EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11305-E

NOLAN WOODS,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

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

ORDER:

Nolan Woods moves for a certificate of appealability and leave to proceed *in forma pauperis*, in order to appeal the denial of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. Woods's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed *in forma pauperis* on appeal is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

EXHIBIT "A"

IN THE UNITED STATES COURT OF APPEALS

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No. 21-11305-E

NOLAN WOODS,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

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

Before: GRANT and LAGOA, Circuit Judges.

BY THE COURT:

Nolan Woods has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 14, 2021, order denying a certificate of appealability and leave to proceed *in forma pauperis* in his underlying habeas corpus petition, 28 U.S.C. § 2254. Upon review, Woods's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

EXHIBIT "A"

EXHIBIT B

NOLAN WOODS, Petitioner, v. MARK INCH, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2021 U.S. Dist. LEXIS 68268
CASE NO.: 19-81418-CIV-MIDDLEBROOKS/Matthewman
April 8, 2021, Decided
April 8, 2021, Entered on Docket

Editorial Information: Subsequent History

Appeal terminated, 07/14/2021

Editorial Information: Prior History

Woods v. Fla. Dep't of Corr., 2021 U.S. Dist. LEXIS 69359, 2021 WL 1320684 (S.D. Fla., Feb. 5, 2021)

Counsel {2021 U.S. Dist. LEXIS 1}Nolan M Woods, Plaintiff, Pro se, South Bay, FL. For Florida Department of Correction, Defendant: Noticing 2254 SAG Broward and North, LEAD ATTORNEY; Georgina Jimenez-Orosa, LEAD ATTORNEY, Attorney General Office, West Palm Beach, FL.

Judges: Donald M. Middlebrooks, United States District Judge.

Opinion by: Donald M. Middlebrooks

ORDER ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE comes before the Court on Magistrate Judge William Matthewman's Report, issued on February 5, 2021. (DE 17). The Report recommends denying Petitioner Nolan Wood's *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254. (*Id.*). Petitioner filed Objections to the Report, which were entered on the docket on March 24, 2021. (DE 20).

I have conducted a *de novo* review of the Report, objections, and the record as a whole. Petitioner raises two claims of ineffective assistance of trial counsel. The Report concludes that Ground One and Ground Two of the Petition were properly exhausted and therefore amenable to review, but that on the merits, the claims fail because the state court decision was supported by the record, and the Petitioner cannot satisfy Strickland's deficient performance prong for either ground.

I have considered Petitioner's{2021 U.S. Dist. LEXIS 2} Objections. Upon review, I agree with Magistrate Judge Matthewman's conclusions in Ground I and find that the reasoning in the Report is accurate.

With regards to Ground II, I find that the Report correctly explains why this claim is unexhausted and fails to meet the *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) exception to the federal court's bar on reviewing unexhausted claims. I also find that Judge Matthewman's ultimate conclusions about the merits of this claim are accurate but find that further elaboration is needed.

When this case first went to trial in 2010, Petitioner was charged with both sexual battery and lewd and lascivious molestation.1 (DE 10-1, 2). Specifically, it was alleged that Petitioner touched and or penetrated a child's vagina with his fingers and attempted to do so with his penis. *See* (DE 10-1, pp. 98-103) (Defendant's Initial Appellant Brief summarizing the allegations). Petitioner was tried by a jury and convicted on both counts. (DE 10-1, p. 5). After the verdict but prior to sentencing, the court dismissed the charge of lewd and lasciviousness molestation because "to adjudicate him or sentence him on both Count 1 and Count 2 would be a violation of his right not to be subject to double jeopardy." (DE{2021 U.S. Dist. LEXIS 3} 11-1, p. 49). The court then sentenced Petitioner to life without parole for his conviction of sexual battery. (DE 10-1, p. 7).

After his conviction, Petitioner appealed his sentence to the Fourth District Court of Appeal ("DCA") where he raised the following issues: (1) the trial court erred in not ordering a competency examination and failing to make any inquiry when counsel stated he had reason to believe appellant was not competent to stand trial, (2) the trial court erred in refusing to conduct a "Nelson" hearing to determine if appellant had grounds to discharge counsel and whether new counsel should be appointed, and (3) the trial court erred in excluding prior statements by the complainant to an investigator that she told her mother that her grandpa did not do anything because the statement impeached the witness as to significant portions of the testimony. (DE 10-1, pp. 10-11). The Fourth DCA reversed Petitioner's sentence and conviction on the basis that the trial court's error of excluding the complainant's prior inconsistent statement was not harmless and remanded for a new trial. *Woods v. State*, 92 So. 3d 890 (Fla. 4th DCA2012); (DE 10-1, pp. 85-86).

Petitioner was retried on the sexual battery count in 2013. (DE 11-2).{2021 U.S. Dist. LEXIS 4} The jury was given a responsive verdict form where the jurors could convict Petitioner of, among other things, lewd and lascivious molestation, a lesser and included offense of sexual battery.2 (DE 10-1, p. 88). Petitioner was convicted of the lesser

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offense of lewd and lascivious molestation and was sentenced to life in prison. (*Id*); (DE 10-1, p. 90). It is this conviction that the Petitioner now challenges in this 2254 proceeding. (DE 1).

In Ground II, Petitioner raises a double jeopardy claim on the basis that he had already been convicted of lewd and lascivious molestation in 2010 and that charge was dismissed by the state. (DE 1, pp. 10-11). He asserts that he could not be convicted of the same lewd and lascivious charge again without violating double jeopardy. Under Florida law, "[j]eopardy attaches *when a court imposes a sentence*, after which the double jeopardy clauses protect the defendant from receiving a punishment greater than the sentence already imposed." *Ingraham v. State*, 842 So.2d 954, 955 (Fla. Dist. Ct. App. 2003)(internal citation omitted)(emphasis added); *Morris v. State*, 185 So. 3d 630, 631 (Fla. Dist. Ct. App. 2016). Here, the court dismissed the charge of lewd and lascivious molestation before jeopardy attached. It would have been error for the court{2021 U.S. Dist. LEXIS 5} to sentence Petitioner to both sexual battery and lewd and lascivious molestation when it was a lesser and included offense of sexual battery, but that was not what happened. Petitioner was sentenced to sexual battery in 2010. That sentence was reversed based on a trial court error and retried as one count of sexual battery in 2013. Petitioner was able to be retried without violating double jeopardy because the state has the right to re-try a defendant for the same crime after a conviction is reversed on appeal for erroneous evidentiary ruling. *See Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001) ("the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the State from retrying a defendant who succeeds in getting his conviction set aside on appeal due to some error in the proceedings below" (citing *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). That Petitioner was ultimately convicted of one count of lewd and lascivious molestation is of no consequence. The trial court followed standard procedure when a sentence and conviction is reversed for a trial court error.

