IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10082-D

DOVED BEN DOWNER,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

To merit a certificate of appealability, an appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Appellant's motion for a certificate of appealability is DENIED because he failed to make the requisite showing. His motion for appointment of counsel is DENIED AS MOOT.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX - A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DOVED BEN DOWNER,

Petitioner,

v.

Case No: 6:17-cv-1629-Orl-22TBS

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

Respondents.
_____/

ORDER

This case is before the Court on Petitioner Doved Ben Downer's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition ("Response," Doc. 13) and a Supplemental Response (Supplemental Response," Doc. 21) in compliance with this Court's instructions. Petitioner filed a Reply to the Response and a Reply to the Supplemental Response (Doc. Nos. 19, 22).

Petitioner asserts thirteen grounds for relief. For the following reasons, the Petition is denied.

I. PROCEDURAL HISTORY

A jury convicted Petitioner of racketeering (Count One) and acquitted him of money laundering (Count Two). (Doc. 14-2 at 13-14.) The trial court sentenced Petitioner to a twenty-five-year term of imprisonment. (*Id.* at 21.) Petitioner appealed, and the Fifth

APPENDIX - B

District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (Doc. 14-4 at 315.)

Petitioner filed a state habeas petition. (*Id.* at 329-43.) The Fifth DCA summarily denied relief. (Doc. 14-7 at 15.)

Petitioner filed a motion for postconviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which he amended. (*Id.* at 17-97.) The state court denied the motion. (*Id.* at 134-46.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (Doc. 14-8 at 135.)

II. LEGAL STANDARDS

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

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

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

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

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d

1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.*

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard For Ineffective Assistance Of Counsel

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of

reasonableness"; and (2) whether the deficient performance prejudiced the defense.[1] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

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

III. ANALYSIS

A. Ground One[2]

Petitioner contends the trial court violated his right to due process by admitting testimony regarding uncharged crimes or bad acts without notice. (Doc. 1 at 6.) In support of this ground, Petitioner complains that Catherine Chisem ("Chisem") testified that Petitioner sold her marijuana for resale and sold beer at his club without a license. (*Id.*)

Petitioner raised this ground on direct appeal. (Doc. 14-4 at 276-77.) The Fifth DCA affirmed *per curiam*. (*Id.* at 315.)

> We review state court evidentiary rulings on a petition for habeas corpus to determine only whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial. Erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a crucial, critical, highly significant factor in the [defendant's] conviction.

Jacobs v. Singletary, 952 F.2d 1282, 1296 (11th Cir. 1992) (internal quotation marks and citations omitted). Additionally, in cases involving review of a state criminal judgment pursuant to 28 U.S.C. § 2254, "an error is harmless unless it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Fry v. Pliler*, 551 U.S. 112, 116, 127 (2007) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)).

The state court's denial of this ground is not contrary to, or an unreasonable application of, federal law. Petitioner did not object to Chisem's testimony. More

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[2] Grounds One, Two, and Four were not raised as federal issues in the state court. Consequently, they are unexhausted. Respondents, however, do not argue that these grounds are procedurally barred from review. The Court will not *sua sponte* raise the procedural default bar.

importantly, four of the eighty predicate incidents for the racketeering charge in the amended information alleged that Petitioner either sold alcohol at his club without a license (Predicate Incident Two) or actually or constructively possessed cannabis on January 2, 2001, January 28, 2003, and April 29, 2003 (Predicate Incidents Sixteen, Seventy-Nine, and Eighty). (Doc. 14-2 at 24, 30, 56-57.) Consequently, Petitioner was charged in Count One with these acts and testimony that Petitioner sold alcohol without a license and possessed cannabis were elements of Count One. Petitioner has not demonstrated that the evidence was inadmissible or that its admission denied him a fair trial. Accordingly, ground one is denied pursuant to § 2254(d).

B. Ground Two

Petitioner asserts that the trial court erred by allowing the State to amend the information on the third day of trial. (Doc. 1 at 9.) According to Petitioner, on the third day of trial, the State amended the information to add the four predicate incidents concerning the sale of alcohol and possession of cannabis. (*Id.*)

Petitioner raised this ground on direct appeal. (Doc. 14-4 at 278.) The Fifth DCA affirmed *per curiam*. (*Id.* at 315.)

The record reflects that the State amended the information on September 23, 2004, before the trial started on October 11, 2004. *See* Doc. 14-1 at 10; *see also* Doc. 14-4 at 8 (trial court referencing the amended information). During the trial, the prosecution moved to amend the amended information solely to correct a scrivener's error regarding the year that Predicate Incident Sixteen occurred, 2002 versus 2004. (Doc. 14-4 at 8-10.) The defense objected, but the trial court overruled the objection finding there was no prejudice

because discovery had disclosed that the predicate incident occurred in 2002. (*Id.* at 10.)

Petitioner has not demonstrated that the trial court improperly allowed the State to amend the information during trial to correct a scrivener's error. Pursuant to Florida law, "the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant." *State v. Anderson*, 537 So. 2d 1373, 1375 (Fla. 1989). The discovery provided to the defense included documents indicating the correct year Predicate Incident Sixteen occurred. Petitioner did not demonstrate any prejudice to the defense in allowing the correction of the scrivener's error. Accordingly, ground two is denied pursuant to § 2254(d).

C. Ground Three

Petitioner maintains the trial court erred by denying his motion for judgment of acquittal. (Doc. 1a t 11.) According to Petitioner, the State failed to present evidence of a past or ongoing criminal enterprise. (*Id.*)

Petitioner raised this ground on direct appeal. (Doc. 14-4 at 278.) The Fifth DCA affirmed *per curiam*. (*Id.* at 315.)

The standard of review in a federal habeas corpus proceeding when the claim is one of sufficiency of the evidence was articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979). In considering a claim of insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *Johnson v. Alabama*, 256 F.3d 1156, 1172 (11th Cir. 2001). Federal

courts may not reweigh the evidence. *Jackson*, 443 U.S. at 319. It is the duty of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id.*

Pursuant to Florida law, in relevant part an "[e]nterprise' means any individual, sole proprietorship, partnership, . . . , or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities." Fla. Stat. § 895.02(3) (2004). The evidence presented at trial included testimony from numerous witnesses that over a period of approximately two-years Petitioner possessed cannabis, which he sold and provided to others for resale, sold alcohol at his club without a license, and paid several individuals to wire large sums of money to California to recipients with made up names. Viewing this evidence in the light most favorable to the prosecution, the Court concludes that any rational trier of fact could have found the element of an ongoing criminal enterprise beyond a reasonable doubt. Accordingly, ground three is denied pursuant to § 2254(d).

D. Ground Four

Petitioner asserts the trial court erred by allowing the jury to consider Predicate Incidents Two, Sixteen, Seventy-Nine, and Eighty to support a conviction for racketeering and by failing to have the jury make a special finding on the verdict form to indicate the predicate acts it found to support the racketeering conviction. (Doc. 1 at 15.) Petitioner argues that possession of cannabis and sale of alcohol without a license focus on the act

of a single person and thus cannot constitute a criminal enterprise as required for a racketeering conviction. (*Id.*)

Petitioner raised this ground on direct appeal. (Doc. 14-4 at 283-86.) The Fifth DCA affirmed *per curiam*. (*Id.* at 315.)

Petitioner did not raise ground four as a constitutional issue. Instead, it is premised solely on issues of state law. A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief because no question of a constitutional nature is involved. *See Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983); *Llamas-Almaguer v. Wainwright*, 666 F.2d 191 (5th Cir. 1982). Federal courts "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) (citing *Spencer v. Texas*, 385 U.S. 648 (1967)).

Furthermore, to the extent this ground raises a federal issue, Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, clearly established federal law. As discussed in ground three, the evidence presented at trial included testimony from numerous witnesses that over a period of approximately two-years Petitioner possessed cannabis, which he sold and provided to others for resale, sold alcohol at his club without a license with the assistance of others, and paid several individuals to wire large sums of money that smelled like cannabis to California to recipients with made up names. Thus, Petitioner has not demonstrated that his possession of cannabis and sale of alcohol could not support a criminal enterprise under state law. *See* Fla. Stat. §§ 895.02(3), (4) (defining "enterprise" and "pattern of racketeering activity").

Moreover, Petitioner has not cited, nor is the Court aware of, any Supreme Court precedent requiring special verdict forms for individual elements of an offense. The Supreme Court has held that "a jury in a federal criminal case brought under [21 U.S.C.] § 848 must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" *Richardson v. United States*, 526 U.S. 813, 815 (1999). *Richardson*, however, does not require the use of a special verdict form. *See United States v. Raysor*, Nos. 99-1503(L), 99-1504(CON), 2001 WL 36037731, at *5 (2d Cir. Apr. 29, 2002) ("[T]here is no basis for the conclusion that *Richardson* requires that a jury be supplied with a special verdict form in order for it to arrive at a unanimous verdict regarding the individual violations."). The jury in the instant case was instructed that it had to unanimously agree about which two predicate incidents Petitioner committed. (Doc. 14-2 at 99.) Accordingly, ground four is denied pursuant to § 2254(d).

E. Ground Five

Petitioner contends that appellate counsel rendered ineffective assistance by failing to argue that his acquittal on the money laundering charge negated his conviction for racketeering. (Doc. 1 at 18.) According to Petitioner, because the jury acquitted him of money laundering, the trial court was collaterally estopped from convicting him of racketeering. (*Id.*)

Petitioner raised this ground in his state habeas petition. The Fifth DCA summarily denied relief. (Doc. 14-7 at 15.)

The state court's denial of this ground is not contrary to, or an unreasonable

application of, *Strickland*. In addition to the seventy-six predicate incidents of money laundering, the amended information charged Petitioner with four predicate incidents that were not money laundering. Thus, the racketeering charge was not premised solely on predicate acts of money laundering. Consequently, Petitioner's conviction for racketeering was not inconsistent with his acquittal of money laundering. Therefore, counsel was not deficient for failing to raise this issue on appeal nor did prejudice result from counsel's failure to do so. Accordingly, ground five is denied pursuant to § 2254(d).

F. Ground Six

Petitioner asserts appellate counsel rendered ineffective assistance by failing to argue that the State failed to prove the nexus between the predicate acts of sale of alcohol and possession of marijuana and the object of the enterprise – the transfer of money from proceeds of drug activity. (Doc. 1 at 20.)

Petitioner raised this ground in his state habeas petition. The Fifth DCA summarily denied relief. (Doc. 14-7 at 15.)

The state court's denial of this ground is not contrary to, or an unreasonable application of, *Strickland*. Petitioner's possession of cannabis and sale of alcohol without a license were part of the pattern of racketeering alleged in the charging document. The State presented evidence that the predicate incidents were related to the racketeering enterprise. Namely the possession of cannabis and sale of alcohol were related to illegally obtaining money to be transmitted. Consequently, a nexus did exist to the predicate acts of possession of marijuana and sale of alcohol without a license and the object of the enterprise. Therefore, counsel was not deficient for failing to raise this issue on appeal,

nor did prejudice result from counsel's failure to do so. Accordingly, ground six is denied pursuant to § 2254(d).

