SUPREME COURT OF THE UNITED STATES

WAYMON JENKINS

V. CASE NO. 19-14939

DEPARTMENT OF CORRECTIONS

MOTION TO FILE PETITION FOR WRIT OF CERTIORARI OUT OF TIME

COMES NOW THE PETITIONER WAYMON JENKINS IN PROPER PERSONA, AND PROCEEDING INFORMA PAUPERIS, PURSUANT TO RULE 45(6)(1)(B) TO MOVE THE COURT FOR AN ORDER TO DIRECT THE FILING OF MR. JENKINS PETITION FOR A WRIT OF CERTIORARI "OUT OF TIME."
IN SUPPORT OF THE INSTANT MOTION, MR. JENKINS WOULD STATE AND SHOW THE FOLLOWING:

1. MR. JENKINS' PETITION FOR A WRIT OF CERTIORARI WAS ORIGINALLY POSTMARKED OCTOBER 6, 2020, AND RECEIVED AGAIN BY THE CLERK ON NOVEMBER 13, 2020
2. THE DATE OF THE LOWER COURT JUDGEMENT OR ORDER DENYING A TIMELY PETITION FOR REHEARING WAS MAY 8, 2020. THEREFORE, THE PETITIO WAS DUE ON OR BEFORE OCTOBER 5, 2020.
3. MR. JENKINS WAS UNABLE TO MEET THE OCTOBER 5, 2020 DEADLINE DUE TO GUILDLINES MANDATED BY THE CDC WHICH CLOSED THE INSTITUTIONS LAW LIBRARY DUE TO COVID-19.
4. PERSUANT TO RULE 45(6)(1)(B), THE COURT MAY NONETHELESS CONSIDER MR. JENKINS' UNTIMELY MOTION IF THE COURT DETERMINES THAT THE FAILURE TO FILE IT ON TIME WAS THE RESULT OF EXCUSABLE NEGLECT
5. ATTACHED TO THE INSTANT MOTION, MR. JENKINS SUBMITS THE INSTITUTIONAL APPROVED GRIEVANCE (LOG #201-2010-0186), AND SEVERAL AFFIDAVITS SIGNED BY INSTITUTIONAL STAFF CONFIRMING THAT MR. JENKINS WAS IMPEDED FROM COMPLYING WITH THE COURTS OCTOBER 5, 2020 DEADLINE DUE TO A QUARANTINE LOCKDOWN AT COLUMBIA

CORRECTIONAL INSTITUTION THAT SPANNED FROM MARCH 25, 2020 UNTIL OCTOBER 30 2020.

6. IN LIGHT OF THE GLOBAL PANDEMIC (COVID-19) MR. JENKINS MOVES THIS HONORABLE COURT IN GOOD FAITH FOR CONSIDERATION OF OF HIS MOTION TO FILE A PETITION FOR WRIT OF CERTIORARI OUT OF TIME DUE TO THE EXTRAORDINARY CIRCUMSTANCE (COVID-19) WHICH LED TO MR. JENKINS' PETITION BEING 24 HOURS LATE.

7. DUE TO MR. JENKINS' CURRECT INCARCERATION HE IS UNABLE TO OBTAIN THE OPPOSING PARTY POSITION ON THE DISPOSITION OF THE INSTANT MOTION

WHEREFORE IT IS HUMBLY PRAYED THAT THE COURT GRANTS MR. JENKINS' MOTION TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME DUE TO EXTRAORDINARY CIRCUMSTANCES CAUSED BY THE COVID-19 PANDEMIC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, SWEAR OR AFFIRM THAT THE FOREGOING MOTION FOR PETITION OF WRIT OF CERTIORARI HAS BEEN SENT BY U.S. MAIL TO THE OFFICE OF THE ATTORNEY GENERAL LOCATED AT 401 NORTH FLAGLER DRIVE, SUITE 900, WEST PALM BEACH, FL. 33401, ON THIS 16th DAY OF December, 2020

RESPECTFULLY SUBMITTED,
WAYMON JENKINS #273939,
COLUMBIA C.I. (M/U)
216 S.E. CORRECTIONS WAY
LAKE CITY, FL. 32025

LEGAL MAIL PROVIDED TO
COLUMBIA CORRECTIONAL INSTITUTION
ON 12-16-20 (DATE) FOR MAILING
BA Staff Initial WJ I/M Initial

"The US postal Service
lost Inmate Waymon Jenkins
DC# 273939, 1st copy of this
entire Legal Mail. He is now 12/16/20
sending out this 2nd copy.

Brenda M. Anderson
Stores Consultant
Columbia Correctional Institution
Mailroom

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14939-D

WAYMON JENKINS,

Petitioner-Appellant,

versus

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Waymon Jenkins is a Florida prisoner serving a life sentence for manslaughter with a firearm and being a felon in possession of a firearm. Mr. Jenkins was charged with state felon-in-possession and second-degree murder with a firearm for the shooting of Quinshala Gray. Mr. Jenkins went to trial and the jury entered a general verdict, convicting him of the lesser-included offense of manslaughter. His sentence was initially affirmed, but Mr. Jenkins's later state habeas corpus petition was granted because the jury was not instructed on

excusable homicide. On remand, the state filed an amended information replacing second-degree murder with manslaughter with a firearm. On retrial, the jury found Mr. Jenkins guilty of manslaughter with a firearm, and the trial court sentenced him to life imprisonment. Mr. Jenkins's attempts at state appeal and habeas corpus relief were unsuccessful.

Mr. Jenkins seeks a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 habeas corpus motion, in which he argued that:

1. the trial court violated his right to "choice of counsel" at retrial when the court appointed counsel from the Office of the Public Defender ("OPD") without his knowledge or consent;

2. the trial court erred in denying his motion to dismiss the charges at retrial when it concluded that counsel's waiver of his right to a speedy trial at the first trial continued at retrial;

3. the trial court erred in summarily denying his motion to disqualify the trial judge;

4. the Double Jeopardy Clause of the Fifth Amendment was violated when a rifle admitted at his initial trial was admitted at retrial;

5. retrial counsel was ineffective for moving for a continuance instead of enforcing his speedy-trial rights;

6. retrial counsel was ineffective for not calling an impeachment witness to show that a state witness had influenced the impeachment witness to provide inconsistent statements to law enforcement;

7. retrial counsel was ineffective for not impeaching a state witness with the witness's testimony at his initial trial;

8. retrial counsel was ineffective for not advising him that he had the right not to testify;

9. the trial court violated his right to assistance of counsel when it did not allow retrial counsel to explain why Mr. Jenkins agreed to testify, and retrial counsel was ineffective for not objecting to the court's refusal;

10. retrial counsel was ineffective for not moving to discharge a sleeping juror;

11. his right to conflict-free counsel was violated when counsel from the OPD was appointed on appeal; and

12. appellate counsel was ineffective for not arguing that the trial court's instruction on lesser-included offenses to manslaughter was "fundamentally flawed."