Petitioner's objection to the Report argues that the "magistrate overlooks" that lewd and lascivious molestation is mutually exclusive from and not a lesser included offense of sexual battery, and{2021 U.S. Dist. LEXIS 6} cites to cases where a lewd and lascivious crime was found to not be a lesser included offense of sexual battery. (DE 20, p. 1). Petitioner misunderstands that while lewd and lascivious molestation is not necessarily a lesser included offense of sexual battery, it is a permissive lesser included offense of sexual battery. *See Osborn*, 177 So. 3d 1036 (finding a lewd and lascivious crime under 800.04 Fla. Stat. Ann can be a lesser included offense of sexual battery).

Petitioner also argues the type of touch alleged was "unnatural" and should have allowed for an instruction on the lesser included offense of "unnatural and lascivious act under section 800.2 Fla. Stat. (2015)." (DE 20 p. 2). However, Petitioner did not raise this as a ground for relief in his habeas petition, nor is it clear that he is requesting relief on this basis in his reply.

Accordingly, it is ORDERED AND ADJUDGED that:

(1) Petitioner's Objections to the Magistrate's Report (DE 20) are OVERRULED.

(2) Magistrate Judge Matthewman's Report (DE 17) is hereby ADOPTED.

(3) Petitioner's *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 (DE 1) is DENIED.

(4) Further, I find that Movant has failed to make "a substantial showing of the denial of a constitutional right" sufficient to support{2021 U.S. Dist. LEXIS 7} the issuance of a Certificate of Appealability. *See* 28 U.S.C. 2253.

(5) Final judgment will be entered by separate Order.

SIGNED in Chambers in West Palm Beach, Florida, this 8th day of April, 2021.

/s/ Donald M. Middlebrooks

Donald M. Middlebrooks

United States District Judge

Footnotes

1

In the Report and Recommendation, the word "luscious" appears in lieu of "lascivious" in two places. (DE 17, pp. 6, 8). The Report is adopted subject to the noted corrections of these typographical errors.

2

The Report cites to *J.F. v. State*, No. 2D18-1619, 2019 WL 6720430, at *4 (Fla. Dist. Ct. App. 2019) for the proposition that lewd and lascivious molestation is a lesser and included offense of sexual battery. (DE 17, p. 15). There, the court found that under the circumstances of that case, lewd and lascivious molestation was not an included offense. *J.F.* 2019 WL 6720430, at *4. The report also cites *Williams v. State*, 957 So. 2d 595, 598 (Fla. 2007) (lewd or lascivious battery is a permissive lesser included

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offense of sexual battery *with a deadly weapon*)(emphasis added). (DE 17, p. 15). In adopting this Report, this court referenced other state law and another section of the *Williams* decision in supporting that lewd and lascivious molestation can be an included offense of sexual battery. *See Osborn v. State*, 177 So. 3d 1034, 1036 (Fla. Dist. Ct. App. 2015) ("a lewd and lascivious battery is a *permissive* lesser-included offense to sexual battery")(emphasis in original); *Williams v. State*, 922 So. 2d 418 (Fla. Dist. Ct. App. 2006), *approved*, 957 So. 2d 595 (Fla. 2007)("Lewd or lascivious battery could be considered a lesser-included offense of sexual battery, under amended version of lewd or lascivious battery statute...definition of "sexual activity" for purposes of lewd or lascivious battery was virtually identical to definition of "sexual battery" for crimes under sexual battery statute, indicating that both were intended to prohibit the same basic conduct. 794.011(3) Fla. Stat. (2017); 800.04 Fla. Stat. (2014). It should be noted that here, the offense was "lewd and lascivious molestation" rather than battery, but the same analysis applies: Petitioner's charged conduct meets elements of both crimes. Sexual battery means the intentional "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object" (794.011 Fla. Stat.) and a "person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation." 800.04 Fla. Stat. Ann.

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EXHIBIT "C"

NOLAN WOODS, Petitioner, vs. FLORIDA DEPARTMENT OF CORRECTIONS, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2021 US Dist LEXIS 693592021 U.S. Dist. LEXIS 69359
Case No. 19-cv-81418-Middlebooks/Matthewman
February 5, 2021, Decided
February 5, 2021, Entered on Docket
Counsel {2021 U.S. Dist. LEXIS 1}Nolan M Woods, Plaintiff, Pro se, South Bay, FL.
For Florida Department of Correction, Defendant: Noticing 2254 SAG Broward and North, LEAD ATTORNEY; Georgina Jimenez-Orosa, LEAD ATTORNEY, Attorney General Office, West Palm Beach, FL.
Judges: WILLIAM MATTHEWMAN, United States Magistrate Judge.Opinion
Opinion by: WILLIAM MATTHEWMANOpinion

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PETITIONER'S PRO SE PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY [DE 1]

THIS CAUSE is before the Court upon Petitioner, Nolan Woods' ("Petitioner") Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") [DE 1]. The matter was referred to the undersigned by the Honorable Donald M. Middlebrooks, United States District Judge. See DE 16. Respondent, Florida Department of Corrections ("Respondent"), has filed a response to the Petition [DE 9], an Appendix [DE 10], and several transcripts [DE 11]. Petitioner has filed a reply [DE 14]. The Court has reviewed and carefully considered the Petition, the response, the reply, the exhibits, the transcripts, and all pertinent portions of the underlying criminal file.

I. WHETHER MOVANT IS ENTITLED TO AN EVIDENTIARY HEARING

As a preliminary matter, the Court{2021 U.S. Dist. LEXIS 2} finds that an evidentiary hearing is not required in this case. "Because this habeas petition can be resolved by reference to the state court record there is no need for an evidentiary hearing." Josey v. Inch, No. 19-62510-CV, 2020 WL 2497884, at *3 Fla. Apr. 22, 2020), report and recommendation adopted, No. 19-CV-62510, 2020 WL 2494642 (S.D. Fla. May 14, 2020) (citing 28 U.S.C. § 2254(e)(2)); Schriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (holding that, if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). Here, Petitioner has failed to demonstrate the existence of any factual disputes that warrant a federal evidentiary hearing. Therefore, Petitioner is not entitled to an evidentiary hearing and no evidentiary hearing shall be scheduled.

Further, the Court finds and RECOMMENDS that Movant's Petition be DENIED in its entirety, as discussed in detail below.

II. BACKGROUND

This case originated in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (case number 50-2008-CF-009777-MB). On March 15, 2010, Petitioner was charged by Second Amended Information with sexual battery on a person less than 12 years of age (Count 1) and lewd or lascivious molestation (Count 2). [DE 10-1, Ex. 1]. After a jury trial, he was{2021 U.S. Dist. LEXIS 3} found and adjudicated guilty on both counts on March 17, 2010. [DE 10-1, Ex. 2]. On May 10, 2010, Petitioner was sentenced to life imprisonment without parole on Count 1, with 693 days of jail credit. [DE 10-1, Ex. 3]. At the sentencing hearing, the State asked the trial court to dismiss Count 2 to avoid a double jeopardy issue under the Florida statutes and the case law, and the trial court granted the State's motion to dismiss Count 2. [DE 11-1, pp. 810-864].

