NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TARVIS WILSON,
PETITIONER,

VS

MARK S. INCH, ET AL,
RESPONDENT(S)

PROVIDED TO HARDEE CORRECTIONAL INSTITUTION ON 12/16/21 FOR MAILING INMATE LEGAL MAIL JR

12-6-21 TW

MOTION FOR EXTENSION OF TIME TO FILE WRIT OF CERTIORARI TO JUSTICE AMY CONEY BARRETT PURSUANT TO SUPREME COURT RULE 30-3

1 I AM REQUESTING FOR A EXTENSION OF TIME TO FILE A WRIT OF CERTIORARI THAT IS DUE JANUARY 5, 2022 ON APPEAL FROM 11TH CIRCUIT COURT OF APPEALS CASE# 19-10320-C, YET, DUE TO I AM HAVING A ISSUE WITH THE UNITED STATES DISTRICT COURT FOR FLORIDA, SOUTHERN DISTRICT, MIAMI DIVISION SEE EXHIBIT(S) A, B, C, D & E. WHERE I AM TRYING TO RETRIEVE CERTAIN DOCUMENTS TO ADD TO MY APPENDIX THAT WILL BE FILED WITH MY WRIT OF CERTIORARI, AS EXHIBIT "F" TO THIS MOTION IS A COPY OF THE APPENDIX I WILL BE FILING WITH MY WRIT OF CERTIORARI AND THE APPENDIX(S) THAT I DON'T HAVE PURSUANT TO EXHIBIT "F" IS (B-F) WHICH I MIGHT TAKE LONGER THAN 1-5-22 TO RECEIVE, ALSO, I HAVE TO GET MY WRIT OF CERTIORARI TYPED UP BY ONE OF THE LAW CLERK'S WHICH WILL TAKE TIME ALSO, NOW DUE TO ALL THE NEW COVID-19 PROTOCOLS/PROCEDURES

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SUPREME COURT, U.S.

CONCLUSION

I AM REQUESTING THAT I GET A 30 DAY EXTENSION UP UNTIL FEBRUARY 4, 2022 TO FILE A WRIT OF CERTIORARI.

PURSUANT TO 28 USC §1746 I DECLARE UNDER A PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

/S/ James Wilson

CERTIFICATE OF SERVICE

I CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING DOCUMENT HAS BEEN PLACED IN THE HANDS OF PRISON OFFICIALS FOR MAILING TO THE PARTIES LISTED BELOW VIA FIRST CLASS U.S. MAIL ON THIS 6 DAY OF DECEMBER, 2021.

CLERK OF COURT
SUPREME COURT OF UNITED STATES
1 FIRST STREET, N.E.
WASHINGTON, DC 20543

ATTORNEY GENERAL
PL-01 THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050

/S/ James Wilson

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

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10320-C

TARVIS WILSON,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Tarvis Wilson is a Florida prisoner serving a life sentence plus 65-years for attempted murder and aggravated assault of a police officer. After pursuing a direct appeal and post-conviction relief in state court, Mr. Wilson filed a pro se 28 U.S.C. § 2254 federal habeas corpus petition. In it, Mr. Wilson argues that trial counsel was ineffective for conceding his guilt (Claim 1); trial counsel was ineffective for failing to present exculpatory DNA evidence (Claims 2 and 6); trial counsel was ineffective for pursuing an insanity defense (Claim 3); trial counsel was ineffective due to a

conflict of interest (Claim 4); appellate counsel was ineffective for not raising Claims 1 and 2 and for not challenging a jury instruction given at trial (Claim 5); actual innocence (Claim 7); a pretrial photo line-up was unduly suggestive (Claims 8 and 10); the state knowingly introduced false identification evidence (Claims 9, 11, and 13); the prosecutor improperly discussed the case with a juror (Claim 12); the prosecutor elicited perjurious testimony concerning the weapon used in Mr. Wilson's crime (Claim 14); and the trial court erred in denying one of Mr. Wilson's requested jury instructions (Claim 15). Mr. Wilson also requested an evidentiary hearing on these claims.