G. Ground Seven

Petitioner asserts counsel rendered ineffective assistance by failing to object to evidence of his possession of cannabis or to move for a judgment of acquittal based on the purported irrelevant evidence. (Doc. 1 at 22.) In support of this ground, Petitioner contends there was no evidence that he acted as part of an enterprise to possess the cannabis. (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief. (Doc. 14-7 at 138-40.) The state court reasoned *inter alia*:

> The possession of marijuana was intrinsic to the eventual sales generating the proceeds that Chisem and others assisted Defendant to wire to California, and the handling of the marijuana was intrinsic to the preparation for commercial sale. Marijuana was located after Defendant's arrest by law enforcement in the "gully" behind Defendant's parent's home in broken down cars, along with FedEx receipts similar to the ones accompanying the marijuana delivered to Defendant on a controlled delivery from California.
>
> The Court agrees with the State in its Response that it is "a misrepresentation of the evidence to suggest that the marijuana possession crimes charged as predicate incidents were unassociated with the RICO charge or with the money laundering crimes also charged as predicate incidents. All such crimes charged were committed in furtherance of Mr. Downer's criminal marijuana importation and distribution business."

(*Id.* at 139) (citations omitted). The state court concluded, therefore, that counsel had no reason to object or move for a judgment of acquittal on this basis and prejudice did not result based on counsel's failure to do so. (*Id.*)

The state court's denial of this ground is neither contrary to, nor an unreasonable

application of, *Strickland*. As discussed *supra*, the predicate incidents of possession of cannabis were related to the criminal enterprise. Namely Petitioner's possession of cannabis, which he sold and provided to others in the enterprise, was used to obtain money, which was then transmitted by individuals in the enterprise. Consequently, counsel was not deficient for failing to object to this evidence or move for a judgment of acquittal on this basis, and a reasonable probability does not exist that the outcome of the trial would have been different had counsel done so. Accordingly, ground seven is denied pursuant to § 2254(d).

H. Ground Eight

Petitioner maintains counsel rendered ineffective assistance by failing to object or move for a judgment of acquittal because the sale of alcohol was not a continuing act. (Doc. 1 at 24.) In support of this ground, Petitioner argues that he obtained a license after he was raided on October 13, 2001, and none of the proceeds from the alleged criminal activity were related to the common intent of the enterprise. (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief. (Doc. 14-7 at 142.) The state court noted that the predicate incidents did not have to be related to each other, but to the affairs of the enterprise. (*Id.*) The state court reasoned that the unlicensed sale of alcohol generated illegal proceeds and was relevant to Petitioner's participation in the importation and distribution of cannabis as related to the enterprise. (*Id.*) The state court, therefore, determined counsel was not deficient and prejudice did not result from counsel's performance. (*Id.*)

The state court's denial of this ground is not contrary to, or an unreasonable application of, *Strickland*. Pursuant to Florida law, to prove the offense of racketeering, the State must prove:

> (1) the existence of an enterprise, which the defendant was employed by or associated with in committing the crimes, (2) a pattern of racketeering activity, and (3) at least two "incidents" of racketeering or racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

Shimek v. State, 610 So. 2d 632, 635 (Fla. 1st DCA 1992) (quoting *Boyd v. State*, 578 So. 2d 718 (Fla. 3d DCA 1991)).

Shakina Bing ("Bing"), who admitted to police that Petitioner gave her cannabis that she sold, testified that Shanqua Carrington ("Carrington") worked behind the bar of Petitioner's club and she (Bing) helped occasionally with alcohol sales. (Doc. 14-3 at 144-45.) Dennis Baldwin also testified that he sold alcohol at Petitioner's club and wired money to California for Petitioner. (*Id.* at 239-45.) Bing and Carrington also transmitted money for Petitioner to California. (*Id.* at 115.) Petitioner's sale of alcohol without a license and possession of cannabis encompassed conduct that had the same intent, *i.e.*, generating illegal money, and the predicate incidents had the same accomplices or methods of commission. Counsel, therefore, was not deficient for failing to object or move for a judgment of acquittal based on the sale of alcohol predicate incident. Furthermore, prejudice did not result from counsel's failure to do so, particularly given that there were three possession of cannabis predicate incidents from which the jury could have found

the requisite two predicate incidents. Accordingly, ground eight is denied pursuant to § 2254(d).

I. Ground Nine

Petitioner asserts counsel rendered ineffective assistance by failing to argue that the jury's verdict on the money laundering charge negated the verdict on the racketeering charge. (Doc. 1 at 26.) Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief. (Doc. 14-7 at 143-44.) The state court reasoned that the jury's acquittal of Petitioner for money laundering did not create an inconsistent verdict with the racketeering verdict. (*Id.* at 143.) The state court, therefore, concluded that counsel was not deficient, and prejudice did not result from counsel's performance. (*Id.* at 144.)

The state court's denial of this ground is not contrary to, or an unreasonable application of, *Strickland*. As discussed in ground five *supra*, the racketeering charge included four predicate incidents that were not money laundering. Thus, the racketeering charge was not premised solely on predicate incidents of money laundering. Petitioner's conviction for racketeering was not inconsistent with his acquittal of money laundering. Therefore, counsel was not deficient for failing to raise this argument nor did prejudice result from counsel's failure to do so. Accordingly, ground nine is denied pursuant to § 2254(d).

J. Ground Ten

Petitioner contends counsel rendered ineffective assistance by failing to argue there was no nexus between the predicate incidents of sale of alcohol and possession of marijuana and the object of the criminal enterprise. (Doc. 1 at 28.) According to Petitioner,

the sale of alcohol without a license and possession of marijuana were isolated incidents, which either did not produce any proceeds linked to the criminal enterprise or which no proof was admitted showing such. (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief, concluding counsel was not deficient and prejudice did not result from counsel's performance. (Doc. 14-7 at 144.)

Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, *Strickland*. As noted previously in ground six, Petitioner's possession of the marijuana and sale of alcohol without a license were part of the pattern of racketeering alleged in the amended information. The State presented evidence that the predicate incidents were related to the criminal enterprise. Namely the possession of cannabis and sale of alcohol were related to Petitioner illegally obtaining money to be transmitted for either the import or export of drugs. Consequently, a nexus existed between the predicate acts of possession of marijuana and sale of alcohol without a license and the object of the enterprise. Counsel, therefore, was not deficient for failing to argue that the predicate incidents of sale of alcohol without a license and possession of marijuana had no nexus to the criminal enterprise, nor did prejudice result from counsel's failure to do so. Accordingly, ground ten is denied pursuant to § 2254(d).

K. Ground Eleven

Petitioner asserts counsel rendered ineffective assistance by failing to request a complete jury instruction on possession of marijuana. (Doc. 1 at 30.) According to

Petitioner, the jury should have been instructed that the State had to prove Petitioner had knowledge of the marijuana's presence on his parents' property. (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief. (Doc. 14-7 at 144-45.) The state court concluded that a reasonable probability did not exist that the outcome of the trial would have been different had the jury been instructed that it must find Petitioner had knowledge of the presence of marijuana because the evidence established that Petitioner knew of the presence of the marijuana. (*Id.*)

The state court's denial of this ground is not contrary to, or an unreasonable determination of, *Strickland*. The jury was instructed that it had to find Petitioner actually or constructively possessed the cannabis. (Doc. 14-2 at 100.) The trial court instructed the jury that "[i]f a thing is in a place over which the person has control or in which the person has hidden or concealed it, it is in constructive possession of that person." (Doc. 14-4 at 196.) The evidence presented at trial established that Petitioner hid or stored his marijuana on his parent's property, that the marijuana was found in the location described by Chisem where she saw Petitioner place marijuana, and Western Union records were found similar to the records from the wire transfers Petitioner paid others to make. (Doc. Nos. 14-3 at 36-38; 14-4 at 60-67, 70, 73.) Ample evidence, therefore, was presented demonstrating that Petitioner knew about the marijuana and possessed it. Therefore, a reasonable probability does not exist that the outcome of the trial would have been different had counsel asked the court to instruct the jury it had to find that Petitioner knew of the marijuana's presence on his parents' property. Accordingly, ground eleven is denied pursuant to § 2254(d).

L. Grounds Twelve and Thirteen

In ground twelve, Petitioner asserts counsel rendered ineffective assistance by failing to file a pretrial motion to dismiss the three possession of cannabis predicate incidents of Count One because possession of marijuana is an insufficient predicate incident for a racketeering charge. (Doc. 1 at 32-34.) In ground thirteen, Petitioner contends counsel rendered ineffective assistance by failing to advise him that he could testify. (*Id.* at 34.) According to Petitioner, had counsel advised him he could testify, Petitioner could have testified about where the money came from to negate the State's theory that it was derived from illicit activity and that the marijuana was for personal use. (*Id.*)

Respondents maintain that these grounds are procedurally barred because the state court found ground twelve to be untimely filed and Petitioner never raised ground thirteen in the state court. (Doc. 13 at 7-8.) One procedural requirement precludes federal courts, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Specifically, 28 U.S.C. § 2254 provides in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or

> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Thus, a federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012). In addition, a federal habeas court is precluded from considering claims that are not exhausted but would clearly be barred if returned to state court. *Id.* at 735 n.1 (stating that if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims).

In order to satisfy the exhaustion requirement, a state petitioner must "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard*, 404 U.S. at 275-76) (internal quotation marks omitted). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998). Furthermore, "[i]n Florida, exhaustion usually requires not only the filing of a Rule 3.850 motion, but an appeal from its denial." *Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979) (citing *Lee v. Wainwright*, 468 F.2d 809, 810 (5th Cir. 1972)).

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Id.* The Supreme Court of the United States has also held that if "a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim. . ." when (1) "the state courts did not appoint counsel in the initial-review collateral proceeding" or (2) "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective" pursuant to *Strickland*. *Martinez*, 566 U.S. at 14. In such instances, the prisoner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* Finally, to establish "prejudice" so as to warrant review of a procedurally defaulted claim, a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different. *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (citations omitted).

The second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, in which a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496

(1986). Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In addition, "'[t]o be credible,' a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

Petitioner concedes that ground twelve was found to be untimely and ground thirteen was not raised in the state court. Thus, these grounds are procedurally barred from review absent application of an exception to the procedural default bar. To overcome the procedural default, Petitioner relies on *Martinez*. Respondents argue that these grounds are not substantial.[3]

With respect to ground twelve, Petitioner was charged with racketeering (Count One) in violation of Section 895.03(3) of the Florida Statutes and money laundering in violation of Section 896.101 of the Florida Statutes (Count Two). (Doc. 14-2 at 23.) The racketeering charge alleged that Petitioner engaged in at least two incidents of racketeering activity as defined in Section 895.02(1)(b) of the Florida Statutes. (*Id.*) Section 895.02(1)(b) specified that a predicate incident for racketeering is "[a]ny conduct defined as 'racketeering activity' under 18 U.S.C. § 1961(1)." Fla. Stat. § 895.02(1)(b) (2004). Pursuant to the federal statute, "racketeering activity" is defined in pertinent part as

[3] The Court notes that it is questionable whether *Martinez* applies to ground twelve because Petitioner did not appeal the state court's denial of this ground as untimely. *See* Doc. 14-8 at 114. The Court, however, will address ground twelve under *Martinez* in an abundance of caution.

"dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year[.]" 18 U.S.C. § 1961(1) (2004).

The amended information charged eighty predicate incidents consisting of seventy-six predicate incidents of money laundering, three predicate incidents of possession of cannabis in violation of Section 893.13(6) of the Florida Statutes, and one predicate incident of sale of alcohol without a license. (Doc. 14-2 at 23-57.) To convict Petitioner of racketeering, the jury had to find that Petitioner committed two of the predicate incidents. (Doc. 14-2 at 72.) The jury acquitted Petitioner of the money laundering count charged in the amended information (Count Two). (*Id.* at 14.)