On June 17, 2011, Petitioner filed a timely direct appeal of the conviction and sentence to the Fourth District Court of Appeal (Case No. 4D10-2054). [DE 10-1, Ex. 4]. On July 18, 2012, the Fourth District Court of Appeal entered a written opinion reversing Petitioner's conviction in light of its finding that the trial court erred in excluding "a critical prior inconsistent statement of the victim" at trial. Woods v. State, 92 So. 3d 890 (Fla. 4th DCA2012); [DE 10-1, Ex. 6]. The mandate issued on August 31, 2012.

Petitioner's jury trial on remand commenced December 10, 2013, and concluded on December 12, 2013. [DEs 11-2, 11-3, 11-4, 11-5, 11-6, and 11-7]. The jury found Petitioner guilty of lewd or lascivious molestation, a lesser included charge of sexual battery on a person{2021 U.S. Dist. LEXIS 4} less than 12 years of age (as charged in the Information). [DE 10-1, Ex. 7]. The sentencing hearing was held on January 10, 2014 [DE 11-8], and the trial court sentenced Petitioner to the Department of Corrections for life imprisonment. [DE 10-1, Ex. 8]. Petitioner is currently serving his sentence at the South Bay Correctional Facility.

On February 12, 2015, Petitioner filed a timely direct appeal of the conviction and sentence to the Fourth District Court of Appeal (Case No. 4D14-0160). [DE 10-1, Ex. 9]. He asserted three issues: (1) that the trial court erred by admitting a portion of the controlled call which referenced a prior accusation of child molestation involving another child because its probative value was greatly outweighed by its prejudicial effect; (2) that defense counsel was ineffective in agreeing to lewd and lascivious molestation as a lesser included offense of capital sexual battery, resulting in Petitioner's conviction for an uncharged offense; and (3) that the trial court erred by overruling the defense's objection to the prosecutor's comment in closing argument that improperly stated the burden of proof. [DE 10-1, Ex. 9]. On April 7, 2016, the Fourth District{2021 U.S. Dist. LEXIS 5} Court of Appeal issued a per curiam affirmance. Woods v. State, 192 So. 3d 67 (Fla. 4th

DCA2016). Petitioner's pro se Motion for Rehearing En Banc was denied by order issued June 16, 2016. [DE 10-1, Ex. 11]. The Mandate issued on July 08, 2016.

Petitioner sent a pro se letter dated August 1, 2016, to the Florida Supreme Court, asking it to review the circumstances of his conviction for "an uncharged crime." [DE 10-1, Ex. 12]. On August 10, 2016, the Florida Supreme Court acknowledged receipt of Petitioner's letter and treated it as a petition for writ of habeas corpus. [DE 10-1, Ex. 13]. In an order dated August 23, 2016, the Florida Supreme Court transferred the petition for writ of habeas corpus to the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida (Case No. 502008CF009777AXXXMB), for consideration as a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. [DE 10-1, Ex. 14]. The order stated that "[t]he transferee court shall treat the petition as if it had been originally filed there on the date it was filed in this Court," which was August 5, 2016. [DE 10-1, Ex. 14].

The Circuit Court docketed Petitioner's letter as a Motion for Post Conviction Relief. [DE 10-1, Ex. 15]. After the Florida{2021 U.S. Dist. LEXIS 6} Supreme Court denied Petitioner's Motion for Rehearing on September 27, 2016 [DE 10-1, Ex. 16], Petitioner filed a "Voluntary Dismissal of Transferred Habeas Proceeding" with the Fifteenth Judicial Circuit in and for Palm Beach County Court on October 26, 2016. [DE 10-1, Ex. 17].

On April 8, 2017, Petitioner filed a "Petition Alleging Ineffective Assistance of Appellate Counsel" with the Fourth District Court of Appeal, seeking a belated appeal to raise "new grounds." [DE 10-1, Ex. 18]. On May 24, 2017, the Fourth District Court of Appeal entered an order summarily denying the petition for ineffective assistance of appellate counsel. [DE 10-1, Ex. 19]. The order denying a motion for rehearing was on issued July 6, 2017. [DE 10-1, Ex. 20].

Thereafter, on July 11, 2017, Petitioner delivered a new motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 to South Bay Correctional Facility for mailing to the Clerk of the Palm Beach Circuit Court. [DE 10-1, Ex. 21]. On October 3, 2017, before the State's response was filed, Petitioner provided an "Amended and Supplemented" Motion for Post-Conviction Relief to South Bay Correctional Facility for mailing to the Clerk of the Palm Beach Circuit Court. [DEs{2021 U.S. Dist. LEXIS 7} 10-1, 10-2, Ex. 23]. The post-conviction court issued an order directing the State to respond on October 12, 2017. [DE 10-2, Ex. 24]. However, before the State had the opportunity to file its response to the amended 3.850 motion, Petitioner provided a Second Amended and Supplemented Motion for Post Conviction Relief to South Bay Correctional Facility for mailing to the Clerk of the Palm Beach Circuit Court on January 17, 2018. [DE 10-2, Ex. 25]. The State timely filed its response to Petitioner's "Pro Se Second Amended and Supplemented Motion for Postconviction Relief." [DE 10-2, 10-3, Ex. 26]. On May 1, 2019, the post-conviction court entered its order, adopted the State's response, and summarily denied Petitioner's 3.850 motion on the merits. [DE 10-3, Ex. 27].

Petitioner appealed the trial court's denial of his 3.850 motion to the Fourth District Court of Appeal (Case No. 4D19-1502). The appellate court issued its per curiam affirmance on September 12, 2019. Woods v. State, 280 So. 3d 60 (Fla. 4th DCA2019). Rehearing was denied by order dated October 10, 2019, and the Mandate issued on November 1, 2019. [DE 10-3, Ex. 28].

While the motion for post-conviction relief was proceeding in the lower court, on February 22, 2018, Petitioner{2021 U.S. Dist. LEXIS 8} filed a "Second or Successive Petition Alleging Ineffective Assistance of Appellate Counsel And Manifest Injustice" with the Fourth District Court of Appeal, again seeking a belated appeal. [DE 10-3, Ex. 29]. On March 20, 2018, the Fourth District Court of Appeal entered its order dismissing the petition for ineffective assistance of appellate counsel. [DE 10-3, Ex. 30]. An order denying a motion for "belated rehearing" was issued on May 24, 2018. [DE 10-3, Ex. 31].

On January 7, 2019, Petitioner filed a "Successive Petition for Writ of Habes (sic) Corpus" with the Fourth District Court of Appeal challenging the conviction rendered January 10, 2014. [DE 10-3, Ex. 32]. On February 14, 2019, the Fourth District Court of Appeal entered an order dismissing the petition as unauthorized. [DE 10-3, Ex. 33].

Petitioner delivered his Petition [DE 1] to South Bay Correctional Facility for mailing to this Court on October 14, 2019, according to a prison stamp on his initial petition. Id. at pp. 1, 17.

III. PETITION, RESPONSE, AND REPLY

A. The Petition [DE 1]

In the underlying Petition, Petitioner seeks federal habeas relief, arguing that (1) defense counsel provided ineffective assistance of counsel in advising Petitioner{2021 U.S. Dist. LEXIS 9} regarding lesser included offenses ("Claim One"), and (2) trial counsel was ineffective in failing to file a motion for judgment of acquittal or arrest of judgment on the lewd and luscious molestation conviction on double jeopardy grounds ("Claim Two"). [DE 1].