The District Court denied Mr. Wilson's § 2254 petition in full and declined to issue a certificate of appealability ("COA"). The District Court also denied Mr. Wilson's subsequent motion for rehearing, again declining to issue a COA. Mr. Wilson now moves this Court for a COA with respect to the District Court's denial of his § 2254 petition and the District Court's denial of his motion for rehearing.

I.

Mr. Wilson was charged by information with attempted first-degree murder of a police officer with a firearm; four counts of aggravated assault with a firearm on a police officer; aggravated assault on a police officer with a deadly weapon; aggravated assault with a firearm; flight or attempted elusion; being a felon in possession of a firearm; and possession of cocaine.

Before trial, counsel for Mr. Wilson requested that Florida Standard Jury Instruction 3.6(c) be given. That instruction would have informed the jury that Mr. Wilson was taking psychotropic medications for a mental condition. See Standard Jury Instructions in Criminal Cases (93-1), 636 So. 2d 502, 503 (Fla. 1994). Mr. Wilson's counsel requested that instruction because Mr. Wilson was in fact taking psychotropic medication and intended to rely on an insanity defense. The trial court denied Mr. Wilson's request.

a. Eyewitness Testimony

Ruth Wyche testified that on April 17, 2008, her son Trevor King came to visit her in Boynton Beach. While they stood outside of her home, Ms. Wyche saw a green Nissan drive by, with the driver pointing a gun at her son. Ms. Wyche said she heard two "clicks," but the gun did not fire. Ms. Wyche said she recognized the driver as Mr. Wilson, whom she knew personally. Mr. Wilson had visited her home before, and Mr. Wilson's sister was dating her son.

The government published Ms. Wyche's 911 call, in which she told the dispatcher that the driver of the green Nissan was "Tarvis," her "son's girlfriend's brother." She could not recall Tarvis's last name, but said that, "if they bring a photo book I will show him in the book." Ms. Wyche testified that she later went to the police station, where the police conducted a photo line-up. During Ms. Wyche's testimony, the state showed her six photographs and asked if this was the same line-

up shown to her at the police station. Ms. Wyche responded that she was shown only two pictures of similar looking individuals at the station, and identified Mr. Wilson as the perpetrator. The state moved to admit this photo line-up into evidence. Mr. Wilson's counsel did not object, and the line-up was admitted.

Officer Richard McNevin testified that police engaged in a high-speed pursuit of the green Nissan soon after Ms. Wyche's 911 call. The driver, who Officer McNevin identified as Mr. Wilson, jumped out of the car and ran away on foot. Officer McNevin testified that while he was pursuing Mr. Wilson, he saw a flash come from Mr. Wilson's waistband, and collapsed to the ground, realizing that he had been shot. Officer McNevin then saw Mr. Wilson point a black handgun at him and shoot twice, missing both times. Mr. Wilson then renewed his flight. Officer Medeiros testified that upon seeing Officer McNevin had been shot, Medeiros fired multiple rounds at Mr. Wilson.

Officer John Crane-Baker testified that he saw Mr. Wilson running while pointing a black gun in the direction of pursuing officers. Officer Crane-Baker testified that he later found Mr. Wilson lying on the ground and arrested him. Officer Joseph Crowder testified that when police went to secure Mr. Wilson, they discovered a black handgun next to his thigh.

Officer Vincent Gray, who was also present during the police's pursuit of Mr. Wilson, testified that he saw the driver of the green Nissan jump out of the car. He

identified the driver as the "black male . . . seated to the . . . left of counsel." The state presented Officer Gray with a video recording from his car, which he confirmed was an accurate depiction of what he observed during the car chase. The court admitted this video into evidence. Officer Gray also testified that after Officer McNevin was shot, Gray saw Mr. Wilson running across a street with a gun. Officer Gray testified that, although Mr. Wilson's "appearance is much different today," he was the same person he saw crossing the street.

Stephen Rice, a civilian who lived in the area of the foot chase, testified that he saw a skinny young black man running away from a police officer. He said he observed the officer catch up to the fleeing man, at which point the two "started scuffling." The fleeing man then pulled out a black gun, shot the officer, and continued running. Mr. Rice testified that he heard the gun go off twice.