Following careful consideration, Mr. Jenkins's motion for a COA is denied.

I.

Before a state prisoner may appeal from the district court's denial of his § 2254 motion, he must first obtain a COA from a circuit justice or judge. 28 U.S.C. § 2253(c)(1); Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1169 (11th Cir. 2017). In order to receive the COA, the petitioner must "ma[ke] a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the petitioner's claim on procedural grounds without reaching the underlying constitutional claim, he must show 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." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). Where, however, the district court has denied the petitioner's claim on the merits, he must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id.; see Buck v. Davis, 580 U.S. ___, 137 S. Ct. 759, 775 (2017) ("A court of appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims, and ask only if the District Court's decision was debatable." (alterations adopted and quotation marks omitted)). Importantly, analysis of a COA "is not coextensive with a merits analysis," and denying a COA by reaching the merits of an appeal is, essentially, "deciding an appeal without jurisdiction." Buck, 137 S. Ct. at 773 (quotation marks omitted).

II.

Claims of ineffective assistance of counsel are governed by the familiar test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984): first, whether the counsel's performance was deficient; and second, whether the deficient performance prejudiced the petitioner's defense. Id. at 687, 104 S. Ct. at 2064; see Hunter v. United States, 559 F.3d 1188, 1191 (11th Cir. 2009) (stating that, in order to meet deficiency prong of Strickland such that a COA should issue, the petitioner must make a substantial showing that "no competent counsel would

have taken the action that his counsel did take"), vacated on other grounds, 558 U.S. 1143, 130 S. Ct. 1135 (2010). "There is a strong presumption that trial counsel's conduct is the result of trial strategy, and 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" Sinclair v. Wainwright, 814 F.2d 1516, 1519 (11th Cir. 1987) (quoting Strickland, 466 U.S. at 690, 104 S. Ct. at 2066).

A. GROUND ONE: CHOICE OF COUNSEL

In Ground One of his § 2254 petition, Mr. Jenkins argued he was denied his constitutional right to "choice of counsel" when OPD counsel was appointed at retrial without his knowledge or consent. He also argued that OPD counsel remained appointed for six months with a conflict of interest, which only solidified the denial of his "counsel of choice."

In his state post-conviction proceedings, Mr. Jenkins gave inconsistent, yet interrelated, articulations of Ground One as claims of trial-court error and ineffective assistance, namely, that (1) his due process rights were violated by the appointment of OPD counsel at retrial without his knowledge or consent, and (2) OPD counsel at retrial was ineffective for not diligently uncovering the conflict of interest in representing both him and Sheth Allen, a witness to part of the crime whom OPD was representing in another case. The District Court liberally

construed Ground One as only raising the latter argument. For clarity, each articulation, along with the relevant state court decision, will be addressed in turn.

1. Due Process

In his state habeas petition, Mr. Jenkins argued that his due process rights were violated when the trial court appointed OPD counsel on remand without his knowledge or consent. The Florida District Court of Appeal ("DCA") summarily denied the petition.

In his § 2254 petition, Mr. Jenkins rearticulated this argument as a claim that the trial court violated his right to "choice of counsel" by appointing OPD counsel at retrial. The District Court did not address this claim in denying Ground One. Even if the District Court's failure to address this argument would constitute a Clisby violation, no COA is warranted because any error was harmless. See Clisby v. Jones, 960 F.2d 925, 938 (11th Cir. 1992) (en banc) (holding that we will vacate the District Court's denial of a § 2254 petition and remand for consideration unaddressed claims).

Reasonable jurists would not debate the DCA's rejection of Mr. Jenkins's argument that his due process rights were denied by the appointment of OPD counsel at retrial without his knowledge or consent because the right to counsel attaches automatically, such that Mr. Jenkins did not have to affirmatively invoke his right to counsel for counsel to be appointed. Stano v. Dugger, 921 F.2d 1125,

1143 (11th Cir. 1991). Further, the right to counsel of choice applies only to defendants who do not require appointed counsel to represent them. See United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561 (2006) (stating that an element of the Sixth Amendment right to counsel is "the right of a defendant who does not require appointed counsel to choose who will represent him"). Thus, Mr. Jenkins did not need to request or give his consent for counsel to be appointed, and, because counsel was appointed, his right to counsel of choice was not implicated. Accordingly, no COA is warranted on this subpart of Ground One See id.

2. Ineffectiveness

Mr. Jenkins also argued in this ground that, as a result of OPD counsel's appointment at retrial, he went six months with counsel having a conflict of interest. In his construed state habeas petition, however, he argued that OPD counsel at retrial performed deficiently by not diligently uncovering the OPD's conflict of interest in representing both Allen and Mr. Jenkins. As a result, he argued that he was not brought to trial within 90 days' of the remand order, depriving him of a fair and speedy trial. The DCA summarily denied the petition.

In his Rule 3.850 motion, Mr. Jenkins argued that OPD counsel at retrial was ineffective for attempting to represent him knowing that counsel at his first trial was not with the OPD and for not discovering the conflict of interest between

representing him and Allen in a timely manner. Consequently, he argued that no action was taken in his case for six months, precluding him from obtaining a speedy trial. The state post-conviction court construed this argument as challenging the inaction of OPD retrial counsel during the six months that OPD counsel represented Mr. Jenkins. The court determined that the claim failed as a matter of law because Mr. Jenkins failed to establish prejudice, as OPD counsel withdrew and conflict-free counsel was appointed.

The District Court liberally construed Ground One as raising the same ineffectiveness arguments Mr. Jenkins had raised in his state habeas petition and Rule 3.850 motion. The District Court determined that Mr. Jenkins failed to establish an ineffective-assistance-claim based on a conflict of interest because he failed to show an adverse effect, as there was no indication that the trial court would have dismissed the charges on account of a speedy-trial violation or that the state would not have been able to remedy the violation under Florida law.