B. The Response [DE 9]

The State concedes that the Petition is timely and that Petitioner exhausted Claim One by raising that same issue on direct appeal and in his 3.850 motion. [DE 9]. However, the State asserts that Claim Two of the Petition has not been ruled upon by the state courts, and, thus, Claim Two has not been exhausted and is procedurally defaulted from federal habeas review. Id. Finally, the State contends that the two substantive arguments asserted by Petitioner have no merit in light of the record in this case. Id.

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C. The Reply [DE 14]

In reply, Petitioner first argues that his trial counsel provided ineffective assistance of counsel by misadvising him regarding lesser included offenses, by failing to request a jury instruction on the lesser included offense of unnatural and lascivious acts, and by failing to inform Petitioner that lewd and lascivious molestation is a life felony. [DE 14]. Petitioner next contends{2021 U.S. Dist. LEXIS 10} that, with regard to Claim Two in the Petition, case law states that "[i]nadequate or no assistance of counsel at the initial-review collateral proceedings may establish cause for a prisoner's default of a claim of ineffective assistance at trial." Id. at p. 9.

IV. ANALYSIS REGARDING EXHAUSTION

Pursuant to 28 U.S.C. § 2254(b)-(c), petitioners are required to exhaust their claims by fairly presenting them to the state courts for adjudication before presenting them in a federal habeas petition. When petitioners do not properly present their claims, exhaust their claims, and comply with the applicable state procedure, § 2254 may bar federal review of those claims in federal court. See Mason v. Allen, 605 F.3d 1114, 1119 (11th Cir. 2010) (citing 28 U.S.C. § 2254(b)-(c)).

Here, Petitioner has conceded in his Petition and in his reply that he failed to exhaust Claim Two laid out in the Petition; however, he argues that his failure to exhaust should not result in procedural default as he was acting in a pro se capacity when he filed his post-judgment motions.

In Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) the Supreme Court recognized a narrow exception to the procedural default rule for claims of ineffective assistance of trial counsel. The Court held, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an{2021 U.S. Dist. LEXIS 11} initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez, 566 U.S. at 17. The rationale of Martinez has since been extended to the cases where the first opportunity to challenge trial counsel's effectiveness is in state post-conviction proceedings. Trevino v. Thaler, 569 U.S. 413, 429, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013).

In order to demonstrate cause in circumstances where Martinez and Trevino apply, a petitioner must establish (1) a "substantial" claim of ineffective assistance of trial counsel; (2) that the cause for failure to exhaust the claim is ineffective post-conviction counsel or lack of post-conviction counsel in the initial-review collateral proceeding; (3) that the state collateral proceeding was the "initial" opportunity to review the claim regarding trial counsel's performance; and (4) that the state requires, either by law or as a practical matter, that ineffective assistance of trial counsel claims be raised in the post-conviction proceeding. Trevino, 569 U.S. at 423, 429; Martinez, 566 U.S. at 17.

Here, Petitioner did file a 3.850 motion, but he failed to raise the argument that his trial{2021 U.S. Dist. LEXIS 12} counsel was ineffective in failing to file a motion for judgment of acquittal or arrest of judgment on the lewd and luscious molestation conviction on double jeopardy grounds. At this point, there is no procedural mechanism for him to return to Florida courts and exhaust the issue. Moreover, Petitioner has failed to demonstrate that an exception excuses him from the procedural default of Claim Two raised in the Petition. He has failed to demonstrate a "constitutional error occurred," and that this is not an "insubstantial" claim. Moreover, Petitioner has made no showing of cause and prejudice to excuse the procedural default of Claim Two. Nor does he attempt to make any showing of a fundamental miscarriage of justice by providing new evidence establishing his actual innocence. Thus, Petitioner has failed to demonstrate that an exception excuses him from the procedural default of Claim Two as raised in the Petition. Accordingly, Claim Two in the Petition is procedurally defaulted.

Pursuant to 28 U.S.C. § 2254(b)(2), the Court has authority to address unexhausted claims when a denial is appropriate on the merits, so, for purposes of judicial economy, and even though Claim Two is procedurally defaulted, the{2021 U.S. Dist. LEXIS 13} merits of Claim Two in the Petition will be addressed in this Report and Recommendation. See Davis v. Fla., No. 18-22622-CV, 2020 WL 7481583, at *3 (S.D. Fla. Nov. 4, 2020), report and recommendation adopted sub nom. Davis v. Fla. Dep't of Corr., No. 18-22622-CIV, 2020 WL 7480818 (S.D. Fla. Dec. 18, 2020). The Court has reviewed the Petition on the merits, as set forth below, but finds it substantively unavailing.

V. ANALYSIS REGARDING PETITIONER'S SUBSTANTIVE CLAIMS

Pursuant to 28 U.S.C. § 2254(d), an individual in state custody is entitled to federal habeas corpus relief only on the ground that he is in custody in violation of the United States Constitution or laws or treaties of the United States. To obtain habeas corpus relief from a federal court, a prisoner must demonstrate that the state court's ruling on the claim: 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1)-(2) (2018); see also Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001).

"A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth{2021 U.S. Dist. LEXIS 14} in this Court's cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result." Brown v. Payton, 544 U.S. 133, 141, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); Williams, 529 U.S. at 405-06. "A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies such precedents to the facts in an objectively unreasonable manner." Id. In the context of habeas petitions, "clearly established Federal law" refers to the holdings of the Supreme Court's decisions as of the time of the relevant state court decision. Hall v. Head, 310 F.3d 683, 690

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(11th Cir. 2002) (citing Williams, 529 U.S. at 412). Federal courts are required to presume the correctness of the state court's factual findings unless the petitioner overcomes them by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001).

The Supreme Court repeatedly has held that "[t]he petitioner carries the burden of proof" and that the § 2254(d)(1) standard is a high hurdle to overcome. See Bobby v. Dixon, 565 U.S. 23, 24, 132 S. Ct. 26, 181 L. Ed. 2d 328 (2011) (quoting Harrington v. Richter, 562 U.S. 86, 102-03, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)); Cullen v. Pinholster, 563 U.S. 170, 180, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). State court decisions must be given a strong presumption of deference even when the state court adjudicates a petitioner's claim summarily. See Richter, 560 U.S. at 96-100; Gill v. Mecusker, 633 F.3d 1272, 1288 (11th Cir. 2011).

i. Claim One: Whether Petitioner was denied his constitutional right to effective assistance of counsel when trial counsel failed to advise Petitioner regarding{2021 U.S. Dist. LEXIS 15} lesser included offenses

Petitioner asserts that his trial counsel's performance was deficient when counsel agreed with the State that lewd or lascivious molestation was a lesser included offense of capital sexual battery, when counsel failed to request an instruction on the lesser included offense of unnatural and lascivious acts, and when counsel failed to advise Petitioner that lewd or lascivious molestation is not a lesser included offense of capital sexual battery. [DE 1, pp. 7-8]. Petitioner argues that, "[a]lthough the record does reflect that counsel informed petitioner about proceeding to retrial on one charge, counsel never explained to petitioner that lewd and lascivious molestation was a life felony." Id. at p. 7.