Trooper Paul Pereira testified that he followed other police cars to a residence, where Pereira heard gunshots. He testified that he then saw Mr. Wilson run past him while holding a silver gun.

b. Expert Testimony

Julie Sikorsky, a forensic scientist, testified that she received five DNA swabs from the firearm lying next to the suspect. Due to insufficient DNA on one of the swabs, she excluded Mr. Wilson as the source. Three of the swabs tested positive for Mr. Wilson's DNA. As to the last swab, Ms. Sikorsky could not conclusively

say it contained Mr. Wilson's DNA, but that there was a 1 in 33 billion probability that the DNA belonged to someone else. During cross-examination, Ms. Sikorsky testified that she prepared an initial report on the first inconclusive DNA swab. She was subsequently sent the four swabs connected to Mr. Wilson, and prepared a supplementary report with her findings.

Dr. Alan Ribler, a defense psychology expert, testified that Mr. Wilson suffered from hallucinations as a child and had been involuntarily committed to a psychiatric hospital for dangerous behavior. Although he was prescribed psychotropic medications, Mr. Wilson stopped taking them and attempted suicide when he was 13. At the time of his arrest, Mr. Wilson was not taking any medications. Dr. Ribler determined that Mr. Wilson was psychotic and a paranoid schizophrenic. He said it was likely that Mr. Wilson's actions were motivated by his paranoid delusions, and that he could not tell right from wrong. Dr. Ribler also testified that Mr. Wilson was currently taking psychotropic medication.

After the close of the evidence, counsel renewed his request for Standard Jury Instruction 3.6(c), which the court again denied. The jury found Mr. Wilson guilty of attempted first-degree murder of a police officer with a firearm; two counts of aggravated assault with a firearm on a police officer, flight or attempted elusion, being a felon in possession of a firearm, and two counts of improper exhibition of a weapon. The trial court sentenced Mr. Wilson to life plus 65-years imprisonment.

Mr. Wilson appealed, arguing only that the trial court erred by refusing to give Standard Jury Instruction 3.6(c). Florida's Fourth District Court of Appeals ("4th DCA") affirmed without an opinion. Mr. Wilson then filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850, raising 34 claims. The state responded, and the trial court denied the motion, adopting the state's response. Mr. Wilson appealed, and while his appeal was pending, filed another Rule 3.850 motion. The 4th DCA affirmed the denial of his first Rule 3.850 motion without an opinion. The trial court denied his second Rule 3.850 motion, and the 4th DCA affirmed that denial as well. Mr. Wilson then filed a petition for a writ of habeas corpus with the 4th DCA, challenging appellate counsel's performance. The 4th DCA summarily denied that motion as well. Lastly, Mr. Wilson filed a "Petition for Writ of Prohibition or in the Alternative Writ of Habeas Corpus" in the 4th DCA, which was denied as unauthorized, untimely, and successive.

Mr. Wilson then filed the instant § 2254 petition. A Magistrate Judge issued a report and recommendation ("R&R") recommending that the petition be denied. The Magistrate Judge concluded that Claims 5, 7, 8, 9, 10, and 12 were procedurally defaulted, and that the remaining claims were without merit. Over Mr. Wilson's objections, the District Court adopted the R&R and denied a COA. Mr. Wilson filed a motion for "rehearing" concerning the District Court's adoption of the Magistrate Judge's R&R. The District Court construed this motion as a motion for

reconsideration under Federal Rule of Civil Procedure 60(b), which it denied. The District Court also declined to issue a COA on its denial of Mr. Wilson's "rehearing" motion.

II.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603–04 (2000) (quotation marks omitted). However, where the District Court denied the movant's claims in part on procedural grounds, the movant must demonstrate that reasonable jurists would find debatable (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the District Court was correct in its procedural ruling. Id.

III.

1. Non-Defaulted Claims

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts

in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a "highly deferential standard for evaluating state-court rulings . . . and demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010) (quotation marks omitted).

"[A]n unreasonable application of federal law is different from an incorrect application of federal law." Williams v. Taylor, 529 U.S. 362, 410 (2000). The question is whether the state court's application of federal law was objectively unreasonable. Id. at 409. Thus, a state prisoner seeking federal habeas relief "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 786–87 (2011).

