No. TBA

IN THE
Supreme Court of the United States

ROY HOWARD MIDDLETON, JR.
Petitioner,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Mark S. Inch
and
ATTORNEY GENERAL OF FLORIDA; Ashley Moody,
Respondent(s).

APPENDIX

Appendix A Order of the Eleventh Circuit Court of Appeal denying a certificate of appealability

Appendix B Order of the Eleventh Circuit Court of Appeal denying motion for reconsideration

Appendix C Order from the District Court of Appeal denying petition for writ of habeas corpus

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Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12380-B

ROY HOWARD MIDDLETON,

Petitioner-Appellant,

versus

SECRETARY DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Roy Middleton, a Florida prisoner serving a 35-year sentence for second degree murder with a firearm, filed this *pro se* 28 U.S.C. § 2254 petition, raising three claims:

(1) the state appellate court should have remanded his case for a new trial based on a double jeopardy violation, instead of remanding with instructions to reduce his conviction to a lesser included and re-sentence him accordingly;

(2) trial counsel failed to object to a jury instruction on the forcible felony exception to self-defense, which negated his sole defense; and

(3) trial counsel failed to file a writ of prohibition after the trial court denied his motion to dismiss the indictment based on double jeopardy.

The district court denied the petition and a certificate of appealability ("COA"), which Middleton now seeks in this Court. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must show that reasonable jurists would debate whether (1) the motion states a valid claim of the

denial of a constitutional right, and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). The "unreasonable application" clause permits federal habeas relief if the state court correctly identified the governing legal principle from Supreme Court precedent, but unreasonably applied that principle to the facts of the petitioner's case. *Borden v. Allen*, 646 F.3d 785, 817 (11th Cir. 2011).

In *Mathews*, the Supreme Court held that reducing a defendant's concededly jeopardy-barred conviction to a conviction that concededly was not jeopardy-barred was an adequate remedy for a double jeopardy violation in circumstances like this case. *See Morris v. Mathews*, 475 U.S. 237, 245-46 (1986). The Supreme Court further held that, when a jeopardy-barred conviction is reduced to a conviction for a lesser-included offense that is not jeopardy-barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted for the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense. *Id.* at 246-47.

In Claim 1, Middleton complained about three specific pieces of testimony presented at trial, all of which, he argued, were admitted for the sole reason of proving first-degree murder, the jeopardy-barred offense: (1) he and the victim had been involved in an argument; (2) he had pointed a gun at two people before the shooting; and (3) before the shooting, he tried to sell someone a car, stating that he needed the money because he was leaving the country.

He failed to show prejudice with respect to the first two pieces of testimony because they were admitted as "inextricably intertwined" with the events of this case, and, contrary to Middleton's argument, they were not admitted to prove the intent element of the first-degree murder charge. *See Wright v. State*, 19 So. 3d 277, 292 (Fla. 2009). With regard to the final piece of testimony, he failed to show prejudice, even if that testimony was admitted to prove premeditation, as, on cross-examination, the witness conceded that it was Middleton's girlfriend, not Middleton, who supposedly sought to leave the country. Moreover, as the state court noted, Middleton admitted to shooting the victim, fleeing the scene, and disposing of the gun. Accordingly, a COA is not warranted on this claim.

To succeed on a claim of ineffective assistance of counsel, a 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." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Here, Middleton failed to establish prejudice for Claim 2 because the evidence at trial independently negated Middleton's self-defense theory. Thus, he could not show that the outcome at trial would be different, had the trial court not given that instruction.

Finally, Claim 3 was unexhausted and not "substantial" because Middleton failed to demonstrate prejudice. *See Martinez v. Ryan*, 556 U.S. 1, 14 (2012). He failed to show a reasonable probability of acquittal in light of all the other evidence that supported his guilt and undermined a theory of self-defense. Accordingly, and in light of the above, this COA motion is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

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Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12380-B

ROY HOWARD MIDDLETON,

Petitioner-Appellant,

versus

SECRETARY DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: WILSON and NEWSOM, Circuit Judges.

BY THE COURT:

Roy Middleton has filed a motion for reconsideration of this Court's December 3, 2019, order, denying a certificate of appealability, following the denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. Upon review, Middleton's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ROY HOWARD MIDDLETON

VS CASE NO. 3:17-CV-261-MCR-EMT

SECRETARY DEPARTMENT OF CORRECTIONS

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is DENIED.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

May 23, 2019
DATE

/s/ A'Donna Bridges
Deputy Clerk: A'Donna Bridges