In response, the State contends that Petitioner simply misunderstands Florida law regarding "lesser included offenses," and state courts have properly rejected his argument in a variety of orders and decisions. [DE 9, p. 24]. The State explains that, in reality, "in Florida[,] lewd or lascivious molestation, under § 800.04(1)(a), Fla. Stat., is a permissive lesser included offense of sexual battery." Id. at p. 32. Moreover, under Florida law, "an instruction on a permissive lesser included offense is appropriate{2021 U.S. Dist. LEXIS 16} if the allegations of the greater offense contain all the elements of the lesser offense and the evidence at trial would support a verdict on the lesser offense." Id. Additionally, "[i]f an offense meets the criteria for an instruction and verdict choice as either a necessarily or permissive lesser included offense, the State may insist on its inclusion, even over defense objection." Id. at p. 33.

According to the State, it properly alleged the elements of lewd or lascivious molestation and then presented sufficient evidence to support a verdict on that charge. [DE 9, p. 33]. The State argues that Petitioner has clearly failed to establish deficient performance on the part of defense counsel when counsel agreed that lewd and lascivious molestation was a permissive lesser included offense. Id. Finally, the State argues that it would have been futile for defense counsel to object since "the State was entitled to the instruction on the permissive lesser included offense over the defense's objection." Id. at p. 34. Therefore, Petitioner cannot establish any prejudice. Id.

Petitioner also argues that his trial counsel was deficient in failing to request a jury instruction on the lesser included offense of unnatural{2021 U.S. Dist. LEXIS 17} and lascivious acts. The State contends in response that "[w]hile it is true that the offense of unnatural and lascivious acts is a permissive lesser included offense of Lewd and Lascivious Molestation...Lewd and Lascivious Molestation was not the offense charged in the information in the second trial." [DE 9, p. 35]. Moreover, Florida law states that an instruction on a lesser offense is not required if it is not a lesser included offense of the offense charged, so trial counsel could not have been deficient in failing to ask for instructions on the offense of unnatural and lascivious acts. Id. The State also argues that, since the "omitted instruction relates to an offense two or more steps removed, a reviewing court may find such error to be harmless," Petitioner cannot establish the prejudice prong. Id.

Finally, Petitioner asserts in his Petition that defense counsel was also deficient in failing to inform Petitioner "that lewd and lascivious molestation was a life felony," therefore, "not a lesser included offense of capital sexual battery," "but rather an 'equally included' offense." [DE 1, pp. 7-8]. Respondent maintains that Petitioner's allegations are simply incorrect because{2021 U.S. Dist. LEXIS 18} sexual battery under § 794.011 (2)(a) is a capital felony punishable by term of mandatory imprisonment for life, while lewd or lascivious molestation is a life felony punishable by a term of imprisonment for life or a split sentence. [DE 9, p. 37]. The State asserts that "Petitioner's misguided interpretation of the applicable Florida Sentencing Statutes was consistently rejected by the Florida courts below. Accordingly, the Florida State courts' rejection of this claim is not contrary to or an unreasonable application of clearly established federal law and is not based on an unreasonable determination of facts." Id. at p. 38. According to the State, "Petitioner failed to show the State courts rejection of this claim was an unreasonable application of the Strickland standard to the facts and circumstances of this case. Thus, this ground was properly denied below." Id.

In reply, Petitioner first argues that lewd or lascivious molestation was not a permissive lesser included offense. [DE 14, p. 1]. He next contends that the record does not establish that his counsel advised him that lewd or lascivious molestation was punishable as a life felony and that he is, therefore, entitled to an evidentiary hearing on this{2021 U.S. Dist. LEXIS 19} issue. Id. at p. 5. Finally, Petitioner contends that "[t]he adjudications of the state court resulted in decisions that involved an unreasonable application of clearly established Florida and federal law, as determined by the United States Supreme Court." Id. at p. 6.

"In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court established a two-prong test for evaluating claims of ineffective assistance of counsel. Under the 'performance' prong, the defendant must show that counsel's performance 'fell below an objective standard of reasonableness.'" King v. U.S., 250 F. App'x. 930, 932 (11th Cir. 2007) (citing Strickland, 466 U.S. at 688). "Under the 'prejudice' prong, the defendant must show that counsel's deficient performance actually prejudiced the defendant and that, "but for the attorney's error, the outcome of the proceeding would have been different." Id. (citing Strickland, 466 U.S. at 694). The burden of

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persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. See Strickland, 466 U.S. at 688. The petitioner must establish that particular and identified acts or omissions of counsel "were outside the wide range of professionally competent assistance." Chandler v. United States, 218 F.3d 1305, 1313, 1314 (11th Cir. 2000) (quoting Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987); see also Strickland, 466 U.S. at 686 (stating that petitioner must show "counsel's representation fell below an objective standard of reasonableness", which means{2021 U.S. Dist. LEXIS 20} that counsel's performance was unreasonable "under prevailing professional norms. . . considering all of the circumstances").

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. When assessing a lawyer's performance, "[c]ourts must indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." Chandler, 218 F.3d at 1314 (11th Cir. 2000). When assessing ineffective assistance of counsel claims, the court's role is not to "grade a lawyer's performance; instead, [the court] determine[s] only whether a lawyer's performance was within the wide range of professionally competent assistance." Van Poyck v. Florida Dept. of Corrections, 290 F.3d 1318, 1322 (11th Cir.2002) (quoting Strickland, 466 U.S. at 690) (internal quotation marks omitted). "Intensive scrutiny and second-guessing of attorney performance are not permitted." Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994).

If a petitioner's claim of ineffectiveness turns on whether counsel should have raised issues of{2021 U.S. Dist. LEXIS 21} state law, § 2254(d) requires that the federal court defer to the state court's decision regarding its own laws. See Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984) (superseded by statute on other grounds). It is "a fundamental principle [that] state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters." See Herring v. Sec'y, Dept. of Corr., 397 F.3d 1338, 1354-55 (11th Cir. 2005) (quoting Agan v. Vaughn, 119 F.3d 1538, 1549 (11th Cir. 1997)).

(a) whether trial counsel performed deficiently by agreeing with the State that lewd or lascivious molestation was a lesser included offense of capital sexual battery

It is clear that lewd or lascivious molestation (Fla. Stat. § 800.04(1)(a)) is a permissive lesser included offense of sexual battery when the information alleges that the touching was in a lewd or lascivious manner and the evidence establishes that the touching was in a lewd and lascivious manner. J.F. v. State, No. 2D18-1619, 2019 Fla. App. LEXIS 18415, 2019 WL 6720430, at *4 (Fla. 2d DCA Dec. 11, 2019) ("[L]ewd or lascivious molestation is not a permissive lesser included offense of capital sexual battery where, as here, the information does not allege that the touching was in a lewd or lascivious manner."); see also Williams v. State, 957 So. 2d 595, 598 (Fla. 2007) (lewd or lascivious battery is a permissive lesser included offense of sexual battery with a deadly weapon or physical force likely to cause serious personal injury); Garcia v. State, 143 So. 3d 1105, 1109 (Fla. 2d DCA2014).