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Deficient performance "requires [a] showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Prejudice occurs when there is a

"reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 466 U.S. at 694, 104 S. Ct. at 2055–56.

When analyzing a claim of ineffective assistance under § 2254(d), our review is "doubly" deferential to counsel's performance. Harrington, 562 U.S. at 105, 131 S. Ct. at 788. Thus, under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

a. Claim 1:

In Claim 1, Mr. Wilson argues that trial counsel was ineffective for conceding his guilt, pointing to two pretrial hearings during which counsel supposedly made this concession over Mr. Wilson's objection. The state post-conviction court denied Mr. Wilson's claim because he failed to show how pretrial discussions prejudiced him at trial or diminished his insanity defense.

Reasonable jurists would not debate the District Court's denial of Claim 1. Mr. Wilson did not provide the state court with any factual allegations or argument to support his claim that he was prejudiced at trial by his counsel's concession of guilt, or that a concession of guilt weakened his insanity defense. Given the conclusory nature of Mr. Wilson's allegations, the State Court's denial of this claim did not involve an unreasonable application of federal law. See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (explaining that a petitioner is not entitled to

federal habeas relief "when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the recorded are wholly incredible").

b. Claims 2 and 6

Claims 2 and 6 of Mr. Wilson's § 2254 petition focus on "exculpatory DNA evidence" that Mr. Wilson says should have been introduced at trial. We understand that the "exculpatory DNA evidence" referenced in these claims is a report by Ms. Sikorsky in which she concluded that one of the five DNA swabs provided by law enforcement did not match Mr. Wilson. Mr. Wilson appears to argue that (a) trial counsel was ineffective for failing to confront Ms. Sikorsky about this "exculpatory" DNA report; and (b) the government committed a Brady violation because it never introduced Ms. Sikorsky's report into evidence, see Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

With respect to Mr. Wilson's ineffective assistance argument, the record shows that his trial counsel did cross-examine Ms. Sikorsky concerning the DNA swab that did not match Mr. Wilson. Beyond that, the state itself elicited testimony that one of the five DNA samples Ms. Sikorsky analyzed was inconclusive. On these facts, reasonable jurists would not debate that Mr. Wilson's counsel performed competently, nor would reasonable jurists argue that Mr. Wilson prejudiced. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

Mr. Wilson's Brady claim is similarly without merit. A Brady violation occurs when the state fails to disclose exculpatory evidence. See Strickler v. Greene, 527 U.S. 263, 280–81, 119 S. Ct. 1936, 1948 (1999). There is nothing in the record to suggest that Mr. Wilson's counsel was not made aware of Ms. Sikorsky's report concerning the inconclusive swab prior to trial. To the extent Mr. Wilson argues that the report should have been provided to the jury, the record reflects that Ms. Sikorsky testified to the report's contents. The report itself could not be introduced into evidence, however, because it constitutes inadmissible hearsay. See Bender v. State, 472 So. 2d 1370, 1371–72 (Fla. 3rd Dist. Ct. App. 1985) (stating that medical reports are inadmissible, but testimony concerning the reports' findings is admissible). No COA is therefore warranted on Claims 2 and 6.

c. Claim 3

In Claim 3, Mr. Wilson argues his trial counsel was ineffective for presenting an "uncorroborated" insanity defense, while also agreeing not to present any exculpatory evidence. The state post-conviction court denied this claim as refuted by the record. Specifically, the court pointed out that Mr. Wilson's insanity defense was not "uncorroborated" given Dr. Ribler's testimony that Mr. Wilson was insane at the time of the offense.

The state post-conviction court correctly denied Mr. Wilson's claim because Mr. Wilson's trial counsel did not proceed on an "uncorroborated" insanity defense.