Federal courts have held that "[s]imple possession of [a controlled substance] does not even constitute a RICO predicate offense." *United States v. Krout*, 66 F.3d 1420, 1431–32 (5th Cir. 1995). Consequently, it is not clear that possession of cannabis could be a predicate incident under Section 895.02(1)(b) of the Florida Statutes to support a racketeering charge.

Respondents concede that the State mistakenly charged Petitioner with racketeering activity defined in Section 895.02(1)(b) of the Florida Statutes. (Doc. 21 at 2.) As argued by Respondents, however, possession of marijuana is a racketeering activity under Section 895.02(1)(a) of the Florida Statutes. *See* Fla. Stat. § 895.02(1)(a)(40) (2004). Furthermore, under Florida law, the State may amend the information any time before trial. *See* Fl. R. Crim. P. 3.140(j) ("An information on which the defendant is to be tried that charges an offense may be amended on the motion of the prosecuting attorney or

defendant at any time prior to trial because of formal defects."). Therefore, had counsel moved to dismiss the three possession of cannabis predicate incidents charged in Count One prior to trial, the State would have been allowed to amend the information to charge Petitioner with racketeering activity by possession of marijuana under Section 895.02(1)(a). As a result, Petitioner has not demonstrated that a reasonable probability exists that the outcome of the trial would have been different had counsel filed a pretrial motion to dismiss the three possession of cannabis predicate incidents. Thus, ground twelve is not substantial, and this ground is procedurally barred from review.

With respect to ground thirteen, Petitioner has not demonstrated that counsel was deficient or that prejudice resulted. Initially, the Court notes that Petitioner does not provide specific testimony that he would have given at trial had he testified, except that the marijuana he possessed was for his personal use. (Doc. 1 at 34.) Testimony, however, was admitted indicating that Petitioner provided marijuana to individuals for sale. Furthermore, from the record, Petitioner knew that he could testify. *See* Doc. No. 14-3 at 13; 14-4 at 219. Counsel advised Petitioner that it would be better for him not to testify. (Doc. 14-4 at 219.) Thus, counsel did not advise Petitioner he could not testify. Finally, Petitioner has not demonstrated that a reasonable probability exists that the outcome of the trial would have been different had he testified. Consequently, ground thirteen is not substantial and is procedurally barred.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for 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 such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

2. Petitioner is **DENIED** a Certificate of Appealability.

3. The Clerk of the Court is directed to enter judgment accordingly and close this case.

DONE and **ORDERED** in Orlando, Florida on June 5, 2019.

Anne C. Conway

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DOVED BEN DOWNER,

Petitioner,

v. Case No: 6:17-cv-1629-Orl-22TBS

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

Respondents.
_____/

ORDER

This case is before the Court on the following matters:

1. Petitioner's for Reconsideration (Doc. 25) is **DENIED**. Petitioner requests the Court to reconsider the denial of his habeas petition.

Rule 59 permits courts to alter or amend a judgment based on "newly-discovered evidence or manifest errors of law or fact." *Anderson v. Fla. Dep't of Envitl. Prot.*, No. 13-13955, 2014 WL 2118984, *1 (11th Cir. May 22, 2014) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)) (quotation marks and alterations omitted). Therefore, "[a] movant 'cannot use a Rule 59(e) motion to relitigate old matters' or 'raise argument[s] or present evidence that could have been raised prior to the entry of judgment." *Levinson v. Landsafe Appraisal Services, Inc.*, 558 F. App'x 942, 946 (11th Cir. 2014) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)). Rule 60(b) provides:

> [T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)-(6).

Review of the motion indicates that Petitioner is attempting to relitigate his claims. Petitioner has not demonstrated the existence of newly-discovered evidence or manifest errors of law or fact. The Court concludes Petitioner has failed to establish a sufficient basis warranting the relief requested.

2. This Court should grant an application for 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). Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida on November 25, 2019.

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party

File copy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DOVED BEN DOWNER
Petitioner,

v. Case No.: 6:17-CV-1629-ORL-22TBS

SECRETARY, DEPARTMENT OF CORRECTIONS, ET. AL.
Respondents.
_____/

PETITIONER MOTION FOR RECONSIDERATION

Pursuant to Rule 52(b) and 59 of the State District Court for the Middle District of Florida, and rules governing section 2254 cases in the United States District Courts in response to denial of the instant Petition for Writ of Habeas Corpus filed on September 6, 2017 and denied on June 5, 2019. The Court has overlooked or misconstrued Claim 3 of Petitioner Writ of Habeas Corpus. Petitioner maintains the court erred by denying his motion for judgment of acquittal. The State failed to present evidence of a past or ongoing criminal enterprise. As this court points out the standard of review in a Federal Habeas Corpus when the claim is one of sufficiency of the evidence is that the "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" Jackson, 443 U.S. at 319; Jackson v. Alabama,

APPENDIX - C

256 F.3d 1156, 1172 (11th Cir. 2001). Federal court may not reweigh the evidence. Jackson, 443 U.S. at 319. It is the duty of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inference from the facts. It is clearly established by federal law that an enterprise must consist of a common purpose of engaging in course of conduct that is illegal based on the pattern of racketeering activity as defined under the statute charged. In Petitioner's case the amended information in (Count One) defined the racketeering activity by the federal statute defining the incidents of racketeering activity which excludes simple possession under 893.13(6) and Sale of Alcohol without a License under 562.12(1). The trier of fact in this case found that the common purpose of the enterprises was not money laundering, which one of the essential elements of the crime charged being the funds or property involved in the financial transaction did in fact represent the proceeds of "specified unlawful activity" in this case the sale, purchase, delivery, possession, or brining into the State cannabis. The State's theory at trial was an open ended pattern of racketeering activity as stated in the statement of particular in this case. The trier of fact not guilty verdict to the substantive money laundering count which were identical to the jury instruction for the specified unlawful activity for the money laundering predicate incidents. Whatever the trier of fact found lacking for the substantive offense was necessarily lacking for the predicate incident of racketeering. Since all of the crimes for which

the common purpose of engaging in a curse of conduct that meet the standard of racketeering activity as defined under the statute charged were dismissed or acquitted. The state failed to present evidence of a past or ongoing enterprise to support the racketeering charge. It is clearly established federal law that an enterprise must consist of a common purpose of engaging in a course of activity that would be illegal as defined under the statute charged. After reviewing the evidence in light most favorable to the prosecution no rational trier of fact could have found the essential element of the crime. An enterprise that consist of a common purpose of engaging in a course of conduct that is illegal based on the pattern of racketeering activity as defined under the statute charged. Petitioner point to the statement of particulars filed in this case. And the states response to defendant's motion in limine. In support of claim 3, the denial of this claim 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.

Ground 5

Petitioner contends that appellate counsel rendered ineffective assistance by failing to argue that his acquittal on the money laundering charge negated his conviction for racketeering. This court point out in addition to the seventy-six predicate incidents of money laundering, the amended information charged Petitioner with four predicate incidents that were not money laundering. Thus, the

racketeering charge was not premised solely on predicate incidents of money laundering. Consequently, Petitioner conviction for racketeering was not inconsistent with his acquittal of money laundering. Petitioner points to the statement of particulars filed in this case as to the amended information charged. 1) The illegal activity alleged as the underlying basis of the money laundering predicate in predicates 1, 3 through 15, and 17 through 78, and in Count 2 are the same whatever was lacking for count 2 was also lacking for racketeering. The Florida Supreme Court in Gross v. State, 756 So.2d 39 (Fla. 2000) specifically held that "in order to prove RICO's enterprise element, the State must prove the following two elements (1) an ongoing organization, formal or informal, with a common purpose of engaging in a course of conduct, which (2) functions as a continuing unit. Petitioner also points to the State's response to defendant's motion in limine (3) the defense further boldly asserts that there is somehow no connection between the alleged predicate and the racketeering charge. It is the State's position that the information properly alleges that Defendant did conduct or participate, directly or indirectly, in such enterprise through a continuing pattern of racketeering activity as defined in Florida Statute 895.02(2), by engaging in at least two incidents of racketeering activity as defined in Florida Statute 895.02(1)(b), which had similar intents, result, accomplices, victims, or methods of commission, or which were otherwise related by distinguishing characteristics and were not

isolated incidents, including at least two of the following, in violation of Florida Statute 895.03(3): as the common purpose of the enterprise could not be money laundering which would make Petitioner conviction for racketeering inconsistent with his acquittal of money laundering, and the remaining four predicate incidents 2, 16, 79, and 80. Which were excluded from definition used in Florida Statute 895.02(1)(b). As the State properly alleged in the information charged. Therefore counsel was deficient for failing to raise this issue on appeal. The error was fundamental because the jury finding of not guilty as to the money laundering negated a finding of guilt as to racketeering the State completely failed to prove the charges of racketeering against Petitioner and this failure is fundamental error. The guilty verdict could not be reached without the assistance of the alleged error or Petitioner conduct did not legally constitute a crime.

Ground Six

Petitioner asserts appellate counsel rendered ineffective assistance by failing to argue that the State failed to prove the nexus between the predicate incident of sale of alcohol and the possession of marijuana and the object of the enterprise the transfer of money from proceeds of drug activity. Petitioner contends the denial of this ground 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 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. The fact that Petitioner charging information clearly states the money laundering prohibition in 18 U.S.C. 1956(a)(1). In Petitioner case the states amended information in Count One defined the incidents of racketeering activity by Stat. 895.02(1)(b) Fla. Stat. which cross referenced to 18 U.S.C. Stat. 1961(1). This enabled the state to charge Petitioner with federal money laundering predicate incidents under 18 U.S.C. 1956. As the charging information in this case specifically defined the incidents of racketeering activity by federal standards, the State and Court are bound under the statutory construction rule of ejusdem generis. The general category of other crimes dangerous to life, limb, or property and punishable by imprisonment for more than one year must be construed as applying only to crimes of the same kind as those precisely stated in the statute. Under the definition as used in this chapter (18 U.S.C. 1961(1)) defining racketeering activity. Simple possession of marijuana in violation of Florida Statute 893.13(6). Nor sale of alcohol without a license in violation of Florida Statute 562.12(1) can not be charged as predicate incidents under the federal RICO statute or the federal money laundering statutes 18 U.S.C. 1961(1)(A)(D); or 18 U.S.C. 1956(a)(1). By these facts it is clearly established federal law that the proof of any crime which is chargeable by indictment or information under the specific provision of the statute enumerated therein could not of been predicate incidents 2, 16, 79, and 80 sale of

alcohol without a license and simple possession of marijuana because they do not meet the standard of racketeering activity as defined under the statute enumerated therein. Therefore the State failed to prove the nexus between them. This court reason for denial of this ground is possession of cannabis and sale of alcohol were related to illegally obtaining money to be transmitted. The jury nor this court was entitled as a matter of law to infer proceeds from the sale of alcohol without a license. As sale of alcohol without a license is a misdemeanor as charged under § 562.12(1). And can not be used to support the predicate incidents of money laundering under racketeering under 18 U.S.C. 1956 or the substantive money laundering under Florida Statute 896.101 as one of the essential elements of both are the defendant knew that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity. The definitions of the term knowing that the funds or property involved in a financial transaction represented the proceeds of some form of unlawful activity "mean that the Defendant knew the property that such funds or property represented proceeds from some form though not necessarily which form, of a felony under State or Federal law. Which excluded sale of alcohol without a license under 562.12(1). Also it is not legally permissible to infer from simple possession the proof of a specific intent crime of sale. Furthermore the facts in this case show that no proceeds came from any of the possession predicate incidents as the State was in

possession of the marijuana an no money could have been obtained to be illegally transmitted. Thus there could be no nexus to the money that was transmitted and the fact that predicate incidents 79 and 80 happened after the last money transaction took place.