A state prisoner raising an ineffective-assistance claim based on a conflict of interest "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). To prove adverse effect, the petitioner must: (1) point to a plausible alternative strategy or tactic that might have been pursued; (2) demonstrate that the strategy or tactic was reasonable under the facts; and (3) show a link between the

actual conflict and the decision to forego the strategy or tactic. Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999) (quotation marks omitted). The petitioner need not show that the alternative strategy or tactic would have been successful, only that it was a viable alternative. Id.

Under Florida law, a person to be tried again must be brought to trial within 90 days of the order granting a new trial. Fla. R. Crim. P. 3.191(m). If the defendant is not brought to trial in that time, the defendant may move to dismiss the charges. Fla. R. Crim. P. 3.191(j), (n). Before such relief can be granted, however, the court shall order the defendant to be brought to trial within ten days, and the defendant's motion will be granted only if he is not brought to trial in that time. Fla. R. Crim. P. 3.191(p)(3). To succeed on an ineffective-assistance claim based on counsel's failure to assert his speedy-trial rights, a prisoner must show that the state could not have brought him to trial within the ten-day period under Rule 3.191(p)(3). Remak v. State, 142 So. 3d 3, 6 (Fla. 2d DCA 2014). The prisoner also must provide specific facts showing that the quality of the state's evidence would have diminished had it been forced to proceed within the time provided under Rule 3.191(p)(3). Id.

Here, reasonable jurists would not debate the state courts' denial of Mr. Jenkins's ineffective-assistance arguments. In both his construed state habeas petition and his Rule 3.850 motion, Mr. Jenkins's argument for why he suffered

prejudice on account of retrial OPD counsel's deficient performance was that he was deprived of an opportunity to assert his right to a speedy trial. Thus, his proposed alternative strategy appears to have been to file a motion to dismiss the charges due to a speedy-trial violation or to enforce his speedy-trial rights. Mr. Jenkins did not, however, establish that retrial OPD counsel's decision not to pursue either strategy was linked in some way to the conflict of interest arising out of the OPD's representation of Allen. See Freund, 165 F.3d at 860. Further, Mr. Jenkins failed to allege, much less establish, that the state could not have brought him to trial within the time provided by Rule 3.191(p)(3), or that the quality of the evidence would have diminished had his speedy-trial rights been enforced. See Remak, 142 So. 3d at 6. Accordingly, no COA is warranted on this subpart of Ground One.

B. GROUND TWO: MOTION TO DISMISS ON RETRIAL

In Ground Two of his § 2254 petition, Mr. Jenkins argued that the trial court erred in applying Florida law when it concluded that his waiver of speedy trial at his first trial continued at retrial. He also argued that conflict counsel at retrial was ineffective for not adequately bringing the speedy-trial violation before the court.

Mr. Jenkins raised the trial-court error claim in his construed state habeas petition, which the DCA summarily denied. He raised a more developed version of his ineffective-assistance claim in his Rule 3.850 motion, in which he argued

that regional conflict counsel at retrial was ineffective for not filing his requested motion to dismiss on account of the speedy-trial issue. He argued that he was prejudiced because, had regional conflict counsel filed the motion, the state would not have been able to retry him in the allotted time. The state post-conviction court determined that Mr. Jenkins failed to establish prejudice because Mr. Jenkins argued the merits of his speedy-trial claim to the trial court directly, and he failed to establish that the motion would have been granted had it been raised sooner.

The District Court determined that the trial court did not err in denying Mr. Jenkins's motion to dismiss on the speedy-trial issue, given the procedural posture of the case. The court also determined that, even had regional conflict counsel moved to dismiss, Mr. Jenkins could not demonstrate that the motion would have been granted.

The Sixth Amendment guarantees the right to a speedy trial. U.S. Const. amend. VI. While constitutional rights are waivable, the defendant must personally waive certain fundamental rights, such as the right to counsel and the right to plead not guilty. New York v. Hill, 528 U.S. 110, 114, 120 S. Ct. 659, 663 (2000). For others, counsel may effect the waiver. See id. at 115, 120 S. Ct. at 664. The Supreme Court has not addressed whether a waiver of speedy trial at a defendant's first trial may operate to waive the same right at retrial.

Under Florida law, a waiver of speedy trial waives all provisions of the relevant state rule, including the 90-day period provided by Florida Rule of Criminal Procedure 3.191(m). E.g., State v. Templar-O'Brien, 173 So. 3d 1129, 1131 (Fla. 2d DCA 2015); Koshel v. State, 689 So. 2d 1229, 1230 (Fla. 5th DCA 1997); State v. Ryder, 449 So. 2d 398, 398–99 (Fla. 2d DCA 1984).

Here, reasonable jurists would not debate the state courts' denial of Ground Two. Reasonable jurists would not debate the DCA's decision because there is no Supreme Court precedent addressing whether an initial waiver of a defendant's speedy-trial rights at a first trial can continue through retrial, such that its decision was not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. See Washington v. Crosby, 324 F.3d 1263, 1265 (11th Cir. 2003) ("[W]e have recognized that where no Supreme Court precedent is on point, we cannot say that the state court's conclusion is contrary to clearly established [f]ederal law as determined by the U.S. Supreme Court." (alteration adopted and quotation marks omitted)). While Mr. Jenkins argued that the trial court erred in applying state law, he cannot obtain a COA on a perceived error of state law. See Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 875 (1984) ("A federal court may not issue [a writ of habeas corpus] on the basis of a perceived error of state law.").

Reasonable jurists also would not debate the state post-conviction courts' determination that Mr. Jenkins failed to establish prejudice on account of regional conflict counsel's failure to file a motion to dismiss. As the state post-conviction court noted, Mr. Jenkins argued the merits of his motion to dismiss directly, and the trial court denied it on the merits. Thus, he cannot establish prejudice on account of counsel's decision not to file the motion. To the extent that Mr. Jenkins claimed that counsel could have argued to the trial court that the initial waiver of his speedy-trial rights did not continue through retrial, he cannot establish a reasonable probability of success because it is foreclosed by Florida precedent. E.g., Templar-O'Brien, 173 So. 3d at 1131; Koshel, 689 So. 2d at 1230; Ryder, 449 So. 2d at 398-99. Thus, no COA is warranted as to this ground.