Dr. Ribler testified that given Wilson's mental health history, it was likely that his actions were motivated by his paranoid delusions, such that he could not tell right from wrong. See Gurganus v. State, 451 So. 2d 817, 820 (Fla. 1984) (stating that the only issues concerning insanity are the defendant's ability to tell right from wrong and understand the wrongfulness of his actions at the time of the offense). Nor was Mr. Wilson's trial counsel ineffective for purportedly agreeing not to introduce "exculpatory" evidence. The evidence against Mr. Wilson was extensive, including countless eyewitnesses. Under these circumstances, counsel's defense strategy was a reasonable one. See Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 2474 (1986) (counsel is not judged incompetent for an approach that "might be considered sound trial strategy"). No COA is warranted on Claim 3.

d. Claim 4

In Claim 4, Mr. Wilson argues that trial counsel could not adequately represent him because he had a conflict of interest. Mr. Wilson says counsel asked the court to use handcuffs and shackles on Wilson during trial because Wilson assaulted him. According to Mr. Wilson, the court never ruled on counsel's request, which allowed Wilson to be represented by biased counsel. The state post-conviction court denied his claim after concluding that Mr. Wilson's bare assertion of a conflict was too conclusory to warrant relief.

Ineffective assistance based on a conflict of interest requires an actual conflict of interest that adversely affected counsel's performance. See Pegg v. United States, 253 F.3d 1274, 1277 (11th Cir. 2001). The prisoner must identify specific evidence in the record that suggests that his interests were compromised. See Barham v. United States, 724 F.2d 1529, 1532 (11th Cir. 1984). A "possible" or hypothetical conflict is not enough. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). Even where an actual conflict exists, the prisoner must still show that the conflict had an adverse effect on counsel's representation. Id.

The state post-conviction court correctly denied Mr. Wilson's claim. Counsel's request that Mr. Wilson be restrained, after he assaulted counsel, was not unreasonable. See Harrington, 562 U.S. at 105, 131 S. Ct. at 788 (explaining that ineffective assistance claims are assessed based on whether counsel's performance was consistent with prevailing professional norms). Beyond that, Mr. Wilson has failed to allege how counsel's request affected his performance at trial. See Deck v. Missouri, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012 (2005). For these reasons, no COA is warranted on Claim 4.

e. Claims 11, 13, and 14

In Claims 11, 13, and 14, Mr. Wilson contends that prosecutors knowingly elicited false testimony by several witnesses. He points out inconsistencies in the witnesses' testimony as proof they were providing perjurious testimony. In Claim

11, Mr. Wilson says Mr. Rice's testimony that Mr. Wilson fired his gun three times was inconsistent with a ballistics report saying the weapon was fired only once. In Claim 13, Mr. Wilson argued, without elaboration, that Officer Gray gave perjurious identification testimony. And in Claim 14, Mr. Wilson says Trooper Paul Pereira testified that Wilson's gun was silver, even though police recovered a black gun. The state post-conviction court construed these claims as alleging violations under Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972). To establish a Giglio violation, a defendant must prove that (1) the witness falsely testified; (2) the state knew the testimony was false; and (3) there was a reasonable likelihood that the testimony was determinative of the defendant's guilt or innocence (i.e. material). Id. at 154, 92 S. Ct. at 766. The post-conviction court then denied each claim because Mr. Wilson did not provide supporting facts or argument concerning the materiality of the testimony or the state's knowledge that the testimony was false.

The state court's denial of these claims was reasonable. With respect to Claim 11, Mr. Rice's testimony that he heard Mr. Wilson shoot multiple times was consistent with the testimony of several other eyewitnesses. And the fact Mr. Rice testified inconsistently with one of the state's experts does not lend itself to a conclusion that the state knowingly introduced false testimony. See United States v. Lopez, 985 F.2d 520, 524 (11th Cir. 1993) ("[T]he fact that [witnesses] remembered the incidents and participants differently and told different stories falls

far short of establishing that the government had knowledge of false testimony being presented to the jury."). With respect to Claim 13, Mr. Wilson failed to explain how Officer Gray's identification testimony was false. United States v. Dickerson, 248 F.3d 1036, 1041 (11th Cir. 2001). As to Claim 14, while Mr. Wilson is correct that Trooper Pereira's testimony on the gun's color was inconsistent with other witnesses' recollection, Mr. Wilson has not explained how the gun's color was material. See Strickler v. Greene, 527 U.S. 263, 290, 119 S. Ct. 1936, 1952 (1999) (materiality element is satisfied if false testimony "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). No COA is warranted on Claim 11, 13, and 14.

f. Claim 15

In Claim 15, Mr. Wilson argues that the trial court erred by denying his requests for Standard Jury Instruction 3.6(c). He says he was entitled to this instruction because he put forth an insanity defense. Mr. Wilson raised this claim in his direct appeal, which the 4th DCA denied without an opinion.