Ground Seven

Petitioner alleges in claim seven that trial counsel was ineffective for failing to object to the evidence of possession of marijuana or move for a judgment of acquittal because the evidence was not relevant and the State failed to prove that the possession was relevant to the racketeering charge. Petitioner in this case was charged with incidents of racketeering activity by Stat. 895.02(1)(b) Fla. Stat. which cross referenced to 18 U.S.C. Stat. 1961(1). As the charging information specifically defined the incidents of racketeering activity by federal standards. The referenced state law violation in predicate incidents 2, 16, 79 and 80 were not relevant to the racketeering charge. Under the statutory construction rule of ejusdem generis as applying only to crimes of the same kind as those precisely stated in the statute under the definitions as used in Chapter 18 U.S.C. Stat. 1961(1) defining racketeering activity simple possession of marijuana in violation of Florida Statute 893.13(6) cannot be charged as a predicate incident under the federal RICO statute or federal money laundering. In Petitioner trial they were which 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. Petitioner points to the State's response to Defendant's Downer's motion for statement of particulars / statement of particulars and State's response to Defendant's Motion in limine which Petitioner will add as a Exhibit to the Motion for ~~Rehearing~~ Certificate of Appealability The State in this case failed to make a prima facie case at trial. The trial court has the authority and obligation to grant a judgment of acquittal. The State argues possession was intrinsic to the eventual illegal sales which generated proceeds that were the subject of the money laundering. The Petitioner points two in the statement of particulars and the State's response to Defendant's motion in limine. As to the amended information filed in this cause 1) the illegal activity alleged as the underlying basis of the money laundering predicates in predicates 1, 3 through, 15 and 17, through 78 and in count 2 are: in violations f.s. 562.12(1) and violations f.s. 893.13 that the criminal activity alleged involves the currency transaction named in the predicates and that it violates the money laundering prohibition in 18 U.S.C. 1956(a)(1) as the acquittal of count 2 would also go to the illegal activity of predicate 1, 3, through 15 and 17 through 78; the state argument could not also go to predicates 2, 16, 79 and 80 as the fact finder have determined that Petitioner did not launder money from violation of 562.12(1) or 893.13. And as the State's response to the defendants motion in limine. States it is the States position that the information properly alleges that the Defendant did conduct or participate directly

or indirectly in such enterprise through a continuous pattern of racketeering activity as defined in f.s. 895.02(4) by engaging in at least two incidents of racketeering activity as defined in F.S. 895.02(1)(b). As the State admits and this court acknowledges that under 895.02(1)(b) which cross referenced to 18 U.S.C. 1961(1) defining racketeering activity as federal in which it excludes violation of 562.12(1) and 893.13(6) as stated in State's response to the defendants motion in limine. The Florida Supreme Court in Gross v. State, 756 So.2d 39. Specifically held that in order to prove Rico's enterprise element the State must prove the following two elements 1) an ongoing organization formal or informal with a common purpose of engaging in a course of conduct which 2) functions as a continuing unit. As the fact finder determined the common purpose was not money laundering and as the State court admits and this court acknowledges under 895.02(1)(b) which cross referenced to 18 U.S.C. 1961(1). The common purpose could not be violation of 562.12(1) or 893.13(6) because they do not meet the standard of racketeering as defined in 895.02(1)(b). Therefore they could not be the common purpose of the enterprise element. Which made predicates 2, 16, 79 and 80 unrelevant to the racketeering charge. As this court reasoned for the denial of this ground the agreement with the State court that all such crimes charged were committed in furtherance of Mr. Downer's criminal marijuana importation and distribution business. Petitioner was never charged with predicate incidents of

possession with the intent to import, distribute, or sale marijuana thus this courts reliance on these uncharged crimes violate the fair notice act which is protected under Article one, section nine of the Florida Constitution. Thus this court cannot use a criminal act that the Petitioner was not charged with to support the reason for denying relief. That constitutes a miscarriage of justice. Pursuant to the AEDPA Federal Habeas Relief may be granted with respect to claims which 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. Petitioner has pointed to the State's statement of particulars which clearly states 1) the illegal activity alleged as the underlying basis of the money laundering predicates in predicate 1, 3, through 15 and 17 through 78 and in count 2 are the same violations as such the fact of the acquittal of count two would go to the 76 predicates of count one also. The State's response to Defendant's motion in limine is Petitioner next facts in light of the evidence presented in the State court proceeding which the State clearly states the racketeering activity in predicates 1, 3, through 15 and 17 through 78 that the criminal activity alleged involves the currency transaction named in the predicates and that it violates the money laundering prohibition in 18 U.S.C. 1956(a)(1). 2) If there was any lack of specificity, and the State would submit that there was not, it has been cured by the filing of the State's response to Defendants motion for statement of particulars and statement of particulars. 3) The defense further boldly

asserts that there is somehow no connection between the alleged predicates and the racketeering charge it is the State's position that the information properly alleges that the Defendant did conduct or participate directly or indirectly in such enterprise through a continuous pattern of racketeering activity as defined in 895.02(4) by engaging in at least two incidents of racketeering activity as defined in Florida Statute 895.02(1)(b). As this court admits 893.13(6) is not a relevant predicate to 895.02(1)(b) under racketeering as was charged by the State and the Defendants motion to limine put on notice of the issue which the State took the position that the information was properly charged. Section 4) of the State response to defendant motion in limine points out the Florida Supreme Court in Gross v. State, 756 So.2d 39 (Fla. 2008) specifically held that in order to prove Rico's enterprise elements (1) an ongoing organization formal or informal with a common purpose.

Ground Eight

Petitioner maintains counsel rendered ineffective assistance by failing to object or move for a judgment of acquittal on sale of alcohol without a license. Predicate incident 2. Petitioner in this case was charged with Stat. 895.02(1)(b) Fla. which cross referenced to 18 U.S.C. Stat. 1961(1) as the charging information specifically defined the incidents of racketeering activity by federal standards. Under these standards the sale of alcohol without a license cannot be relevant

because as defined in section 102 of the controlled substances act 21 U.S.C. Stat. 802(6) the term controlled substances does not include distilled spirits, wine, malt beverages, or tobacco. Base on the fact that the term controlled substance does not include alcohol means that the predicate incidents of sale of alcohol without a license cannot be related to the affairs of the enterprise, the laundering of money the proceeds of illegal controlled substances. Furthermore, Petitioner points to the jury instructions used in this case defining the funds or property involved in a financial transaction represented the proceeds of some for of unlawful activity. For the predicates incidents of racketeering and money laundering the definitions defining the term knowing that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity means that the defendant know the property. That such funds or property represented proceeds from some form though not necessarily which form of a felony offense under State or Federal law sale of alcohol without a license 562.12(1) is a misdemeanor which also excludes it from being a source of proceeds that can meet the standard of racketeering or money laundering which could be related to the enterprise. For these reason Petitioner's trial counsel was ineffective for failing to object to the evidence or move for a judgment of acquittal on sale of alcohol without a license.

Ground Nine

Petitioner would point to the facts raised in ground 5 for ~~rehearing~~ certificate of appealability and the State's statement of particulars and the State response to Defendant's motion in limine and ~~this~~ The middle District courts answer in Ground 12. The court's denial of this ground is contrary to, or an unreasonable application of Strickland. As discussed in ground 12 the racketeering charge included three predicates incidents that the federal courts have held that simple possession of a controlled substance does not even constitute a RICO predicate offense. United States v. Krout, 66 F.3d 1420 as this Court concedes that 895.02(1)(b) specified that a predicate incident for racketeering is any conduct defined as racketeering activity under 18 U.S.C. § 1961(1) which excludes simple possession of marijuana under 893.13(6) thus the racketeering conviction was inconsistent with his acquittal of money laundering as there was no other 2 predicate that could legally support the racketeering conviction.

Ground Ten

Petitioner would point to the argument raised in ground six of this ~~rehearing~~ certificate of Appealability in an effort of not being redundant.

Ground Eleven

Petitioner assert counsel rendered ineffective assistance by failing to request a complete jury instruction on possession of marijuana. The jury should have been

instructed that the State had to prove Petitioner had knowledge of the marijuana's presence on all predicate incidents 16, 79, and 80 Petitioner would make clear that this claim should be applied to predicate incidents 16, 79, and 80 and this court only answered this claim as applied to predicate incident 80. Petitioner would point out predicate incident 16, happened on January 2, 2002 prior to the legislature amended Florida Statute 893.101 making lack of knowledge as to the illicit nature affirmative defense. Petitioner was entitled to the benefit of the Chicone instruction. Subsequent judicial review of the amendment held it not to be applied retroactively. The evidence presented in trial for predicates 16, 79, and 80 showed that the State's theory could only be constructive possession. Therefore the State had to prove that Petitioner had constructive possession of marijuana through adequate proof that Petitioner had both knowledge of and dominion and control over the marijuana. Predicate incident 16 was a package sent in the mail that Petitioner signed for under the law at the time of the offense Petitioner was entitled to the Chicone guilty knowledge instruction.

Ground Twelve

In Ground twelve, petitioner assert counsel rendered ineffective assistance by failing to file a pretrial motion to dismiss, predicate incidents 16, 79, and 80 on the merits, counsel did not file a motion in limine, a motion to suppress, a motion to sever, or otherwise object to the evidence of possession **or argue in motion for**

judgment of acquittal that simple possession cannot provide a scienter intent to prove some other crime. As raised in his petition under 28 U.S.C. §2254 for writ of habeas corpus filed on 9/6/2017. Petitioner points out in this ~~rehearing~~ certificate of appealability that ~~this~~ The middle District court only answered part of this claim as it applied to pretrial motions. However, this court did not address the issue concerning the judgment of acquittal, which the reasoning used to deny the pretrial motion does not apply to the judgment of acquittal, thus leaving this part of the ground unrefuted. Petitioner would point out that the State admits and this court acknowledges that the racketeering charge alleged that petitioner engaged in at least two incidents of racketeering activity as defined in section 859.02(1)(b) of the Florida statutes section 895.02(1)(b) specifically that a predicate incident for racketeering is "any conduct defined as racketeering activity under 18 U.S.C §1961(1)." Fla. Stat. §895.02(1)(b) (2004). Pursuant to the federal statute, "Racketeering activity" is defined in pertinent part as dealing in controlled substance or listed chemical (as defined in section 102 of the controlled substances act), which is chargeable under state or federal law and punishable by imprisonment for more than one year." 18 U.S.C. §1961(1) (2004). The amended information charged eighty predicate incidents consisting of seventy-six predicate incidents of money laundering three predicate incidents of simple possession of cannabis in violation of section 893.13(6) of the Florida statues, and one predicate incident of sale of alcohol without a license. (Doc 14-2 of 23-57). To

convict petitioner or racketeering the jury had to find that petitioner committed two of the predicate incidents (Doc. 14-2 at 72). The jury acquitted petitioner of the money laundering count charged in the amended information (Count two). (Id. at 14). Petitioner would point to the **State's Statement of Particulars** filed in open court on October 6, 2004. (State's Response APP. A13-15)(Attached here as Exhibit A). as to the amended information filed in this case which made the illegal activity alleged as the underlying basis of the money laundering predicates in predicates 1,3 through 15, and 17 through 78, and Count 2 the same. Therefore the jury's acquittal of Count 2 would also apply to the illegal activity alleged as the underlying basis of the racketeering money laundering predicates in 1,3 through 15, and 17 through 78. This court acknowledged that federal courts have held that "simple possession of a controlled substance does not even constitute a Rico predicate offense." United States v. Krout, 66 F.3d 1420 1431-32 (5th Cir. 1995).