C. GROUND THREE: MOTION TO DISQUALIFY

In Ground Three of his § 2254 petition, Mr. Jenkins argued that his rights to due process, equal protection, and the assistance of counsel under the United States and Florida Constitutions were violated by the trial court's summary denial of his motion to disqualify the trial judge. Mr. Jenkins raised a variation of this claim in his construed state habeas petition, arguing that the trial court erred because his motion to disqualify the trial judge was legally sufficient under Florida law to warrant recusal, as he did not feel that the trial judge could be unbiased because (1) the judge had instructed Jenkins's appointed counsel on retrial, Craig Lawson, to

move to the back of the courtroom, and (2) expressed displeasure with Jenkins's decision to proceed pro se, indicating that the judge had a personal interest in the manner of his representation.

The DCA summarily denied the construed state habeas petition. The District Court then denied Ground Three of the § 2254 petition on the merits, concluding that Mr. Jenkins had failed to establish an objective fear that he would not receive a fair trial.

"A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999) (per curiam). A federal claim is subject to procedural default where (1) the state court applies an independent and adequate ground of state procedure to reject the petitioner's federal claim; or (2) the petitioner never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred. Id. at 1302–03. Under the procedural-default doctrine, "if the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief." Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001). Exhaustion or procedural default may be excused if the petitioner establishes (1) "cause for not raising the claim of error on direct appeal and actual

prejudice from the alleged error," or (2) a fundamental miscarriage of justice, meaning actual innocence. McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011) (quotation marks and emphasis omitted). In addition, the procedural default of an ineffective-assistance-of-trial-counsel claim can be overcome if the "claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Martinez v. Ryan, 566 U.S. 1, 14, 132 S. Ct. 1309, 1318 (2012).

In his construed state habeas petition, Mr. Jenkins did not raise a federal constitutional challenge based on the trial court's denial of his motion to disqualify the trial judge, but rather asserted that the trial court had erred in denying the motion because it was legally sufficient under Florida law. Because the federal constitutional nature of Ground Three was not raised in state court, it is unexhausted and thus was procedurally defaulted because it could have been raised on direct appeal. See Bailey, 172 F.3d at 1303, 1305; Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001) (stating that claims that could have, or should have, been raised on direct appeal are not cognizable in a post-conviction motion). He cannot overcome his procedural default because he has not argued or alleged cause or prejudice to excuse his default. See McKay, 657 F.3d at 1196. Thus, Ground Three is procedurally defaulted, and no COA is warranted.

D. GROUND FOUR: DOUBLE JEOPARDY CLAUSE

In Ground Four of his § 2254 petition, Mr. Jenkins argued that a double-jeopardy violation occurred when evidence that he possessed a rifle was admitted at retrial. He argued that evidence of the rifle was only admitted at his first trial to establish the mens rea requirement for second-degree murder, a depraved mind, and, because the jury found him guilty only of manslaughter, the state was precluded from re-litigating the issue at retrial. Mr. Jenkins also argued the state should be precluded from presenting testimony by Allen that, about an hour before the offense, he saw Jenkins remove a rifle from the trunk of a car and threaten to kill Gray.

Mr. Jenkins raised these arguments in his construed state habeas petition, which the DCA summarily denied. As raised in his Rule 3.850 motion, Mr. Jenkins argued that Allen's testimony about the rifle was inadmissible at retrial because the jury's finding of guilt only as to manslaughter implied an acquittal of second-degree murder and, therefore, a finding that he did not act with a depraved mind. Consequently, he argued that the state was collaterally estopped from presenting the evidence at retrial and, thereby re-litigating it. However, he conceded that the testimony was relevant to disprove accident or mistake. The state post-conviction court denied the ground because Mr. Jenkins conceded that the evidence was relevant to establish different issues at each trial, he was not tried

for second-degree murder at retrial, and the reason for retrial was not due to sufficiency of the evidence.

The District Court determined that no double jeopardy violation resulted from the admission of testimony relating to the rifle because each trial concerned a different substantive offense.

The principle of "collateral estoppel" or "issue preclusion" provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194 (1970); see Yeager v. United States, 557 U.S. 110, 119 n.4, 129 S. Ct. 2360, 2367 n.4 (2009) (stating that "issue preclusion" is a more descriptive term often used in lieu of "collateral estoppel"). In criminal proceedings, it is embodied in the Fifth Amendment guarantee against double jeopardy. Ashe, 397 U.S. at 445-46, 90 S. Ct. at 1195.

Where a defendant was initially acquitted by a general verdict, the reviewing court must examine the record to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id. at 444, 90 S. Ct. at 1194. A general verdict finding a defendant guilty of a lesser-included offense operates as an acquittal of the greater charge. Green v. United States, 355 U.S. 184, 190-91, 78 S. Ct. 221,

225 (1957). "Collateral estoppel, however, is limited in its application. Its parent doctrine, double jeopardy, prohibits prosecution of the crime itself, whereas collateral estoppel simply forbids the government from relitigating certain facts in order to establish the fact of the crime." Ferenc v. Dugger, 867 F.2d 1301, 1303 (11th Cir. 1989).

Florida second-degree murder is the unlawful killing of another without premeditation, "when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life." Fla. Stat. § 782.04(2). Manslaughter, a lesser-included offense of second-degree murder, is the killing of another by act, procurement, or culpable negligence, without lawful justification and where the killing does not constitute excusable homicide. Fla. Stat. § 782.07(1); Bolin v. State, 8 So. 3d 428, 429 (Fla. 2d DCA 2009). "Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion." Fla. Stat. § 782.03.

Here, reasonable jurists would not debate the state courts' denial of Ground Four. Mr. Jenkins was correct that the jury's general verdict of guilty only as to the lesser-included offense of manslaughter at his first trial implied acquittal of second-degree murder. See Green, 355 U.S. at 190-91, 78 S. Ct. at 225. The acquittal, however, did not preclude Allen's testimony regarding the rifle because,

as Mr. Jenkins conceded, it was relevant to whether Gray's death was the result of accident or mistake, excusable homicide, which was not at issue at his first trial. Because the jury was not instructed on excusable homicide at his first trial, that verdict could not have been based on a finding that Gray's death was not an accident or mistake. See Ashe, 397 U.S. at 444, 90 S. Ct. at 1194. Thus, the state was not estopped from presenting Allen's testimony to show that Gray's death was not an accident, and the state post-conviction court's denial of Ground Four was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, no COA is warranted as to this claim.

E. GROUND FIVE: CONTINUANCE BY RETRIAL COUNSEL

In Ground Five of his § 2254 petition, Mr. Jenkins argued that Lawson was ineffective for moving for a continuance instead of enforcing his speedy-trial rights.