"State court jury instructions ordinarily comprise issues of state law and are not subject to federal habeas corpus review absent fundamental unfairness." Jones v. Kemp, 794 F.2d 1536, 1540 (11th Cir. 1986). In determining whether the failure to provide a requested instruction implicates fundamental unfairness, a federal habeas court must determine whether such a failure "so infected the entire trial that

the resulting conviction violates due process." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S. Ct. 1730, 1737 (1977) (internal quotations marks and citation omitted). Mr. Wilson cannot make this showing. Standard Jury Instruction 3.6(c) informs the jury that the defendant is under psychotropic medication for a mental condition. Although the trial court declined to give Instruction 3.6(c), the jury nevertheless heard extensive testimony concerning Mr. Wilson's mental health issues, including the fact that Mr. Wilson was currently taking psychotropic medications.

Nor can Mr. Wilson demonstrate that the failure to give this instruction affected his insanity defense. In Florida, the insanity defense revolves around the defendant's state of mind at the time of the offense. Patton v. State, 784 So. 2d 380, 387 (Fla. 2000). Mr. Wilson does not explain how a failure to provide a jury instruction about medications he was taking during trial would influence the jury's determination of whether Mr. Wilson was insane at the time of the offense. See Gurganus v. State, 451 So.2d 817, 820–821 (Fla. 1984). Because reasonable jurists would not debate the District Court's denial of Claim 15, no COA is warranted on this issue.

2. Defaulted Claims

The District Court held that six of Mr. Wilson's claims were procedurally defaulted. 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. Bailey v. Nagle, 172 F.3d 1299, 1302–03 (11th Cir. 1999). 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).

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). Under Florida law, a claim of trial court error must be raised on direct appeal, and issues that could have, or should have, been raised on direct appeal are not cognizable in a post-conviction motion. Bruno v. State, 807 So. 2d 55, 63 (Fla. 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). Whether a petitioner has procedurally defaulted a claim is a mixed question of fact and law, which would be subject to de novo review on appeal. Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001).

a. Claims 8, 9, 10 and 12:

Reasonable jurists would not debate that Mr. Wilson has procedurally defaulted Claims 8, 9, 10, and 12. When Mr. Wilson raised these claims in his Rule 3.850 motion, the state post-conviction court determined they were procedurally barred because they allege trial errors, and thus should have been raised on direct appeal. See Byrd v. State, 597 So. 2d 252 (Fla. 1992). The state post-conviction court's denial of these claims was therefore based only on an independent and adequate state procedural rule that is firmly established and regularly followed. See, e.g., King v. State, 597 So. 2d 780 (Fla. 1992); Kelly v. State, 569 So. 2d 754 (Fla. 1990). Mr. Wilson's claims are thus procedurally defaulted. See Ward, 592 F.3d at 1156–57.

Mr. Wilson argues that cause and prejudice exist to overcome Florida's procedural bar because his appellate counsel rendered ineffective assistance in failing to raise these claims in his direct appeal. Ineffective assistance of appellate counsel can overcome a procedural bar only if there is merit to the claims appellate counsel failed to raise on appeal. Payne v. Allen, 539 F.3d 1297, 1315 (11th Cir. 2008). Here, Mr. Wilson would not be able to show that his appellate counsel was

ineffective for failing to raise Claims 8, 9, 10, and 12, because none of those claims have merit. See Brown v. United States, 720 F.3d 1316, 1335 (11th Cir. 2013) (holding that appellate counsel cannot be ineffective for raising non-meritorious claims).

In Claims 8 and 9, Mr. Wilson argues (a) that the photo line-up shown to Ms. Wyche at trial was "unduly suggestive"; and (b) it amounted to prosecutorial misconduct for the state to seek admission of the line-up shown to Ms. Wyche at trial because a different line-up was shown to her at the police station. This would not have been a meritorious claim on appeal because Ms. Wyche testified that she saw a different line-up at the police station, so jurors were not misled by the line-up introduced into evidence. Beyond that, the state introduced evidence that during Ms. Wyche's 911 call, she identified Mr. Wilson as the driver of the green Nissan. This 911 call took place before Ms. Wyche was shown a line-up. Therefore, any attack on Ms. Wyche's in-court identification of Mr. Wilson would have been futile.