Consequently, it is not clear that possession of cannabis could be a predicate incident under section 895.02(1)(b) of the Florida statutes to support a racketeering charge. Respondents concede that the State mistakenly charged petitioner with racketeering activity defined in **section 895.02(1)(b)** of the Florida statutes. Petitioner points the court to the State's Response to the defendant's motion in limine filed in open court on October 6th, 2004, section 3. (State's Response APP. A16-18)(Attached here as Exhibit A). The defense further boldly asserts that there

somehow no connection between the alleged predicates and the racketeering charge, it is the State's position that the information "properly alleges that the defendant did conduct or participate, directly or indirectly in such enterprise through a continuous pattern of racketeering activity as defined in Florida statute 895.02(4), by engaging in at least two incidents of racketeering activity as defined in Florida statute 895.02(1)(b), which had similar intents, results, accomplices, victims, or methods of commission, or which were otherwise related by distinguishing characteristics and were not isolated incidents, including at least two of the following, in violation of Florida statute 895.03(3): The predicates offense are then listed in the information. This charging method has stood the test of time. The State must only put the defense on notice as to what the charges are and then at trial prove those allegations. The Court has found that there is probable cause for the offenses in this case, based upon the affidavit on file. There is no finding that the State make any further showing in advance of presenting evidence at trial, **if the State fails to make a prima facie case at trial the court has the authority and obligation to grant a judgment of acquittal.** Petitioner submits the State's Statement of Particulars and State's Response to Defendant's motion in limine as Exhibit A to this motion for rehearing. As the State made clear, it was the State's position that the information properly alleged 895.02(1)(b) and no mistake was made invoking its discretion in doing so. And the fact that the statement of

particulars made the illegal activity in the predicates incidents 1, 3, through 15, and 17 through 78, and count 2 the same. The not guilty verdict as to count two, state money laundering (which encompassed predicate incidents 1, 3, through 15, and 17 through 78 of Racketeering constituted a finding that Petitioner did not launder money, through drug proceeds. As this court acknowledges simple possession of a controlled substance does not even constitute a Rico predicate offense under 18 U.S.C §1961(1) as was charged under 895.02(1)(b) in Petitioner case, and the only predicate incident left for the jury was one predicate incident of sale of alcohol without a license, which this court has acknowledged. To convict the petitioner of racketeering the jury had to find that petitioner committed two of the predicate incidents. There could be no prima facie case as there were not enough predicate incidents to meet the Rico standard. Even viewing the evidence most favorable to the State the legal sufficiency was never met, as argued herein. Had counsel put forth these facts in a motion for judgment of acquittal, a reasonable probability exists that the outcome of the trial would have been different. Petitioner would have been acquitted of all counts. As petitioner has met the standard of ineffective assistance of counsel. As a result of counsel's deficient representation it rendered the trial fundamentally unfair and unreliable. Specifically, the error was fundamental because the jury's finding of not guilty as to the money laundering negated a finding of guilt as to Racketeering as shown in the State's statement of

particulars filed in this case. And as this court acknowledges simple possession of a controlled substance does not even constitute a Rico predicate offense under 18 U.S.C. §1961, as was charged under 895.02(1)(b) and as the State court admits to charging, which was a crucial, critical highly significant factor in the petitioner's conviction. Petitioner has also met the standard of review under 28 U.S.C. 2254(d)(1) and (2). By this court's acknowledgment of that the federal courts have held that simple possession of a controlled substance does not even constitute a Rico predicate offense United States v. Krout, 66 F.3d 1420, 1431-32 (5th Cir. 1995). As, it was charged in petitioner case under 895.02(1)(b) which 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 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. Petitioner points to the State's statement of particulars and the State's Response to defendant's motion in limine, and the verdict of not guilty as to count 2 of the information. Even viewing the evidence most favorable to the State the legal sufficiency was never met, as argued herein. Furthermore, petitioner asserts that he is "actually innocent" of Racketeering and has demonstrated a fundamental miscarriage of justice in Ground 12, and would assert that exception to any procedural default bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing motion was furnished to the following:

united States court of Appeals ~~eleventh~~ eleventh circuit 56 forSyth Street N.W Atlanta, GA 30303

office of the Attorney General 444 seaBreeze Blvd, Ste 500 Daytona Beach, Florida 32118

united States District court middle District of florida George C. Young, U.S courthouse Annex Vol W. Central Ste. 2100 Orlando, florida 32801-0120

and was placed in the hands of prison officials for mailing, via. U.S. Mail on this

27 day of December 2019.

Is/ Dovel B. Downer, D.O.C # 391900
DADe correctional institution
19000 South west ~~street~~ 377 Street
florida city florida, 33034

EXHibit-A

LEGAL

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

DOVED BEN DOWNER,

Defendant.
_____/

COURT CASE NO.: 04-CF-6586

OSWP NO. 2004-104-ORL

FILED IN OPEN COURT
THIS 6 DAY OF Oct, 20 04
Lydia Gardner, Clerk
BY _____ D.C.

STATE'S RESPONSE TO DEFENDANT DOWNER'S MOTION FOR STATEMENT OF PARTICULARS/STATEMENT OF PARTICULARS

The State of Florida, through the undersigned Assistant Statewide Prosecutor, respectfully files this its Response to Defendant Downer's Motion For Statement of Particulars/Statement of Particulars and would show the following:

1) The Defendant has requested that further specifics concerning the illegal activity referenced in the predicate offenses be provided.

2) Normally, tracking the language of the statute(s) charged is sufficient if such language informs the defendant of the act(s) alleged to have been committed and does nothing to mislead or embarrass the defendant in the preparation of his or her defense. *State v. Dilworth*, 397 So.2d 292, 293 (Fla. 1981); *State v. Bostic*, 446 So.2d 264 (2d DCA 1984); *State v. Cardinal*, 429 So.2d 747 (4th DCA 1983). A charging document framed substantially in the language of the statute is sufficient. *State v. Waters*, 436 So.2d 66 (Fla. 1983).

3) The Florida Supreme Court has repeatedly pointed to the state's liberal discovery rules as availing a defendant of information about the charge beyond the charging document. *State v. Lindsey*, 446 So.2d 1074 (Fla. 1984); *Waters*, 436 So.2d at 69; *Dilworth*, 397 So.2d at 294. *See also State v. Whiddon*, 384 So.2d 1269 (Fla. 1980). Florida is a law pleading state, not a fact-pleading state. It is only necessary that the elements be alleged in the charging document -- not every fact it will rely on to prove the charge at trial. Evidentiary facts need not be alleged. *Harrison v. State*, 557 So.2d 151 (4th DCA 1990).

Docketed By:
J.W. BROWN

4) Motions for Statements of Particulars are commonly used as a discovery tool beyond that wide discovery already available to a defendant. Even the federal Eleventh Circuit has held that generalized discovery is not a function of the comparable rule on statements of particulars in the federal courts (where the discovery rules are significantly less liberal than Florida's). *U.S. v. Warren*, 772 F.2d 827 (11th Cir. 1985); *U.S. v. Colson*, 662 F.2d 1389 (11th Cir. 1981).

5) A mere allegation by the defendants of a lack of notice, prejudice, surprise, or an inability to prepare their defense without a more definite Statement of Particulars is insufficient to warrant it. Instead, the defense has the burden of showing such impediments to its preparation, and a Statement of Particulars is never required in Florida, except where denial of it would constitute an abuse of judicial discretion. *Harrison*, 557 So.2d 151; *Peel v. State*, 154 So.2d 910, 912 (2d DCA 1963). *See Jones v. State*, 466 So.2d (3d DCA 1985).

STATEMENT OF PARTICULARS

While it may not be necessary for the State to do so, the State hereby files it Statement of Particulars as to the Amended Information filed in this cause.

1) The illegal activity alleged as the underlying basis of the money laundering predicates in Predicates 1, 3 through 15, and 17 through 78, and in Count 2 are:

(a) Violations of FS 560.125(1), that is, the money in question came from, was used in the commission of, or was intended to promote the carrying on of, the commission of unauthorized money transmitter violations.

(b) Violations of FS 562.12(1), that is, the money in question came from, was used in the commission of, or was intended to promote the carrying on of, the sale of alcoholic beverages, the permitting the sale of alcoholic beverages, or the keeping or maintaining a place from which, alcoholic beverages were sold, without having a license from the State of Florida to do so.

(c) Violations of FS 893.13, that is, the money in question came from, was used in the commission of, or was intended to promote the carrying on of, the commission of sale, possession, purchase, delivery or bringing into the state, of cannabis.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

DOVED BEN DOWNER,

Defendant.
_____/

COURT CASE NO.: 04-CF-6586

OSWP NO. 2004-104-ORL

FILED IN OPEN COURT
THIS 9 DAY OF Oct, 20 04
Linda Gardner, Clerk
BY _____ D.C.

STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE

The State of Florida, through the undersigned Assistant Statewide Prosecutor, respectfully requests this Honorable Court to deny the Defendant Downer's Motion in Limine. In support thereof, the State would show the following:

1) The Defense has alleged in its motion that it is somehow "unclear from the information what racketeering activity the State is alleging..." The information filed by the State clearly states in Predicates 1, 3 through 15, and 17 through 78 that the criminal activity alleged involves the currency transaction named in the predicate including transaction number, date and location, and that it violates the money laundering prohibition in18 USC 1956(a)(1).

2) If there was any lack of specificity, and the State would submit that there was not, it has been cured by the filing of the State's Response to Defendant's Motion for Statement of Particulars and Statement of Particulars. To summarize, the illegal activity alleged as the underlying basis of the money laundering predicates in Predicates 1, 3 through 15, and 17 through 78, are:

(a) Violations of FS 560.125(1), that is, the money in question came from, was used in the commission of, or was intended to promote the carrying on of, unauthorized money transmitter violations.

(b) Violations of FS 562.12(1), that is, the money in question came from, was used in the commission of, or was intended to promote the carrying on of, the sale of alcoholic beverages, the permitting the sale of alcoholic beverages, or the keeping or maintaining a place from which, alcoholic beverages were sold, without having a license from the State of Florida to do so.

Docketed By:
J.U. BROWN

(c) Violations of FS 893.13, that is, that the money in question came from, was used in the commission of, or was intended to promote the carrying on of, the sale, possession, purchase, delivery or bringing into the state, of cannabis.

3) The Defense further boldly asserts that there is somehow no connection between the alleged predicates and the Racketeering charge. It is the State's position that the information properly alleges that the Defendant:

did conduct or participate, directly or indirectly, in such enterprise through a continuous pattern of racketeering activity as defined in Florida Statute 895.02(4), by engaging in at least two incidents of racketeering activity as defined in Florida Statute 895.02(1)(b), which had similar intents, results, accomplices, victims, or methods of commission, or which were otherwise related by distinguishing characteristics and were not isolated incidents, including at least two of the following, in violation of Florida Statute 895.03(3):

The predicate offenses are then listed in the information. This charging method has stood the test of time. The State must only put the Defense on notice as to what the charges are and then at trial prove those allegations. The Court has found that there is probable cause for the offenses in this case, based upon the affidavit on file. There is no requirement that the State make any further showing in advance of presenting evidence at trial. If the State fails to make a prima facie case at trial, the Court has the authority and obligation to grant a Judgment of Acquittal.