As raised in his Rule 3.850 motion, Mr. Jenkins argued that, because the case was set for retrial, all Lawson had to do was become familiar with the record and consult with counsel from his first trial. A speedy trial, he argued, would have allowed Tony Kendrick, an unavailable neighbor, to give live testimony that Allen had lied to police about what happened the day of the offense, and the state likely would not have been able to bring him to trial within the period provided by Rule 3.191. He also argued, however, that shortly after Lawson was appointed, he gave

Lawson a transcript of his first trial and asked Lawson to (1) appoint a private investigator to locate witnesses, (2) hire Dr. John Marraccini, a forensic consultant, and (3) consult with former counsel on the presentation of evidence. The state post-conviction court construed Mr. Jenkins's arguments as restating his argument in Ground Two—that counsel was ineffective for failing to pursue his speedy-trial rights—and denied this ground for the same reasons discussed in Ground Two.

The District Court determined that, as the state court concluded, Mr. Jenkins could not show that his speedy-trial rights had been violated by Lawson's failure to enforce his speedy-trial rights because they already had been waived. The court further concluded that Mr. Jenkins failed to establish that Lawson's decision to request a continuance was incorrect, given his own instructions to Lawson to conduct further investigation and hire experts.

Here, reasonable jurists would not debate the state court's determination that Mr. Jenkins failed to establish prejudice on account of Lawson's decision to move for a continuance, rather than to move for a speedy trial, albeit for different reasons. See Gill v. Mecusker, 633 F.3d 1272, 1291 (11th Cir. 2011). The trial court concluded that the speedy-trial window reset after Lawson was appointed. Thus, Lawson had the choice of enforcing that period or moving for a continuance independent of the effect of the waiver of Mr. Jenkins's speedy-trial rights at his first trial. Nevertheless, because Mr. Jenkins's ineffective-assistance claim turns

on whether the state court's interpretation of Florida law on the waiver of speedy trial was correct, the state court's decision warrants deference. See Pinkney v. Sec'y, DOC, 876 F.3d 1290, 1295 (11th Cir. 2017) (stating that this Court must defer to a state court's construction of its own law when the validity of an ineffective-assistance claim turns on state law).

Further, as discussed in Ground One, Mr. Jenkins has not alleged, much less established, that the state could not have brought him to trial within the time provided by Rule 3.191(p)(3) or that the quality of the evidence would have diminished, had his speedy-trial rights been enforced. See Remak, 142 So. 3d at 6. His conclusory argument that the state would not be able to bring him to trial in time is insufficient to warrant relief. See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating that a movant is not entitled to habeas relief when his claims are merely "conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible" (quotation marks omitted)).

Reasonable jurists also would not debate the District Court's alternative determination that Lawson's decision was not erroneous. While Mr. Jenkins argued that all Lawson had to do was review the available record and proceed to trial, he also argued that he asked Lawson to investigate witnesses, consult with counsel from his first trial, hire a private investigator, and retain Dr. Marraccini. Given Mr. Jenkins's request, and the deference afforded to counsel's performance

under §2254(d), there is a reasonable argument that Lawson satisfied the Strickland standard. See Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 788 (2011). Accordingly, no COA is warranted as to this claim.

F. GROUND SIX: IMPEACHMENT WITNESS

In Ground Six of his § 2254 petition, Mr. Jenkins argued that Lawson was ineffective for not calling Eric Houston to testify. During a police interview, Houston stated that he observed a man, later identified as Mr. Jenkins, retrieve a rifle from the trunk of a car, point the rifle at Gray, and tell Gray, "get your ass up the stairs." However, in a later deposition Houston testified that, an hour or so before the shooting, he saw Mr. Jenkins get out of the passenger-side of a car driven by another man and retrieve a rifle from the trunk of a car. During cross-examination, Houston testified that he could not recall telling police that Mr. Jenkins had pointed the rifle at a woman and told her, "get your ass up the stairs." Mr. Jenkins claims Houston told Jenkins's private investigator that he had lied to police due to Allen's influence.[1] He argued that counsel received the private investigator's report of what Houston said, but failed to follow up and interview or call Houston as a witness. He argued that Houston's testimony had the potential of rendering the testimony of the rifle inadmissible.

[1] Mr. Jenkins's argument in support of Ground Six is based on facts not in the state record.

As raised in his Rule 3.850 motion, however, Mr. Jenkins argued that Lawson was ineffective for not calling Houston as a witness because Houston previously had given deposition testimony that (1) Houston was walking home with Allen on the day of the shooting; (2) Houston observed Mr. Jenkins remove a rifle from his car one to two hours before the shooting; (3) a black man was driving the car; and (4) Gray was not present at that time. Mr. Jenkins argued that he was prejudiced because Houston's testimony would have established that Allen gave false testimony about seeing Mr. Jenkins pull out a rifle and threaten Gray shortly before the offense. The state post-conviction court determined that Mr. Jenkins failed to establish that the jury would have believed Houston's proposed testimony, as he likely would have been confronted with his prior statements to police. The court also noted that Houston's proposed testimony was at odds with Mr. Jenkins's testimony admitting to retrieving a rifle from his car.

The District Court denied Ground Six, concluding that Mr. Jenkins failed to establish deficient performance because Lawson reasonably could have concluded that Houston might have provided inculpatory, rather than exculpatory, testimony, given that Mr. Jenkins had admitted at trial to retrieving a rifle from his car when he was with Gray. The court also concluded that Mr. Jenkins failed to establish prejudice in light of the other evidence and the inconsistency between Houston's and Mr. Jenkins's testimonies.

Here, reasonable jurists would not debate the state court's determination that Mr. Jenkins failed to establish prejudice on account of Lawson's failure to call Houston as a witness. As the state court noted, Houston's deposition testimony was at odds with his prior statement to police. Thus, at trial, he likely would have been impeached with his prior inconsistent statement, which would have bolstered Allen's credibility. As the state court also noted, Houston's testimony was at odds with Mr. Jenkins's own testimony on cross-examination admitting to retrieving the rifle from the trunk of the car. Further, Allen's credibility already had been attacked by counsel by emphasizing the difference between Allen's testimony and that of the other neighbors, none of whom observed Mr. Jenkins carrying a rifle up the stairs with Gray. Thus, Mr. Jenkins failed to establish prejudice on account of Lawson's omission.

As for Mr. Jenkins's new argument in his § 2254 petition—that Houston had told his private investigator that he gave a false statement to police due to Allen's influence—it was not raised in state court. Regardless, even if Lawson had called Houston and preempted the inconsistent statement, the inculpatory nature of his prior inconsistent statement would remain, especially because Mr. Jenkins did not explain how Allen had influenced Houston, and Houston's testimony still would have been at odds with that of Mr. Jenkins's testimony. Accordingly, no COA is warranted as to this claim.