In Claim 10, Mr. Wilson says Mr. Rice's identification of him at trial violated his due process rights because Mr. Rice told police he had never seen Mr. Wilson before, and was unable to identify him in a line-up. This claim fails for the simple reason that Mr. Rice did not identify Mr. Wilson at trial.

In Claim 12, Mr. Wilson argues that the state spoke with a juror outside of the courtroom during trial and improperly influenced the juror's decision. Mr. Wilson's

claim has no basis in the record. He refers to an encounter that occurred during a trial recess, when a juror approached a prosecutor and began to say something about his sister. The prosecutor immediately cut him off, saying "we can't talk." The juror walked away and onto an elevator. Counsel for both parties raised this incident to the trial court, which proceeded to question the juror. The juror told the court he was going to tell the prosecutor that "she has a slight resemblance to [his] sister, that's all." The court asked the juror if the prosecutor's resemblance to his sister would make him more partial to the state, to which the juror respond: "No, it has nothing to do with that." Because there is nothing in the record to suggest this juror was improperly influenced or biased by his comments to the prosecutor, Claim 12 would not have been a meritorious argument to raise on appeal. See Spencer v. State, 842 So. 2d 52, 65–66 (Fla. 2003) (holding that trial counsel was not ineffective for failing to voir dire jurors after they made "innocuous comments" to prosecutors and the victims' advocate).

Because Claims 8, 9, 10, and 12 are plainly without merit, appellate counsel could not have been ineffective for failing to raise them on appeal. Brown, 720 F.3d at 1335. And as a result, Mr. Wilson cannot rely on his appellate counsel's ineffective assistance to establish the cause and prejudice required to overcome his procedural default. Sealey v. Warden, Ga. Diagnostic Prison, No. 18-10565, ___ F.3d. ___, 2020 WL 1527977, at *18 (11th Cir. Mar. 31, 2020).

b. Claim 5

In Claim 5, Mr. Wilson claims his appellate counsel was ineffective for not arguing that: (1) trial counsel was ineffective for conceding his guilt; (2) trial counsel was ineffective for failing to make an argument on the basis of "DNA exculpatory evidence"; and (3) the trial court erred in instructing the jury on his possession of a firearm. In one of Mr. Wilson's state habeas corpus petitions, he did raise a claim for ineffective assistance of appellate counsel. However, that claim did not argue that appellate counsel should have raised an ineffective assistance of trial counsel claim or that appellate counsel should have challenged the trial court's jury instructions. As a result, to the extent Mr. Wilson argues his appellate counsel was ineffective on these two grounds, Claim 5 is unexhausted.

Any future attempt to raise these ineffective assistance claims in state court would be futile, because Florida law procedurally bars new claims or claims that have already been raised in prior petitions when "the circumstances upon which they are based were known or should have been known at the time the prior petition was filed." Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994). Nothing in Claim 5 suggests Mr. Wilson could not have raised this ineffective assistance claims in one of his several state court post-conviction motions. Id. Under these circumstances, reasonable jurists would not disagree that Mr. Wilson's ineffective assistance claims are procedurally defaulted. See Jimenez v. Fla. Dep't of Corr., 481 F.3d 1337, 1342

(11th Cir. 2007) ("[I]f unexhausted claims would be procedurally barred in state court under the state's law of procedural default, the federal court may consider the barred claims as having no basis for federal habeas relief."). Mr. Wilson does not allege any cause or prejudice that would excuse his procedural default. See McKay, 657 F.3d at 1196.

