not objectively unreasonable application of federal law).

Finally, Petitioner argues that the State committed a *Brady* violation. To prevail on a *Brady* claim a petitioner must demonstrate (1) the government possessed evidence favorable to the defendant; (2) the evidence was suppressed willfully or inadvertently; and (3) prejudice resulted. *See also Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Petitioner has not shown that the State possessed any information regarding Hilligus' criminal history or had any knowledge with regard to this matter. Moreover, as noted above, there is no indication that Hilligus was biased. Thus, Petitioner has not demonstrated prejudice. Therefore, Petitioner cannot prevail on his claim. Accordingly, claim six is denied.

G. Claim Seven

Petitioner claims trial counsel was ineffective for failing to call Nora Choquette ("Choquette") as a witness (Doc. 1 at 52). Petitioner raised this claim in his Rule 3.850

motion (App. L at 177). The trial court held an evidentiary hearing on this claim (App. M-1).

At the post-conviction evidentiary hearing, defense counsel Jack Maro ("Maro") testified that during his preparation for trial it "came out" that who paid for diapers (Karen or the victim's mother) for the children in the family was a concern. *Id.* at 12. Nonetheless, Maro stated that none of the witnesses testified or indicated that Petitioner kept diapers for the victim in his truck. *Id.* Maro admitted that a defense witness stating this fact would have helped him argue Petitioner had a reason to be outside with the victim the night the crimes occurred. *Id.* at 12-13. Maro also stated that he did not find anyone who would have testified that the victim's injuries occurred prior to the night Petitioner was arrested. *Id.* at 17.

Maro testified that prior to trial, he did not speak to Choquette. *Id* .at 17. Maro stated that Choquette's name was not in his notes. *Id.* Maro did not subpoena anyone to testify on behalf of the defense. *Id.* at 18. On cross-examination, Maro stated that he would not have called any witness who merely would have testified that Petitioner kept diapers in his truck because at the time he had first and last closing argument. *Id.* at 24. Maro opined that he thought "we did a pretty good job" at trial, and as a matter of trial strategy, he did not want to lose his ability to make the final argument to the jury. *Id.* at 24. Maro stated that even if there was evidence that Petitioner changed diapers in his vehicle, it would not have refuted Christine's testimony or the injuries the victim sustained. *Id.* at 25.

Choquette testified that she had visited Petitioner several times in February through June, prior to the crimes occurring. *Id.* at 34. Choquette recalled observing loose diapers in Petitioner's vehicle. *Id.* at 37. According to Choquette, Petitioner would change the

victim's diaper in his vehicle. *Id.* at 37-38. Choquette stated that she saw Petitioner approximately two to four days before his arrest at which time she changed the victim's diaper in his vehicle. *Id.* at 39. Choquette observed "severe redness, blotching, and inflammation" in the victim's genital area. *Id.* Choquette notified Kim about the victim's condition. *Id.* at 40. The photographs of the injuries to the victim's genital area were consistent with what she had observed when changing the victim's diaper. *Id.* Choquette also stated that she spoke to Maro in his office on several occasions. *Id.* Choquette was available to testify at trial. *Id.* at 41-42.

The trial court denied the claim, stating the following:

> Even assuming that Ms. Choquette's testimony is true, her testimony does not refute Ms. Talaga's testimony. In fact, Ms. Choquette's testimony would tend to strengthen Ms. Talaga's opinion as to the timing of the injury. Ms. Choquette testified as to seeing redness and inflammation two to four days prior to the incident; however, Ms. Choquette was unable to describe the extensive damage that the victim received - "bloody," laceration," "bruised," or "very swollen." This supports Ms. Talaga's testimony that the assault that caused the "laceration" and other major damage occurred roughly twelve or so hours before she examined the victim. . . . The weight of the evidence presented at trial was overwhelming and it is highly unlikely that the outcome of the trial would have been different had Ms. Choquette testified.

Id. at 336-37. The Fifth DCA affirmed *per curiam* (App. Q).

Petitioner has not demonstrated that he is entitled to relief on this claim. Choquette's testimony would not have produced an acquittal at trial because her testimony does not refute Talaga's testimony that the sexual battery occurred within twelve hours of Petitioner's arrest. Although Choquette would have testified that she observed redness and inflammation in the victim's genital area two to four days prior to the crime, she did not observe bleeding, lacerations, or bruising. Therefore, any earlier redness and inflammation

would not have absolved Petitioner of the crime. Moreover, even if the jury heard evidence that Petitioner routinely changed the victim's diaper in his vehicle, this testimony also does not refute Christine's testimony that Petitioner had the victim in a closed trash bag or the DNA evidence (App. B at 825-29). The Court concludes that Petitioner cannot demonstrate prejudice, in that there is no indication that but for Maro's actions, the result of the proceeding would have been different.

The state court's denial of this claim is neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim seven is denied pursuant to § 2254(d).

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit. Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus filed by David Curtis Smith (Doc. 1) is **DENIED** and the case is **DISMISSED** with prejudice.

2. The Clerk of Court is directed to enter judgment and close this case.

DONE AND ORDERED in Ocala, Florida, this 16th day of September, 2015.

UNITED STATES DISTRICT JUDGE

OrlP-3
Copies to:
David Curtis Smith
Counsel of Record
Mari Jo Taylor

ATTACHMENT D

866 So.2d 1230 (Table)
(The decision of the Florida District Court of Appeal is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
District Court of Appeal of Florida,
Fifth District

David Curtis Smith

v.

State

NO. 5D04-409

|

February 17, 2004

Appeal From: Cir. Ct. (Marion)

Opinion

Disposition: Aff.

All Citations

866 So.2d 1230 (Table)

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