4) The Defense next alleges that there is no connection between the individuals such as to create an enterprise. F.S.895.02(3) defines an enterprise to include "a group of individuals associated in fact although not a legal entity." The State has alleged exactly this definition in the information. The Courts have routinely held that this definition is sufficient to support the finding of an enterprise. The Florida Supreme Court in **Gross v State**, 756 So.2d 39 (Florida 2000) specifically held that "In order to prove RICO's enterprise element, the State must prove the following two elements: (1) an ongoing organization, formal or informal, with a common purpose of engaging in a course of conduct , which (2) functions as a continuing unit." This and more are clearly shown by the evidence.

5) The Defense next refers to the Court resolving legal issues, preventing the admission of cumulative evidence and determining relevance of certain evidence. Clearly the Court deals with evidentiary issues in every trial and will correctly deal with them in the trial of this matter. As for

cumulative evidence, if the Defense is willing to stipulate to certain matters the State will be more than willing to accept certain stipulations to prevent the waste of valuable court and prosecutorial resources.

6) The Defense further requests to know of any immunity agreements with the witnesses in this case. There are no immunity agreements other than those conferred upon a witness by virtue of FS 914.04 and the service of a State subpoena.

WHEREFORE, the State respectfully requests this Honorable Court to deny the Defendant's Motion in Limine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile to Janice Orr, Esquire, 141 Waterman Avenue, Mount Dora, Florida 32757, on this 6th day of October, 2004.

RICHARD B. BOGLE
Assistant Statewide Prosecutor
Florida Bar Number 363731
135 West Central Boulevard
Suite 1000
Orlando, Florida 32801
(407)245-0893

APPEAL, CLOSED, HABEAS

U.S. District Court
Middle District of Florida (Orlando)
CIVIL DOCKET FOR CASE #: 6:17-cv-01629-ACC-EJK

Downer v. Secretary, Department of Corrections et al
Assigned to: Judge Anne C. Conway
Referred to: Magistrate Judge Embry J. Kidd
Case in other court: Orange County Circuit Court, 2004-CF-6586-A-O
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 09/13/2017
Date Terminated: 06/06/2019
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Doved Ben Downer

represented by **Doved Ben Downer**
#391900
Dade Correctional Institution
19000 SW 377th Street
Florida City, FL 33034-6409
PRO SE

V.

Respondent

Secretary, Department of Corrections

represented by **Robin A. Compton**
Office of the Attorney General
Suite 500
444 Seabreeze Blvd
Daytona Beach, FL 32118
386/238-4990
Fax: 386/238-4997
Email: crimappdab@myfloridalegal.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

Attorney General, State of Florida

represented by **Robin A. Compton**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/13/2017	1	PETITION for Writ of Habeas Corpus - State, filed by Doved Ben Downer.(JLC) (JLC). (Additional attachment(s) added on 10/3/2017: # 1 Exhibit) (EJS). (Entered: 09/14/2017)

09/13/2017	2	MOTION for Leave to Proceed in forma pauperis by Doved Ben Downer. (JLC) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 09/18/2017)
09/19/2017	3	NOTICE of filing amended pages by Doved Ben Downer in re 1 Petition for writ of habeas corpus (Attachments: # 1 Amended Page)(JLC) (Entered: 09/22/2017)
09/26/2017	4	**ORDER denying without prejudice 2 Motion for Leave to Proceed in forma pauperis. Petitioner must submit a computer printout or notarized statement that contains all the transactions in his prisoner account for the period from June 13, 2017, through September 13, 2017. Failure to do so within 21 days from the date of this order will result in the dismissal of this action without further notice. Signed by Magistrate Judge Thomas B. Smith on 9/26/2017. (EJS)** (Entered: 09/26/2017)
09/26/2017	5	**RELATED CASE ORDER, NOTICE OF DESIGNATION under Local Rule 3.05-Track 1, INTERESTED PERSONS ORDER and ORDER Requiring Electronic Filing. Notice of pendency of other actions due by 10/10/2017, Certificate of interested persons and corporate disclosure statement due by 10/10/2017. Signed by Judge Anne C. Conway on 9/26/2017. (JLC)** (Entered: 09/26/2017)
10/03/2017	6	**ORDER. Petitioner's construed Motion to Amend Petition (Doc. 3) is GRANTED. The Clerk of Court is directed to file the exhibit to the construed motion (Doc. 3-1) as an exhibit to the Petition (Doc. 1). Signed by Magistrate Judge Thomas B. Smith on 10/2/2017. (EJS)** (Entered: 10/03/2017)
10/13/2017	8	NOTICE of pendency of related cases re 5 Related case/interested persons/ECF-1 per Local Rule 1.04(d) by Doved Ben Downer. Related case(s): no (AKJ) (Entered: 10/17/2017)
10/13/2017	9	CERTIFICATE of interested persons and corporate disclosure statement re 5 Related case/interested persons/ECF-1 by Doved Ben Downer. (AKJ) (Entered: 10/17/2017)
10/16/2017	7	MOTION for leave to appeal in forma pauperis/affidavit of indigency by Doved Ben Downer with attached prisoner account statement. (AKJ) Modified on 10/18/2017 (JLC). (Entered: 10/17/2017)
10/31/2017	10	**ORDER granting 7 Motion for leave to appeal in forma pauperis/affidavit of indigency. Respondents shall, within 90 days from the date of this Order, file a response, entitled "Response to Petition," indicating why the relief sought in the petition should not be granted. The Clerk is directed to send a copy of this Order, the petition, and any supporting documentation to Respondents and the Attorney General of Florida. Signed by Magistrate Judge Thomas B. Smith on 10/31/2017. (EJS)** (Entered: 10/31/2017)
11/15/2017	11	NOTICE of Appearance by Robin A. Compton on behalf of Attorney General, State of Florida, Secretary, Department of Corrections (Compton, Robin) (Entered: 11/15/2017)
11/15/2017	12	NOTICE of pendency of related cases per Local Rule 1.04(d) by Attorney General, State of Florida, Secretary, Department of Corrections. Related case(s): yes (Compton, Robin) (Entered: 11/15/2017)

01/29/2018	13	RESPONSE to 1 Petition for writ of habeas corpus by Attorney General, State of Florida, Secretary, Department of Corrections.(Compton, Robin) (Entered: 01/29/2018)
01/31/2018	14	APPENDIX by Attorney General, State of Florida, Secretary, Department of Corrections. (Attachments: # 1 Appendix Exhibit A, # 2 Appendix Exhibit A, # 3 Appendix Exhibit B, # 4 Appendix Exhibit B, C, D, E, F, G, H, I, J, # 5 Appendix Exhibit J, # 6 Appendix Exhibit J, # 7 Appendix Exhibit K, L, M, N, # 8 Appendix Exhibit N, O, P, Q, R, S)(Compton, Robin) (Entered: 01/31/2018)
02/20/2018	15	MOTION for leave to file Reply to Respondent's Response by Doved Ben Downer. (RMF) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 02/20/2018)
02/22/2018	16	**ORDER granting 15 Motion for Leave to File. Petitioner shall have 90 days from the date of this Order to file a Reply to the Response. Signed by Magistrate Judge Thomas B. Smith on 2/22/2018. (EJS)** (Entered: 02/22/2018)
05/24/2018	17	MOTION for Extension of Time to File Reply as to 13 Response to habeas petition by Doved Ben Downer. (RMF) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 05/24/2018)
05/29/2018	18	**ORDER granting 17 Motion for Extension of Time to File Response/Reply. Signed by Magistrate Judge Thomas B. Smith on 5/29/2018. (SMW)** (Entered: 05/29/2018)
06/04/2018	19	REPLY re 13 Response to habeas petition by Doved Ben Downer. (JP) (Entered: 06/05/2018)
02/07/2019	20	**ORDER: Within THIRTY (30) DAYS from the date of this Order, Respondents shall file a supplemental response addressing whether ground twelve is substantial to overcome the procedural default bar. Upon the filing of the supplemental response, Petitioner shall have THIRTY (30) DAYS to file a reply to the supplemental response that shall not exceed ten pages. Signed by Judge Anne C. Conway on 2/6/2019. (RMF)** (Entered: 02/07/2019)
03/07/2019	21	*Supplemental* RESPONSE to 1 Petition for writ of habeas corpus by Attorney General, State of Florida, Secretary, Department of Corrections.(Compton, Robin) (Entered: 03/07/2019)
04/05/2019	22	Petitioner's REPLY to State's Supplemental Response to Petitioner's Petition re 21 Response to habeas petition by Doved Ben Downer. (RMF) (Entered: 04/05/2019)
06/05/2019	23	**ORDER. The Petition for Writ of Habeas Corpus (Doc. 1) is DENIED, and this case is DISMISSED WITH PREJUDICE. Petitioner is DENIED a Certificate of Appealability. The Clerk of the Court is directed to enter judgment accordingly and close this case. Signed by Judge Anne C. Conway on 6/5/2019. (LMM)** (Entered: 06/05/2019)
06/06/2019	24	JUDGMENT that the Petition for Writ of Habeas Corpus is DENIED, and this case is DISMISSED WITH PREJUDICE. (Signed by Deputy Clerk) (LMM) (Entered: 06/06/2019)

07/08/2019	25	MOTION for Reconsideration re 23 Order dismissing case by Doved Ben Downer. (Attachments: # 1 Exhibit A)(RMF) Motions referred to Magistrate Judge Thomas B. Smith. (Entered: 07/09/2019)
11/25/2019	26	**ORDER denying 25 Motion for Reconsideration. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a Certificate of Appealability is DENIED in this case. Signed by Judge Anne C. Conway on 11/25/2019. (RMF)(ctp).** (Entered: 11/25/2019)
12/19/2019	27	Case Reassigned to Magistrate Judge Embry J. Kidd. New case number: 6:17-cv-01629-Orl-22EJK. Magistrate Judge T. B. Smith no longer assigned to the case. (ALL) (Entered: 12/19/2019)
12/19/2019	28	MOTION for Extension of Time to File a Certificate of Appealability by Doved Ben Downer. (Originally received in the USCA on 12/16/2019 and forwarded to USDC.) (ALL) Motions referred to Magistrate Judge Embry J. Kidd. (Entered: 12/19/2019)
01/02/2020	29	**ORDER granting 28 Motion for Extension of Time to File. Petitioner shall have through January 17, 2020, to file an Application for Certificate of Appealability. Signed by Magistrate Judge Embry J. Kidd on 1/2/2020. (ALL)** (Entered: 01/02/2020)
01/06/2020	30	NOTICE of change of address by Doved Ben Downer (MEJ) (Entered: 01/07/2020)
01/06/2020	31	NOTICE OF APPEAL (construed from Motion for Certificate of Appealability) as to 26 Order on Motion for Reconsideration by Doved Ben Downer. Filing fee not paid. (MEJ) (Entered: 01/08/2020)
01/06/2020	32	MOTION for certificate of appealability by Doved Ben Downer. (MEJ) (Entered: 01/08/2020)

PACER Service Center			
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01/08/2020 08:53:42			
PACER Login:	maghern14:6149506:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	6:17-cv-01629-ACC-EJK
Billable Pages:	3	**Cost:**	0.30

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DOVED BEN DOWNER,

Petitioner,

v. Case No: 6:17-cv-1629-Orl-22TBS

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

Respondents.
_____/

ORDER

This case is before the Court on the following matters:

1. Petitioner's for Reconsideration (Doc. 25) is **DENIED**. Petitioner requests the Court to reconsider the denial of his habeas petition.