G. GROUND SEVEN: IMPEACHMENT OF STATE WITNESS

In Ground Seven of his § 2254 petition, Mr. Jenkins argued that Lawson was ineffective for not impeaching Allen with his inconsistent testimony from the first trial, though he did not further elaborate on what inconsistent testimony he was referring to.

As raised in his Rule 3.850 motion, Mr. Jenkins more specifically argued that Lawson should have impeached Allen with his inconsistent testimony on what Jenkins told Gray while going up the stairs. At retrial, Allen said he heard Mr. Jenkins tell Gray, "I ought to k . . . ," but Mr. Jenkins did not finish his sentence. During a sidebar on cross-examination, Lawson argued that Allen for the first time added a "k" to the command to Gray, leading to the inference that Mr. Jenkins had threatened to kill Gray. The state argued that it was improper impeachment because Allen never said the full word "kill." The trial court concluded sidebar discussion, stating, "I mean, as far as the transcript—but if Mr. Lawson wants to stand up and say, 'Isn't it true that you went 'k . . . ,' whatever that is, then so be it." Lawson did not ask further questions relating to the inconsistency. Mr. Jenkins argued that this led to the jury being left with the inference that he threatened to kill Gray, causing the jury to convict him. The state post-conviction court denied this argument as refuted by the record because Lawson did try to

impeach Allen with his prior inconsistent statement, and he failed to show that any additional testimony could have been elicited or to establish prejudice as a result.

Returning to Mr. Jenkins's § 2254 petition, the District Court construed Ground Seven as more broadly challenging Lawson's cross-examination and failure to challenge the increase in detail in Allen's testimony at retrial. The court determined that Mr. Jenkins failed to establish prejudice, as the jury was able to measure Allen's credibility in reaching its verdict.

Here, reasonable jurists could debate the state court's determination that Ground Seven was refuted by the record. While the record shows that Lawson attempted to impeach Allen with his prior inconsistent statement of the threat that he purportedly heard Mr. Jenkins say, Lawson did not follow through with his impeachment once the trial court appeared to allow the question. Reasonable jurists, however, would not debate the state court's ultimate denial of Ground Seven because Mr. Jenkins failed to establish prejudice, as counsel was able to emphasize the various discrepancies between Allen's testimony and that of the other neighbors. See Gill, 633 F.3d at 1291. Further, even had Allen been impeached, Allen's consistent testimony still would have established that Mr. Jenkins made an unspecified threat against Gray soon before her death. Thus, Mr. Jenkins failed to establish a reasonable probability of acquittal, and no COA is warranted as to this claim.

H. GROUND EIGHT: ADVICE REGARDING RIGHT NOT TO TESTIFY

In Ground Eight of his § 2254 petition, Mr. Jenkins argued that Lawson was ineffective for not advising him that he could choose not to testify at all.

As raised in his Rule 3.850 motion, however, Mr. Jenkins had argued that Lawson was ineffective for not advising him that, if he testified on his own behalf, he would be waiving the defense of excusable homicide. He argued that, had he known that testifying would waive the defense of excusable homicide, he would not have testified and his criminal history would not have been presented to the jury. The state post-conviction court determined that he failed to establish prejudice because the only evidence suggesting that Gray's death was due to excusable homicide was Mr. Jenkins's own testimony that it was an accident.

Returning to Mr. Jenkins's § 2254 petition, the District Court denied Ground Eight on the merits, concluding that it was refuted by the record because the court advised him that the choice of whether or not to testify was his.

Here, as with Ground Three, the District Court erred by independently analyzing the merits of Ground Eight as presented, as it was never raised in state court. His claim in state court concerned Lawson's advice on the waiver of defenses if he chose to testify, not allegedly deficient advice about his right to not testify at all. Mr. Jenkins cannot raise the right-to-not-testify claim now in state court, as more than two years have passed since his conviction became final. See

Bailey, 172 F.3d at 1303; Fla. R. Crim. P. 3.850(b) (barring consideration of Rule 3.850 motions filed more than two years after the judgment becomes final unless). Thus, Ground Eight is procedurally defaulted. See Bailey, 172 F.3d at 1303. He cannot overcome his procedural default because he has not alleged, much less established, cause or prejudice for not raising it in state court. See McKay, 657 F.3d at 1196.

Further, Mr. Jenkins cannot overcome his procedural default under Martinez because this ground is not a substantial one. See Martinez, 566 U.S. at 14, 132 S. Ct. at 1318. Mr. Jenkins cannot demonstrate prejudice on account of any omission by Lawson in advising him on whether he could or could not testify because the trial court twice informed him that he could choose not to testify. Moreover, after Lawson indicated to the trial court that Mr. Jenkins would testify, Jenkins told the court directly that he would not, only to later change his mind. Thus, he cannot establish that his decision to testify was due to Lawson's failure to advise him that he could choose not to testify. Accordingly, Ground Eight is procedurally defaulted and no COA is warranted as to this claim.

I. GROUND NINE: EXPLAINING WHY MR. JENKINS TESTIFIED

In Ground Nine of his § 2254 petition, Mr. Jenkins argued that he and Lawson had entered into an agreement to secure his testimony, in which Lawson stated that Lawson would visit him over the weekend to prepare his testimony,

which was important because he had not met with Dr. Marraccini before or discussed whether or not he had the right to testify. He argued that Lawson tried to inform the court of the agreement, but the court cut him off. He argued that the court's interjection interfered with his right to assistance of counsel. He also argued that Lawson was ineffective for not objecting to the court's interjection and getting him to agree to a strategy, but not following through with it.

As raised in his Rule 3.850 motion, Mr. Jenkins argued that Lawson was ineffective for not ensuring that he would testify in Dr. Marraccini's presence at trial. He argued that he only elected to testify based on an agreement with Lawson that he would be testifying in Dr. Marraccini's presence, and Lawson assured him that Lawson would inform the court of the agreement. He argued that, when Lawson tried to explain that to the court, the court did not allow him to explain but insisted that he testify, thereby violating his right to effective assistance and right to testify. He argued that, had he been able to testify in front of Dr. Marraccini, Dr. Marraccini would have been able to give the jury "a play by play explanation within [his] demonstration to support the theory of defense" and explain how the evidence did not amount to criminal liability. He also argued that Lawson was ineffective for abandoning their agreement.