It is also clear{2021 U.S. Dist. LEXIS 22} that, in Florida, a "trial court must give a jury instruction on a permissive lesser-included offense if: (1) the indictment or information alleges all the statutory elements of the permissive lesser-included offense, and (2) there is some evidence adduced at trial establishing all of those elements." Bordes v. State, 34 So. 3d 215, 216 (Fla. 4th DCA2010) (citing Khianthalat v. State, 974 So. 2d 359, 361 (Fla. 2008)); Welsh v. State, 850 So. 2d 467, 470 (Fla. 2003). Furthermore, if an offense meets the criteria for an instruction and verdict choice as either a necessarily or permissive lesser included offense, the State may insist on its inclusion, even over defense objection. Caruthers v. State, 235 So. 3d 931, 933 (Fla. 4th DCA2017) ("Upon request, the judge must instruct the jury on permissive lesser included offenses of the crime charged which are supported by the information and evidence.") (citing Wimberly v. State, 697 So.2d 1272, 1273 (Fla. 4th DCA1997)); State v. Johnson, 601 So. 2d 219, 220 (Fla. 1992); Gallo v. State, 491 So. 2d 541, 543 (Fla. 1986)), receded from on other grounds by Gould v. State, 577 So. 2d 1302, 1305 (Fla. 1991).

In this case, the State alleged the elements of lewd or lascivious molestation and presented sufficient evidence to show that Petitioner committed an act meeting the definition of sexual activity pursuant to Fla. Stat. § 800.04(5)(a)-that the victim was less than twelve years of age, and that Petitioner is a person eighteen years of age or older-in order to support a verdict thereon. Therefore, the trial court was correct in finding that lewd and lascivious molestation was a permissive{2021 U.S. Dist. LEXIS 23} lesser included offense of sexual battery, as charged in the Information, under the facts and circumstances of this specific case.

Petitioner has failed to establish that defense counsel provided ineffective assistance of counsel when he agreed with the trial court and the State that lewd and lascivious molestation was a permissive lesser included offense of sexual battery, given the particular facts of this case. Further, even if defense counsel had objected, the State was entitled to the instruction on the permissive lesser included offense over the defense's objection, so Petitioner has failed to establish the prejudice prong of the Strickland standard as well.

(b) whether trial counsel performed deficiently by failing to request a jury instruction on unnatural and lascivious acts

Petitioner was re-tried in 2013 for sexual battery upon a person less than 12 years of age, contrary to § 794.011(2)(a), Fla. Stat., a capital felony. [DE 11-4, pp. 354-66; 387-89]. Defense counsel requested instructions on lewd and lascivious molestation, attempted sexual battery, attempted lewd or lascivious molestation, and battery, as lesser included offenses of the offense charged, sexual battery. [DE 11-4, pp. 597-98]. The jury{2021 U.S. Dist. LEXIS 24} was instructed on the four lesser included offenses as requested. [DE 11-4, p. 760-645]. The jury found Petitioner guilty of "lewd or lascivious molestation, a lesser included charge." [DE 10-1, Ex. 7; DE 11-7, p. 846-7].

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Unnatural and lascivious acts is a permissive lesser included offense of lewd and lascivious molestation. Lowman v. Moore, 744 So. 2d 1210, 1211 (Fla. 2d DCA1999). However, lewd and lascivious molestation was not the offense with which Petitioner was charged, and for which he was tried, during the second trial. Therefore, unnatural and lascivious acts is twice removed from the offense actually charged and tried (sexual battery). In Florida, an instruction on a lesser offense is not required if it is not a lesser included offense of the offense charged. When the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to harmless error analysis. Bigio v. Crews, No. 14-CV-60783, 2015 WL 13541058, at *27 (S.D. Fla. July 13, 2015), report and recommendation adopted, No. 14-60783-CIV, 2015 WL 13540986 (S.D. Fla. Sept. 22, 2015), aff'd sub nom. Bigio v. Fla. Dep't of Corr., 694 F. App'x 672 (11th Cir. 2017); Pena v. State, 910 So. 2d 781, 787 (Fla. 2005); State v. Jefferson, 347 So. 2d 427 (Fla. 1977); Martin v. State, 342 So. 2d 501 (Fla. 1977). Only a trial court's failure to instruct on the lesser offense one step removed, is per se reversible; all other lesser offense instructions fall within the harmless error analysis.{2021 U.S. Dist. LEXIS 25} State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978).

In light of the relevant law, the Court finds that trial counsel was not deficient in failing to ask for jury instructions on the offense of unnatural and lascivious acts. Furthermore, even if trial counsel had been deficient in failing to request the instructions, Petitioner has failed to establish the prejudice prong. He has provided no evidence to support his argument that the jury would have found him guilty of unnatural and lascivious acts if the instructions on that crime had been read. Any alleged error asserted by Petitioner is clearly harmless. In sum, Petitioner has failed to satisfy the requirements of Strickland and has failed to show the Florida courts' rejection of this claim is contrary to, or an unreasonable application of clearly established federal law, or that it is based on an unreasonable determination of facts.

(c) whether trial counsel performed deficiently by failing to advise Petitioner that lewd or lascivious molestation is not a lesser included offense of capital sexual battery

Here, Petitioner appears to assert a variation of his above argument that his trial counsel should not have agreed to the inclusion of lewd or lascivious molestation as a permissive{2021 U.S. Dist. LEXIS 26} lesser included offense. Again, as stated above, the jury would have been instructed regarding lewd or lascivious molestation regardless of whether defense counsel had objected. Therefore, it does not matter whether defense counsel sufficiently explained to Petitioner that lewd or lascivious molestation could result in a life sentence. Since Petitioner cannot possibly establish any prejudice, there is no reason to conduct an evidentiary hearing on this sub-issue.

Next, Florida Statute § 794.011(2)(a), regarding sexual battery, states: "A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141." On the other hand, Florida Statute § 800.04(5)(b) states in relevant part that lewd or lascivious molestation is a life felony, punishable as provided in Fla. Stat. § 775.082(3)(a)4. Florida Statue § 775.82(3)(a)4. allows for "(1) a term of imprisonment for life or (2) a split sentence that is a term of at least 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4), at the discretion of the trial{2021 U.S. Dist. LEXIS 27} court." Thus, under Florida law, the trial court could sentence Petitioner anywhere from 25 years to life. Petitioner was sentenced to life in prison as the court had discretion to do under § 775.82(3)(a)4. Petitioner has failed to show trial counsel was deficient in failing to inform him "that lewd and lascivious molestation was a life felony," therefore, "not a lesser included offense of capital sexual battery," "but rather an 'equally included' offense." Nor has he shown any prejudice. The State is correct that Petitioner misunderstands the relationship between the two crimes and relies on outdated case law to support his position.