Rule 59 permits courts to alter or amend a judgment based on "newly-discovered evidence or manifest errors of law or fact." *Anderson v. Fla. Dep't of Envitl. Prot.*, No. 13-13955, 2014 WL 2118984, *1 (11th Cir. May 22, 2014) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)) (quotation marks and alterations omitted). Therefore, "[a] movant 'cannot use a Rule 59(e) motion to relitigate old matters' or 'raise argument[s] or present evidence that could have been raised prior to the entry of judgment." *Levinson v. Landsafe Appraisal Services, Inc.*, 558 F. App'x 942, 946 (11th Cir. 2014) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)). Rule 60(b) provides:

> [T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)-(6).

Review of the motion indicates that Petitioner is attempting to relitigate his claims. Petitioner has not demonstrated the existence of newly-discovered evidence or manifest errors of law or fact. The Court concludes Petitioner has failed to establish a sufficient basis warranting the relief requested.

2. This Court should grant an application for 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). Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a Certificate of Appealability is **DENIED** in this case.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2004-CF-006586-A-O
DIVISION NO.: 16

STATE OF FLORIDA,

Plaintiff,

vs.

DOVED BEN DOWNER,

Defendant.
_____/

ORDER DENYING "SECOND AMENDED MOTION FOR POST-CONVICTION RELIEF AND MEMORANDUM OF LAW IN SUPPORT THEREOF"

THIS MATTER came before the Court for consideration of Defendant's "Second Amended Motion for Post-Conviction Relief and Memorandum of Law in Support Thereof," filed September 7, 2011, pursuant to Florida Rule of Criminal Procedure 3.850. After reviewing the Motion, State's Response, file, and record, the Court finds as follows:

PROCEDURAL HISTORY

On September 23, 2004, Defendant was charged by Amended Information with Racketeering (Count One), Money Laundering (Count Two) and Structuring Transactions to Evade Reporting or Registration Requirements (Count Three). (*See* Amended Information, attached). On October 13, 2004, Defendant was convicted of Racketeering (Count One). The jury acquitted Defendant of Money Laundering (Count Two) and the State filed a *Nolle Prosequi* with respect to Structuring Transactions to Evade Reporting or Registration Requirements (Count Three). (*See* Verdict Forms, *Nolle Prosequi*, and Judgment of Acquittal, attached). Defendant was sentenced the same day to twenty-five (25) years in the Department of Corrections followed by

APPENDIX - D

five (5) years of Supervised Probation. (*See* Sentence, Order of Probation, and Judgment, attached). The Fifth District Court of Appeal *per curiam* affirmed and the Mandate issued on January 3, 2006. *Downer v. State*, 917 So. 2d 204 (table) (Fla. 5th DCA 2005). (*See* Mandate, attached).

On April 26, 2007, Defendant filed through counsel, James Miller, a "Motion for Post-Conviction Relief and Memorandum of Law in Support Thereof." (*See* Motion, attached). On May 20, 2008, the State was ordered to respond to the Motion. On July 7, 2008, the State filed its Response. (*See* State's Response to Defendant Doved Downer's Motion for Post-Conviction Relief, attached). On September 8, 2008, counsel filed a "Motion for Permission to Amend Pending Motion for Post-Conviction Relief." (*See* Motion, attached). It appears the Court was unaware of the 2008 "Motion for Permission to Amend Pending Motion for Post-Conviction Relief" as a copy was never sent to the Court and was only filed in the Court file. However, on January 27, 2010, Defendant filed a *pro se* "Motion for Leave to Supplement and Amend Pending Motion for Post-Conviction Relief and Defendant's Notice of Intent to File Petition for Writ of Habeas Corpus Pursuant to Steele v. Kehoe." (*See* Motion, attached).

On March 1, 2010, an "Order Granting Motion to Amend" was entered and the Court advised counsel that courtesy copies of pleadings filed by attorneys must be sent to the Court so it is ensured they are received and reviewed in a timely manner. The Court also advised that since the motion requesting leave to amend was filed outside of rule 3.850's 2-year time limitation Defendant would not be permitted to add any new grounds for relief and may only supplement existing grounds. Additionally, the Court advised that because Defendant was represented by counsel all pleadings must be filed by counsel and the Court would not consider any pleadings filed simultaneously by Defendant, *pro se*, and counsel. Defendant was provided thirty (30) days

to file any amendments. (*See* Order Granting Motion to Amend, attached).

While beyond the due date of the Court's prior Order Granting Leave to Amend, on April 21, 2010, counsel filed a "Motion for Extension of Time to File Amendment to Pending Rule 3.850 Fla. R. Crim. P. Motion" requesting a forty-five (45) day extension. Again, the Court was unaware of the Motion for Extension as counsel only sent a copy of the Motion to the Clerk of the Court, and therefore, no ruling was made on the Motion. (*See* Motion for Extension of Time to File Amendment to Pending Rule 3.850 Fla. R. Crim. P. Motion and Letter dated April 19, 2010, from counsel to the Clerk of the Court, attached). Again, Counsel failed to provide a courtesy copy of the Motion to the presiding judge assigned to the case so that it would be addressed. It was not until five hundred (500) days later, or over one (1) year and (five) months later on September 7, 2011, that the instant "Second Amended Motion for Post-Conviction Relief and Memorandum of Law in Support Thereof" was filed. Furthermore, the Defendant filed the Amended Motion *pro se* in violation of the Court's Order Granting Leave to Amend.

On December 27, 2011, almost four (4) months after Defendant filed his *pro se* Amended Motion, counsel filed a "Motion to Adopt Pro Se Pleadings." (*See* Motion to Adopt Pro Se Pleadings, attached). Then, on April 25, 2013, Defendant filed a letter to the Clerk of the Court requesting that the Clerk file the letter as a notice of the death of his attorney James Miller. Defendant requested the case be put on hold until he could find a new attorney. (*See* Letter to Clerk filed April 25, 2013, attached). Subsequently, the only correspondence in the case from Defendant were multiple notices of address changes. (*See* Letters/Notices filed to the Clerk of the Court by Defendant, attached). Finally, on August 8, 2016, Defendant filed a "Notice of Inquiry" to the Clerk of the Court requesting a status on his pending rule 3.850 motion. The Clerk responded to Defendant without referring the Notice of Inquiry to the presiding judge, which eventually was

returned as "undeliverable" because the Clerk of the Court failed to indicate Defendant's Department of Corrections number on the correspondence back to Defendant. The Clerk failed to resend the correspondence back to Defendant with the required DOC number included, which was contained in his "Notice of Inquiry." (*See* Notice of Inquiry, Clerk of the Court's Correspondence to Defendant, and Returned Mail, and attached envelope, attached). The Notice of Inquiry to the Clerk of the Court was the last filing to date in the court file of which the Court was never made aware.

Defendant's Amended Motion has now been brought to this Court's attention as the Defendant filed a Petition for Writ of Mandamus because his Amended Motion has been pending since 2011.

ANALYSIS AND RULING

In the instant Amended Motion, Defendant alleges six (6) claims for relief. Ineffective assistance of counsel claims are reviewed under the two-part standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant has the burden of identifying specific acts or omissions that rendered counsel's performance unreasonable under prevailing professional norms. *Duest v. State*, 12 So. 3d 734, 742 (Fla. 2009). Counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Additionally, a defendant must show that the deficient performance resulted in prejudice. *Id.* The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and a defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 689.

GROUND ONE (A)

In Ground One (A), Defendant alleges counsel was ineffective for failing to object to evidence of possession of marijuana or move for a judgment of acquittal because the evidence was not relevant to prove RICO and the State failed to prove that the possession of marijuana related to the RICO charge, citing predicate acts 16, 79, and 80 in the Information. He argues this evidence was not relevant to prove RICO because all of the other predicate acts (except act 2, which alleged sale of alcohol without a license) alleged the sending of money, which related to a violation of Chapter 893, prohibiting the sale or possession of controlled substances.

As Defendant acknowledges, the other predicate acts "alleged the illegal transfer of money related to the proceeds of illegal drug activity" and the State's theory was that "the RICO charge embodied an enterprise of individuals who allegedly combined with Defendant to launder money, which was used to purchase marijuana or which was the proceeds of the sale of marijuana." Contrary to his argument, the allegation of simple possession of marijuana was inextricably intertwined with the charges of RICO and money laundering because, as the State argues, possession was intrinsic to the eventual illegal sales, which generated proceeds that were the subject of the money laundering.

At trial, Catherine Chisem ("Chisem") testified that Defendant received marijuana and fronted it in quarter pound increments to individuals, including herself, who then sold it to end-users and paid Defendant back after the sale of the marijuana. (TT 32-34).[1] Furthermore, Chisem testified that upon Defendant's request she wired money from Orange County to California on several occasions when she was asked by Defendant to assist him with the transactions. (TT 29-

[1] TT refers to Trial Transcript

34). Additionally, at trial, there was a stipulation entered that the money transfers were done by Defendant or at his request and in his presence, the money that was transmitted was provided by Defendant to the clerk at Western Union/Winn Dixie, and that Defendant personally filled out the transmittal forms or personally directed the information to be written on the form. (*See* Stipulation with attached Western Union Records, attached).

The possession of marijuana was intrinsic to the eventual sales generating the proceeds that Chisem and others assisted Defendant to wire to California, and the handling of the marijuana was intrinsic to the preparation for commercial sale. (TT 30-32, 59-60). Marijuana was located after Defendant's arrest by law enforcement in the "gully" behind Defendant's parent's home in broken down cars, along with FedEx receipts similar to the ones accompanying the marijuana delivered to Defendant on a controlled delivery from California. (TT 404-10, 421-22).

The Court agrees with the State in its Response that it is "a misrepresentation of the evidence to suggest that the marijuana possession crimes charged as predicate incidents were unassociated with the RICO charge or with the money laundering crimes also charged as predicate incidents. All such crimes charged were committed in furtherance of Mr. Downer's criminal marijuana importation and distribution business." (*See* State's Response, attached).

Defendant acknowledges counsel moved for a judgment of acquittal "based upon an argument that there was no proof of where the money came from that was laundered," but argues counsel did not make the specific arguments that Defendant now raises in this claim. However, because Defendant's possession of marijuana was relevant to his participation in the business of commercial marijuana importation and distribution, counsel had no basis to object, or move for a judgment of acquittal on the issue, and there is no reasonable probability that the outcome of the trial would have been different if he had done so. Counsel cannot be ineffective for failing to make

a meritless motion or objection. *Maharaj v. State*, 778 So. 2d 944 (Fla. 2000); *Ridel v. State*, 990 So. 2d 581 (Fla. 3d DCA 2008). Accordingly, Defendant is not entitled to any relief on Ground One (A).