The state post-conviction court determined that Mr. Jenkins could not attack the trial court's actions because "that is a matter for direct appeal and not

cognizable in a 3.850 motion." With regard to Lawson's performance, the court determined that Mr. Jenkins failed to establish prejudice because he failed to show that Dr. Marraccini's testimony would have been different had he been present during Mr. Jenkins's testimony.

The District Court construed Ground Nine as raising two claims: (1) that Lawson did not prepare Mr. Jenkins to testify, and (2) that Lawson was ineffective for not ensuring Dr. Marraccini's presence during Jenkins's testimony. As to the former, the court determined that Mr. Jenkins failed to establish prejudice because he failed to explain how more preparation would have affected the outcome. As to the latter, the court stated that Mr. Jenkins could not now fault Lawson over Jenkins's own decision to testify knowing that Dr. Marraccini was not available. The court did not address Mr. Jenkins's arguments relating to the trial court's actions, Lawson's failure to object to the court's actions, or Lawson's failure to ensure Dr. Marraccini's presence.

A state court's ruling rests on adequate and independent state grounds if: (1) the last state court to decide the issue expressly stated that it relied on state procedural rules to resolve the federal claim, without reaching its merits; (2) the decision rests entirely on state law grounds and is not intertwined with an interpretation of federal law; and (3) the procedural rule is firmly established and regularly followed. Ward v. Hall, 592 F.3d 1144, 1156-57 (11th Cir. 2010).

As an initial matter, the District Court's denial of Ground Nine without addressing the actual arguments raised would normally constitute a Clisby violation. However, no COA is warranted because it was harmless, as reasonable jurists would not debate the state post-conviction court's denial of Ground Nine. The state court's determination that Mr. Jenkins could not attack the trial court's actions in his Rule 3.850 motion was effectively a determination that the argument was procedurally barred. See Bruno, 807 So. 2d at 63. That determination was not intertwined with an interpretation of federal law, and that procedural rule is firmly established and regularly followed. E.g., Smith v. State, 445 So. 2d 323, 325 (Fla. 1983); Davis v. State, 219 So. 3d 863, 864 (Fla. 4th DCA 2017). As such, Ground Nine is partly procedurally defaulted, and Mr. Jenkins did not establish cause or prejudice. See McKay, 657 F.3d at 1196; Ward, 592 F.3d at 1156-57.

Reasonable jurists would not debate the state court's determination that Mr. Jenkins failed to establish prejudice on account of Lawson's failure to ensure Dr. Marraccini's presence because Dr. Marraccini testified based on Mr. Jenkins's account of what happened and to his opinion to the ultimate issue that Gray's death was the result of either an accident or homicide. While Mr. Jenkins argued that Dr. Marraccini could have given a "play by play" explanation, presumably utilizing Jenkins to demonstrate his version of the events, he did not explain how such

testimony would have been materially different from Dr. Marraccini's testimony at retrial.

With regard to Mr. Jenkins's new argument—that Lawson should have objected to the trial court's interjection when he tried to explain their agreement—that issue was not raised in state court and is thus unexhausted. See Bailey, 172 F.3d at 1303. The claim is procedurally defaulted because he cannot raise it now in state court, as more than two years have passed since his conviction became final. See id.; Fla. R. Crim. P. 3.850(b). He cannot overcome his procedural default because he has not alleged, much less established, cause or prejudice for not raising it in state court. See McKay, 657 F.3d at 1196. He cannot overcome his procedural default under Martinez because, as discussed above, he cannot establish prejudice on account of him not testifying in Dr. Marraccini's presence. Accordingly, no COA is warranted as to this claim.

J. GROUND TEN: NOT MOVING TO DISCHARGE A SLEEPING JUROR

Ground Ten of Mr. Jenkins's § 2254 petition concerns Juror 13, whom Jenkins says slept through part of Tony Kendrick's recorded testimony. Lawson brought Juror 13 to the trial court's attention. The court responded, "Let's . . . keep an eye on whichever juror it is that you think may be sleeping. . . . [If] it continues to be a problem, we can address that a little bit later on." Counsel agreed.

Mr. Jenkins argued that Lawson was ineffective for not moving to replace Juror 13 with an alternate. Mr. Jenkins said that, while Lawson brought Juror 13 to the trial court's attention, there was another instance of Juror 13 sleeping that Jenkins brought to Lawson's attention, but Lawson took no action. As a result, he argued that Juror 13 missed Kendrick's recorded testimony, which prejudiced him because Kendrick's testimony showed that Allen was not being truthful.

Mr. Jenkins raised this claim in his Rule 3.850 motion, which the state post-conviction denied, crediting Lawson's testimony at the state evidentiary hearing that Juror 13 was not fully asleep and was not seen falling asleep again for the remainder of trial. The court concluded that Lawson was not deficient because Lawson did raise the issue of the sleeping juror to the court and, based on Lawson's testimony, Mr. Jenkins suffered no prejudice, noting that no one else raised a concern of juror inattentiveness for the remainder of trial.

Returning to Mr. Jenkins's § 2254 petition, the District Court denied Ground Ten, deferring to the state court's credibility finding.

Here, reasonable jurists would not debate the state court's denial of Ground Ten. The state court's determination that Lawson's testimony at the evidentiary hearing was credible warrants deference. See Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011) (stating that credibility determinations by the state trial court are questions of fact to which § 2254(e)'s presumption of

correctness applies). Thus, there was only one instance in which Juror 13 was nodding off during Kendrick's testimony. Lawson reasonably could have concluded that removing the witness was unnecessary because he did not see the witness completely asleep, but only nodding off, and he did not see the juror have issues for the remainder of trial. Thus, Mr. Jenkins cannot show a Strickland violation. See Harrington, 562 U.S. at 105, 131 S. Ct. at 788.

Reasonable jurists also would not debate the state court's prejudice determination. Because Juror 13 only allegedly slept through portions of Kendrick's testimony, it was possible that he heard the portions of the testimony that contradicted Allen's. Further, Allen's testimony also was inconsistent with the testimony of the other neighbors, which Lawson emphasized at closing. Thus, Juror 13 still would have been made aware of Allen's inconsistent testimony, such that Mr. Jenkins cannot establish a reasonable possibility of acquittal had Lawson moved to substitute the juror with an alternate. Accordingly, no COA is warranted as to this claim.