Mr. Wilson did advance one of his arguments in Claim 5—that appellate counsel failed to introduce "exculpatory DNA evidence"—in his state habeas corpus petition. However, that claim is without merit. Consistent with our discussion of Claims 2 and 6, we construe Mr. Wilson's argument concerning "exculpatory DNA evidence" to be either that (a) trial counsel was ineffective for failing to challenge Ms. Sikorsky's testimony concerning her DNA analysis; or (b) the state committed a Brady violation by failing to provide defense counsel with Ms. Sikorsky's first report, or by failing to introduce the report into evidence. And as we explain above, neither claim has merit. Mr. Sikorsky's appellate counsel therefore could not have been ineffective for failing to raise these claims on appeal. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000).

c. Claim 7

In Claim 7, Mr. Wilson argued an actual innocence claim based on trial counsel's failure to (i) pursue an insanity defense; (ii) present a defense theory that a "third person" was responsible for shooting Officer McNevin; and (iii) object to

the state's pre-trial motion in limine not to present an exculpatory evidence. In Mr. Wilson's Rule 3.850 motion, he raised an actual innocence claim, but one that was based on the suppression of exculpatory DNA evidence. The actual innocence claim Mr. Wilson raises in Claim 7, which is based on ineffective assistance of trial counsel, is therefore different from the actual innocence claim he raised in his Rule 3.850 motion. Mr. Wilson thus failed to exhaust Claim 7 in his state court proceedings. See Jimenez, 481 F.3d at 1342. Any future attempt to raise this actual innocence claim in state court would be futile, because Mr. Wilson could have brought the same actual innocence claim in one of his several post-conviction motions. See Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994). Under these circumstances, reasonable jurists would not disagree that Mr. Wilson's claim is procedurally defaulted. See Jimenez, 481 F.3d at 1342.

Nor does Mr. Wilson satisfy the "fundamental miscarriage of justice" exception to procedural default. That exception provides that a petitioner may overcome procedural default by establishing "actual innocence." McKay, 657 F.3d at 1196. Although Mr. Wilson refers to Claim 7 as an "actual innocence" claim, we have held that such claims may not be premised on ineffective assistance of counsel. Id. at 1198–99 (holding that actual innocence refers to factual, not legal, innocence).

3. Evidentiary Hearing:

The Magistrate Judge recommended denying the petition without a hearing, as the claims could be resolved with the record at hand. On appeal, we review the District Court's 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 set forth above, the record demonstrates that Mr. Wilson's claims have no merit. Id. Therefore, reasonable jurists would not dispute that Mr. Wilson was not entitled to an evidentiary hearing. See Chavez, 647 F.3d at 1060.

4. Motion for Rehearing:

In his motion for rehearing, Mr. Wilson argued that the District Court "racially profiled" him "for the reason [that] he is an African American man" and because he was convicted of "attempted murder [] on a white male police officer." As proof of this "fraud," Mr. Wilson argues that the District Court made numerous errors in denying his claims. The District Court construed Mr. Wilson's motion as a motion for reconsideration under Rule 60(b) and summarily denied it.

Reasonable jurists would not debate the District Court's construction of Mr. Wilson's "rehearing" motion as a motion for reconsideration under Rule 60(b). Throughout the motion, Mr. Wilson repeatedly referred to the Magistrate Judge's R&R, as well as the District Court's subsequent adoption of the R&R, as a "fraud."

See Fed. R. Civ. P. 60(b)(3) (allowing relief from final judgment due to fraud). Nor would reasonable jurists disagree that the District Court did not abuse its discretion in denying Mr. Wilson's motion. Mr. Wilson's motion merely repeats arguments he made in prior District Court filings related to his § 2254 claims, which is not a proper basis for a Rule 60(b) motion. See Rice v. Ford Motor Co., 88 F.3d 914, 918–19 (11th Cir. 1996) (holding that "[a] motion for reconsideration cannot be used to relitigate old matters"). And to the extent Mr. Wilson alleges that the District Court was biased against him, his only evidence of such bias is the denial of his claims. This Court has held that adverse rulings are insufficient to establish bias. McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990).

In conclusion, Mr. Wilson has not made a substantial showing of the denial of a constitutional right, and his motion for a COA is DENIED.

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10320-C

TARVIS WILSON,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: JILL PRYOR and LAGOA, Circuit Judges.

BY THE COURT:

Tarvis Wilson has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's April 20, 2020, order denying a certificate of appealability. Upon review, Wilson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief. His motion for leave to file a motion in excess of page limits is GRANTED.