In sum, the state courts' rejection of this claim is not contrary to, or an unreasonable application of, clearly established federal law and is not based on an unreasonable determination of facts. Petitioner has failed to show that the state courts' rejection of this claim was an unreasonable application of the Strickland standard to the facts and circumstances of this case.

ii. Claim Two: Whether Petitioner's trial counsel was ineffective when counsel chose not to file a motion for judgment of acquittal or arrest of judgment on the lewd and lascivious molestation conviction{2021 U.S. Dist. LEXIS 28} on double jeopardy grounds

Petitioner argues that his trial counsel provided ineffective assistance of counsel in failing to file a motion for judgment of acquittal or arrest of judgment on the lewd and lascivious molestation conviction on double jeopardy grounds when counsel was aware that the lewd and lascivious molestation charge had been dismissed at the previous trial during the sentencing hearing at the behest of the State to avoid a double jeopardy issue. [DE 1, p. 11]. Petitioner further asserts that his counsel's failure to move for a judgment of acquittal or an arrest of judgment was "prejudicial and especially egregious where jeopardy had already attached to the lewd or lascivious charge at the previous trial and the court indicated that Count 2 was dismissed and not revived by the mandate." Id. He contends that the lewd or lascivious molestation charge "was the same charge that petitioner was prosecuted for at the previous trial, and double jeopardy protections prohibited petitioner's conviction for the lewd or lascivious charge that was not a lesser included offense and which was dismissed at the previous trial." Id.

The State points out that the 2013 re-trial was on a single{2021 U.S. Dist. LEXIS 29} count of sexual battery on a person less than 12 years of age, and the jury was instructed on the one count of sexual battery on a person less than 12 years of age, with 1) lewd and lascivious molestation; 2) attempted sexual battery on a person less than the age of 12; 3) attempted lewd or lascivious molestation; and 4) battery as the four lesser included offenses. [DE 9, p. 42]. The jury ultimately found Petitioner guilty of "lewd or lascivious molestation, a lesser included charge." [DE 10-1, Ex. 7]. The State argues that Petitioner's trial counsel clearly could not have filed a motion for judgment of acquittal or arrest of judgment on the lewd or lascivious molestation conviction on double jeopardy grounds when the second count in the amended information had been dismissed at the end of the first trial in 2010, and was not considered by the jury at the re-trial in 2013 as an individual

count, but solely as a lesser included offense. [DE 9, p. 42]. According to the State, Petitioner has failed to demonstrate both professional error and a prejudicial effect on the proceedings. Id. at p. 43.

The record is clear that, in 2013, Petitioner was retried on a single count of sexual battery on a person{2021 U.S. Dist. LEXIS 30} less than 12 years of age. [DE 11-4, pp. 354-66; 387-89]. When the trial court judge instructed the jury, the judge explained, "Nolan M. Woods, the Defendant in this case has been accused of the crime of Sexual Battery Upon a Person Less than 12 Years of Age." [DE 11-4, p 759, lines 20-22]. The judge then explained that the lesser included crimes included "Lewd and Lascivious Molestation, Attempted Sexual Battery on a Person Less than 12 Years of age, Attempted Lewd or Lascivious Molestation, or Battery. [DE 11-4, p. 760, lines 7-11]. The jury was instructed on each of the offenses. [DE 11-4, pp. 760-64]. The jury ultimately convicted Petitioner of Lewd or Lascivious Molestation, a lesser included charge. [DE 11-7, p. 846, lines 22-23].

It appears to the Court that Petitioner is confused as to what happened at his first trial versus his second trial. During the first trial, the State proceeded on two charges against Petitioner: sexual battery on a person less than 12 years of age (Count 1) and lewd or lascivious molestation (Count 2). He was convicted by a jury of both charges. Then, the State moved to dismiss Count 2 at sentencing to avoid a double jeopardy issue. During the second{2021 U.S. Dist. LEXIS 31} trial, the State only proceeded on the charge of sexual battery upon a person less than 12 years of age, along with its lesser included offenses. Petitioner cannot satisfy Strickland's deficient performance or prejudice prong since, at the conclusion of the 2013 retrial, his attorney could not have possibly filed a successful motion for judgment of acquittal or arrest of judgment on the lewd and lascivious molestation conviction on double jeopardy grounds.

VI. CERTIFICATE OF APPEALABILITY

As amended effective December 1, 2009, § 2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b) to the Rules Governing § 2254 Proceedings.

After a careful review of the record, the Court finds that Petitioner is not entitled to a certificate of appealability. "A certificate of appealability may [be] issued[d] . . . only if the applicant has made a substantial showing of the denial of a constitutional{2021 U.S. Dist. LEXIS 32} right." 28 U.S.C. § 2253(c)(2). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues she seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); see also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised in the Petition are clearly without merit, Petitioner cannot satisfy the Slack test. Upon consideration of the record as a whole, the District Judge should deny a certificate of appealability.

VII. RECOMMENDATION TO THE DISTRICT JUDGE

A very careful review of the entire record establishes that Petitioner's claims are meritless and due to be denied for the reasons stated above. No evidentiary hearing is necessary. The Petition fails to establish any grounds for relief. Accordingly, the undersigned Magistrate Judge recommends that the District Judge DENY Petitioner Nolan Woods' Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody [DE 1].

NOTICE OF RIGHT TO OBJECT

The parties shall have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with United States District Judge Donald M. Middlebrooks. Failure to file objections timely shall{2021 U.S. Dist. LEXIS 33} bar the parties from a de novo determination by the District Judge of an issue covered in the Report and Recommendation and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report and Recommendation. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); Henley v. Johnson, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in Chambers at West Palm Beach in the Southern District of Florida, this 5th day of February, 2021.

/s/ William Matthewman

WILLIAM MATTHEWMAN

United States Magistrate Judge

EXHIBIT "C"

EXHIBIT D

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(Rev. 10/07)

PETITION UNDER 28 U.S.C. §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED SATES DISTRICT COURT	District: SOUTHERN DISTRICT OF LORIDA
Name (under which you were convicted): **NOLAN M. WOODS**	**Docket or case No:**
Place of Confinement: **Southbay Correctional Facility,** **Post Office Box - 7171** **South Bay, Florida. 33493-7171**	**PrisonerNo:W39711**

Petitioner (include the name under which you were convicted)		**Respondent**
NOLAN M. WOODS	**V.**	**MARK S. INCH, Secretary, Florida Department of Corrections.**

The Attorney General of the State of: **FLORIDA -- ASHLEY MOODY**

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: The Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

(b) Criminal case number 2008CF009777AXXX

2. (a) Date of judgment of conviction: Dec.12th 2013

(b) Date of sentence: Jan.10, 2014.

3. Length of sentence: Life.

4. In this case, were you convicted on more than one count or of more than one crime? No.

5. Identify all crimes of which you were convicted and sentenced in this case: One Count of Lewd or Lascivious Molestation.

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6. (a) What was your plea? Not guilty.

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty and what did you plead not guilty to? N/A.

(c) If you went to trial, what kind of trial did you have? Jury.

7. Did you testify at a pretrial hearing, trial, or a post trial hearing? No.

8. Did you appeal from the judgment of conviction? Yes.

9. If you did appeal, answer the following:

(a) Name of court: Fourth District Court of Appeal.