GROUND ONE (B)

In Ground One (B), Defendant goes beyond supplementing Ground One of his original "Motion for Post-Conviction Relief and Memorandum of Law in Support Thereof" when he argues entirely new claims that counsel was ineffective for: (1) failing to file a pretrial motion to dismiss predicate incidents 16, 79, and 80 because possession of marijuana was legally insufficient to charge a RICO violation; (2) failing to file a motion in limine; (3) failing to file a motion to suppress; (4) failing to file a motion to sever; and (5) failing to otherwise object to the evidence of possession or argue in a motion for judgment of acquittal that simple possession cannot provide scienter intent to prove some other crime.

Defendant has raised entirely new allegations of ineffective assistance by adding them as a sub-ground "(B)" under Ground One, which is improper, as the Defendant was made aware in the Court's Order Granting Leave to Amend that no new claims would be heard as the 2-year time limitation had expired for any new claims to be raised. Defendant cannot get around the 2-year time limitation by adding multiple claims of ineffective assistance in a sub-ground of Ground One, and therefore, the claims alleged in Ground One (B) are untimely and procedurally barred.

GROUND TWO

In Ground Two, Defendant alleges ineffective assistance of counsel for failing to object to evidence and move for a judgment of acquittal based on the State's evidence that Defendant possessed marijuana because there was no scientific evidence (a laboratory test) to prove the substance was marijuana. This claim lacks merit.

First, Chisem's testimony revealed that Defendant did possess and deal in large quantities of marijuana. (TT 31-34). Law enforcement also located and seized marijuana upon Defendant's arrest. (TT 401-10). Additionally, Defendant was stopped by police on multiple occasions and trained drug sniffing dogs alerted to his car for the positive smell of marijuana. (TT 290-91, 308-09). There was evidence that currency obtained from Defendant by Western Union/Winn Dixie witnesses smelled like marijuana based on their own personal experiences. (TT 195-96, 208-09, 223). That currency was also sent to California in Defendant's presence and subsequent to the money being sent FedEx packages containing marijuana were sent from California to Defendant utilizing false names. (TT 35, 53, 246-253). All of this testimony, combined with the in-court drug identification testimony by smell and sight of drug dealers, like Chisem, historical users, like the Western Union/Winn Dixie employees, and law enforcement witnesses with many years of experience and training concerning drug identification, are all sufficient to identify the substances. *See State v. Raulerson*, 403 So. 2d 1102 (Fla. 5th DCA 1981) (holding that as an alternative to scientific testing of marijuana ". . . other facts tending to show the identity of the substance, such as its appearance and smell and the circumstances under which it was seized . . . can meet the State's burden of proof."); *Robinson v. State*, 818 So. 2d 588, 589 (Fla. 5th DCA 2002) (finding chemical or scientific testing is not necessary for the state to prove that a particular substance is an illegal drug); and *Turner v. State*, 388 So. 2d 254 (Fla. 1st DCA 1980).

Therefore, counsel had no basis to object, and there is no reasonable probability that the outcome of the trial would have been different had he objected or moved for a judgment of acquittal on the issue. Counsel cannot be ineffective for failing to make a meritless motion or objection. *Maharaj v. State*, 778 So. 2d 944 (Fla. 2000); *Ridel v. State*, 990 So. 2d 581 (Fla. 3d DCA 2008). Accordingly, Defendant is not entitled to any relief on this claim.

GROUND THREE

In Ground Three, Defendant alleges ineffective assistance of counsel for failing to object to the evidence, or move for a judgment of acquittal, on sale of alcohol without a license, which was not related to the alleged intent in the RICO charge. As in Ground One, he argues this evidence was not relevant to prove RICO.

The elements of RICO are: (1) conduct or participation in an enterprise through (2) a pattern of racketeering activity. *Doorbal v. State*, 983 So. 2d 464, 492 (Fla. 2008). Intent is not a requisite element. *See Huff v. State*, 646 So. 2d 742, 744 (Fla. 2d DCA 1994). Furthermore, as the State argues in its Response, the predicate crimes need not be related to each other, but to the affairs of the enterprise. While predicate incidents must be related to the enterprise, there is no requirement that they bear any relation to each other. *See U.S. v. Elliott*, 571 F. 2d 880 (5th Cir. 1978) and *United States v. Phillips*, 664 F. 2d 971, 1011 (5th Cir. Unit B 1981).[2]

Finally, Defendant's unlicensed sale of alcohol involved numerous transactions generating illegal proceeds, which related to the enterprise. (TT 121-23, 233-36). Since Defendant's sale of alcohol without a license was relevant to his participation in the business of commercial marijuana importation and distribution, counsel had no basis to object, and there is no reasonable probability that the outcome of the trial would have been different had he done so.

GROUND FOUR

In Ground Four, Defendant alleges ineffective assistance of counsel for failing to raise the issue that the verdict of not guilty for money laundering (Count Two) negated a finding of guilt of racketeering (RICO) because all of the eighty (80) predicate incidents except four (4) involved

2 Both *Elliott* and *Phillips* were cases from the Federal Fifth Circuit prior to 1982 when Florida was part of that federal appellate circuit.

allegations that Defendant used drug sale proceeds to launder money. Defendant argues the not guilty verdict on Count Two meant the jury found the State did not prove predicate acts 1, 3-15, and 17-78. Defendant also argues that once the jury found Defendant not guilty on Count Two, the State was collaterally estopped from obtaining a guilty verdict as to racketeering.

Convictions for both racketeering and money laundering would not have violated double jeopardy, because the offenses involve separate and distinct elements of proof. The jury's acquittal on Count Two does not create an inconsistent verdict with its finding of guilt on Count One (RICO). *Harvey v. State*, 617 So. 2d 1144, 1148 (Fla. 1st DCA 1993) (finding the definition of "racketeering activity" . . . does not require the state to obtain convictions for the alleged predicate incidents. It merely requires proof of "[a]ny crime which is chargeable by indictment or information" under the specific provisions of the Florida Statutes enumerated therein).

Furthermore, the multiple crimes charged as RICO in Count One through multiple federal money laundering predicate incidents under 18 USC 1956, and the single crime charged in Count Two as a state money laundering violation of Section 896.101, Florida Statutes, are not the same crime for double jeopardy purposes. The two crimes are similar, but not identical. Florida has no "interstate or foreign commerce" element. The federal money laundering offense requires "an effect on interstate or foreign commerce" element absent from Florida's statute. Additionally, there is no federal base level of funds that must be laundered in order to be liable under federal law. However, in Florida, a certain amount of funds (above $300.00) must be laundered in order to be liable under Florida law along with the laundering activities to be aggregated into one count for a twelve-month period, but these elements are not required under federal law.

Next, Defendant's claim of collateral estoppel also lacks merit as collateral estoppel did not exist at the time the jury was given the case to render verdicts. There was no issue of ultimate

fact previously determined by any valid and final judgment so as to allow the use of collateral estoppel theory at the time the jury rendered its verdict.

Finally, Defendant has cited several cases, but none involve the two offenses at issue here, and the Court finds no authority to support his claim. Therefore, it appears counsel had no basis to raise this issue, and there is no reasonable probability that the outcome of the trial would have been different had he done so. Accordingly, Defendant is not entitled to any relief.

GROUND FIVE

In Ground Five, Defendant alleges ineffective assistance of counsel for failing to argue that the State failed to prove the nexus between the predicate incidents of sale of alcohol and possession of marijuana and the alleged object of the criminal enterprise – the illegal transfer of money (the proceeds of drug activity). This claim lacks merit for the same reasons set forth in Grounds One, Two, and Three, and is therefore, denied.

GROUND SIX (A)

In Ground Six (A), Defendant alleges ineffective assistance of counsel for failing to request a complete jury instruction on possession of marijuana which would have included that Defendant had knowledge of the presence of the substance. Defendant contends the trial court did not instruct the jury that "if a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred," or that the State had to prove he had knowledge of the presence of the marijuana. The jury was instructed that the State had to prove Defendant possessed a certain substance and that the substance was marijuana. It was also told that knowledge could not be inferred or assumed. (TT 533-34). The jury was also instructed on the definition of "possession," including the difference between "actual possession," "constructive possession," "joint

possession" and "exclusive possession." Additionally, the jury heard the instruction on reasonable doubt and the presumption of innocence, as well as how to weigh the evidence. (TT 545-48).

Given the evidence and testimony set forth at trial, as summarized in the State's Response of this Ground, there is no reasonable probability that the outcome of the trial would have been different if the jury had been specifically instructed that it must find Defendant had knowledge of the presence of marijuana, because the evidence and testimony clearly indicated Defendant was aware of the presence of marijuana and its identity. (TT 25-30, 33-36, 59-60, 191, 195-96, 209, 223, 249, 251, 253, 261-62, 291, 294-95, 308-09, 404-410, 420-23, and Stipulation (Summary of Western Union Transfers, attached)). Accordingly, Defendant is not entitled to any relief.

GROUND SIX (B)

In Ground Six (B), Defendant alleges ineffective assistance of counsel for failing to request a complete jury instruction on possession of marijuana that Defendant had knowledge of the illicit nature of the substance in predicate incident 16 as an element of the offense and to this same instruction as an affirmative defense to predicate incidents 79 and 80. For the same reasons set forth in Ground Six (A), Ground Six (B) is also denied. Accordingly, Defendant is not entitled to any relief.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's "Second Amended Motion for Post-Conviction Relief and Memorandum of Law in Support Thereof" is **DENIED**.

2. The State's Response is incorporated into this Order by reference.

3. Copies of the following are attached to this Order and incorporated by reference: Amended Information; Verdict Forms; *Nolle Prosequi*; Judgment of Acquittal; Sentence; Order of Probation; Judgment; Mandate; Motion for Post-Conviction Relief and Memorandum of Law in Support Thereof filed on April 26, 2007; State's Response to Defendant Doved Downer's Motion for Post-Conviction Relief; Motion for Permission to Amend Pending Motion for Post-Conviction Relief; Motion for Leave to

Supplement and Amend Pending Motion for Post-Conviction Relief and Defendant's Notice of Intent to File Petition for Writ of Habeas Corpus Pursuant to Steele v. Kehoe; Order Granting Motion to Amend; Motion for Extension of Time to File Amendment to Pending Rule 3.850 Fla. R. Crim. P.; Letter dated April 19, 2010; Motion to Adopt Pro Se Pleadings; Letter to Clerk filed April 25, 2013; Letters/Notices filed to Clerk of the Court by Defendant; Notice of Inquiry; Clerk of the Court's Correspondence to Defendant; Returned Mail/Envelope; Stipulation with attached Western Union Records. Copies of the relevant portions of the Trial Transcript are also attached and incorporated by reference.

4. Defendant is advised that if he wishes to appeal, he must do so, in writing, within thirty (30) days of the date of this Order.

5. The Clerk of Court shall promptly serve a copy of this Order upon Defendant, including an appropriate certificate of service.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 27 day of October, 2016.

GREG A. TYNAN
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished by U.S. Mail or hand delivery to **Doved Downer**, DOC #391900, Century Correctional Institution, 400 Tedder Road Century, Florida 32535-3659; and to **William Busch**, Office of the State Attorney, Postconviction Felony Unit, 415 North Orange Avenue, Post Office Box 1673, Orlando, Florida 32801, on this 28 day of October, 2016.

Judicial Assistant

State of Florida, County of Orange
I hereby certify that the foregoing is a true and correct copy of the instrument filed in this office.
Confidential or sealed items, if any, have been removed per Fla.R.Jud.Admin. 2.420.
Witness my hand and official seal this 1st day of November 2016
Tiffany Moore Russell, Clerk of the Circuit Court
By: _____ Deputy Clerk