K. GROUND ELEVEN: RIGHT TO CONFLICT-FREE COUNSEL ON APPEAL

In Ground Eleven of his § 2254 petition, Mr. Jenkins argued that his right to conflict-free counsel was violated by the appointment of counsel from the OPD on appeal, who was prohibited from representing him on appeal due to the OPD's conflict of interest in his case.

As raised in his construed state habeas petition, however, Mr. Jenkins argued that his second direct appeal was adversely affected by appellate counsel's conflict of interest. He argued that Lawson had indicated to him ten issues that Lawson considered the most favorable issues to raise on appeal. Mr. Jenkins did not elaborate on any particular one, but listed the issues as follows: (1) objections made during hearings and trial, and at sentencing; (2) denial of special jury instructions; (3) objections made during sentencing; (4) denial of pretrial motions; (5) denial of speedy-trial motion; (6) jury instructions regarding excusable homicide; (7) denial of motion regarding counsel's conflict of interest; (8) denial of challenge to jury panel; (9) denial of motion to disqualify; and (10) denial of motion to dismiss for double jeopardy and collateral estoppel. Mr. Jenkins argued that appellate counsel's conflict of interest and ineffectiveness resulted in these issues not being raised and, had appellate counsel raised any of those issues on appeal, the DCA would not have affirmed his convictions and sentence. The DCA summarily denied this claim.

Returning to Mr. Jenkins's § 2254 petition, the District Court determined that, assuming that a potential conflict of interest existed, he failed to demonstrate how the alleged conflict adversely affected appellate counsel's representation on appeal.

Here, reasonable jurists would not debate the state court's denial of Ground Eleven because, while Mr. Jenkins claimed that appellate counsel's failure to raise his desired issues on appeal was due to a conflict of interest, he failed to establish any link between appellate counsel's decision and the OPD's former representation of Allen. See Freund, 165 F.3d at 860. Therefore, the state court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, and no COA is warranted.

L. GROUND TWELVE: APPELLATE COUNSEL ARGUMENTS

In Ground Twelve of his § 2254 petition, Mr. Jenkins argued that appellate counsel during his second direct appeal was ineffective for not challenging the trial court's instruction on lesser-included offenses to manslaughter, as the inclusion of "when there are lesser-included crimes or attempt" made it fundamentally flawed. Mr. Jenkins raised this claim in his second petition for a belated appeal, which the DCA dismissed as untimely and successive and, therefore, procedurally barred, citing Florida Rule of Appellate Procedure 9.141(d)(5) and (d)(6)(C).

Returning to his § 2254 petition, the District Court determined that Ground Twelve was procedurally defaulted because the state court properly applied a procedural bar to preclude review of the claim on the merits, as his second petition for a belated appeal had been filed more than two years after his retrial conviction became final. The court determined that he failed to establish cause or prejudice,

and his claim nonetheless failed on the merits because he failed to establish prejudice.

Here, reasonable jurists would not debate the District Court's determination that Ground Twelve was procedurally barred. The state court dismissed Mr. Jenkins's second habeas petition, expressly stating that it was relying on its procedural rules to resolve his ineffective-assistance-of-appellate-counsel claim without reaching its merits. See Ward, 592 F.3d at 1156–57; Fla. R. App. P. 9.141(d)(5)(A) (providing that a petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the judgment becomes final unless the petitioner was affirmatively misled about the results of the appeal); Fla. R. App. P. 9.141(d)(6)(C) (permitting the dismissal of a second or successive petition if it fails to allege new grounds and the prior determination was on the merits, or if a failure to assert the grounds was an abuse of procedure). The state court's decision rested entirely on state law grounds and was not intertwined with an interpretation of federal law. See Ward, 592 F.3d at 1156–57.

The procedural bar on successive petitions raising claims of ineffective assistance of appellate counsel is firmly established and regularly followed. See id.; Butler v. State, 162 So. 3d 26, 26 (Fla. 2d DCA 2014); Morris v. State, 134 So. 3d 1066, 1068 (Fla. 4th DCA 2013). The same is true regarding the bar on untimely petitions. E.g., Turner v. State, 184 So. 3d 620, 620 (Fla. 1st DCA 2016);

Chance v. State, 65 So. 3d 1176, 1176 (Fla. 1st DCA 2011). Thus, Ground Twelve is procedurally defaulted. See Ward, 592 F.3d at 1156-57; Bailey, 172 F.3d at 1302. This Court need not review whether the state court's application of the procedural bar was correct because it concerns the state court's interpretation of state law. See Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983) (concluding that the Florida Supreme Court's determination that a particular state statute did not encompass the defense presented by the defendant was binding on this Court because it involved a state's interpretation of its own laws).

Mr. Jenkins cannot establish cause to overcome his procedural default because, while he argued that appellate counsel should have raised the issue, he did not explain why he did not raise the issue in his construed state habeas petition, which was addressed on the merits. He also has not established prejudice. Lastly, he cannot overcome his procedural default under Martinez because Martinez applies only to ineffective-assistance-of-trial-counsel claims, not appellate counsel. See Martinez, 566 U.S. at 14, 132 S. Ct. at 1318; see also Davila v. Davis, 582 U.S. ___, 137 S. Ct. 2058, 2065 (2017) (declining to extend Martinez to defaulted claims of ineffective assistance of appellate counsel). Thus, Ground Twelve is procedurally defaulted, and this Court need not address the District Court's alternative merits ruling.

M. EVIDENTIARY HEARING

The District Court denied Mr. Jenkins's § 2254 petition without an evidentiary hearing. This Court reviews the denial of an evidentiary hearing for an abuse of discretion. Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011). Where the record conclusively establishes that a habeas claim has no merit, no evidentiary hearing is warranted. Tejada, 941 F.2d at 1559. As discussed above, the record clearly showed that Mr. Jenkins's claims were meritless. Thus, the District Court did not abuse its discretion in declining to hold an evidentiary hearing. See Chavez, 647 F.3d at 1060.

III.

In light of the above, the Court **DENIES** Mr. Jenkins's motion for a COA and **DENIES AS MOOT** his motion for appointment of counsel.

Barry B. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14939-D

WAYMON JENKINS,

Petitioner-Appellant,

versus

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Waymon Jenkins has filed a "petition for rehearing," which we construe as a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's April 3, 2020, order denying a certificate of appealability and appointment of counsel in his appeal from the denial of his underlying habeas corpus petition, 28 U.S.C. § 2254. Upon review, Mr. Jenkins's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Additional material from this filing is available in the Clerk's Office.