(b) Case number: 4D14-0160

(c) Result: Per curiam affirmed.

(d) Date of result: April 7, 2016

(e) Citation to the case: 192 so.3d 67 (Fla.4thDCA2016).

(f) Grounds raised:

POINT 1

The Trial Court Erred In Not Redacting A Portion Of The Controlled Call In Which There Was A Reference To Another Allegation Of Child Molestation Involving Another Child. The Probative Value Of The Portion Was Greatly Outweighed By Its Prejudicial Effect.

POINT II

Defense Counsel Provided Ineffective Assistance Of Counsel By Agreeing That Lewd Or Lascivious Molestation Was A Lesser Included Of Capital Sexual Battery. Lewd Or Lascivious Molestation Is Not Necessarily A Permissible Lesser Included Offense. This Error Resulted In Appellant Being Convicted Of Lewd Or Lascivious Molestation, An Uncharged Offense.

POINT III

The Trial Court Erred In Permitting The State In Rebuttal Argument To Improperly State The Required Burden Of Proof. The Prosecutor's Comment Could Have Influenced A Juror To Convict, Even If The

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State Had Not Proven The Case Beyond A Reasonable Doubt

(g) Did you seek further review by a higher state court? Yes. Filed on August 16, 2016.Denied on October 14 2016.

(h) Did you file a petition for certiorari in the United Sates Supreme Court? No.

10. Other than a direct appeal listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? Yes.

11.If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: The Fifteenth Judicial Circuit in and for Palm Beach, County Florida

(2) Docket or case number: 2008CF009777AXXX

(3) Date of filing: Initial Motion, filed JULY 17, 2017, Amended Motion filed, October 3, 2017, Second and Supplemented Motion, filed January 17, 2018.

(4) Nature of the proceeding: Motion for Post –Conviction.

(5) Grounds Raised: **I: THE TRIAL COURT ERRED IN NOT ORDERING A COMPETENCY EXAMINATION AND IN FAILING TO MAKE ANY INQUIRY WHEN COUNSEL STATED HE HAD REASON TO BELIEVE APPELLANT WAS NOT COMPETENT TO STAND TRIAL.**

II: DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN MISADVISING DEFENDANT REGARDING LESSER INCLUDED OFFENSES

III: DEFENDANT RETRIAL ON THE LESSER INCLUDED OFFENSE OF LEWD OR LASCIVIOUS MOLESTATION VIOLATED DOUBLE JEOPARDY.

(6) Did you receive a hearing where evidence was given in your motion? No.

(7) Result: Denied.

(8) Date of result: May 1, 2019.

(b) If you filed any second petition, application, or motion, give the same information:

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(1) Name of court: Fourth District Court of Appeal

(2) Docket or case number: 4D17-1425

(3) Date of filing: May 9, 2017.

(4) Nature of the proceeding: Petition for Writ of Habeas Corpus

(5) Grounds raised:

Claim One: Appellate Counsel was ineffective by virtue Of failing to argue on appeal that the evidence presented at trial was insufficient to Support the trial court's denial of defense counsel's motion for judgment of acquittal

Claim Two:
Appellate Counsel was ineffective by virtue of failing
To argue on appeal that defense counsel failed to object
Where the trial court erred in admitting his statement
Into evidence without establishing the trustworthiness
Of his statement, pursuant to § 92.565 (2), Fla. Stat.(2009)

(6) Did you receive a hearing where evidence was given in your motion? No.

(7) Result: Denied.

(8) Date of result: May 24th 2017.Rehearing filed June 12th 2017, denied on July 6, 2017

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Fourth District Court of Appeal.

(2) Docket or case number (if you know)? 4D19-0154

(3) Date of filing (if you know): January 10, 2019.

(4) Nature of proceeding: **"SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS".**
(5) Grounds Raised: CLAIM I: DEFENDANT'S CONVICTION AND SENTENCE WAS IMPOSED IN VIOLATION OF THE CONSTITUTION AND DUE PROCESS WHEN HE WAS CONVICTED OF AN UNCHARGED CRIME

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?
No

(7) (Result): Dismissed as unauthorized.

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(8) Date Of Result (If you know): February 14th, 2019.

(d) Did you appeal to the highest state court having jurisdiction over the action on your motions?

(1) First petition: No (2) Second petition: No. (3) Third petition. No.

(e)If you did not appeal to the highest state court having jurisdiction, explain why you did not: All decisions were per curiam decisions without opinions; or dismissed without explanation.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United State. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN MISADVISING PETITIONER REGARDING LESSER INCLUDED OFFENSES [MARTINEZ CLAIM]

(a) Supporting facts:

Petitioner was charged by amended information with sexual battery on a person less than 12 years of age (Count 1), a capital felony contrary to Section 794.011 (2) (a), Florida Statutes (2008), and lewd or lascivious molestation (Count 2), a Life felony contrary to Section 800.04 (5) (a) and (b), Florida Statutes (2008). (SRI 99-100).

Petitioner was previously convicted after a jury trial on both counts. (SRI 27, SR8 790-1). During sentencing, the State requested that Count 2 be dismissed because it would constitute a double jeopardy violation. (SR9 850). The Court granted the State's motion and dismissed Count 2. (SR9 858). On Count I, the Court sentenced petitioner to Life in Prison. (SR1 34; SR9 858-9).

The re-trial on remand began December 10, 2013 (Vol. 4 of 7, T. 1). After the jury was selected, and prior to opening statements, the court inquired whether petitioner was going to trial

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on one or two counts. The court indicated that Count 2 was dismissed and not revived by the mandate. (T3 354-65).While the State insisted that on remand the case was back to the original charges (Vol. 6 of 7, T. 355-356), the state ultimately asserted that because of the way the information was prepared, Count II was a lesser included offense of Count I, which is why petitioner could not be sentenced on both. (Vol. 6 of 7, T. 356-359).

The record reveals that after the parties had decided to retry petitioner on the single count of capital sexual battery, the Judge instructed counsel to talk to petitioner and inform him about the 2 charges versus the lesser. (T3 387). After a brief recess, the parties reconvened whereupon counsel told the judge, the following:

MR. GORMAN: Yes, Judge. And I explained it to Mr. Woods.

THE COURT: Right.

MR. GORMAN: And he agrees that we go forward with one count—

THE COURT: Right.

MR. GORMAN: -- Instead of 2.

THE COURT: Okay. Is that right, Mr. Woods?

THE DEFENDANT: That's fine.

(T3 387-388).

During petitioner's direct Appeal, the state argued the following during its answer brief: "Appellant alleges defense counsel provided ineffective assistance of counsel because defense counsel failed to object to lewd or lascivious molestation as a lesser included offense (I B, P.23), resulting "in Appellant being convicted of an uncharged crime". The state maintains Appellant failed to meet either of the two prongs of the Strickland standard, and that the claimed

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ineffectiveness at bar is clearly refuted by the record". See State's Response (DE#420) exhibit O answer brief, pages 30 -35.

However as pointed out in Petitioner's reply to the State's response, (DE# 429), the State failed to address other significant aspects of the Petitioner's ineffective assistance claim, where the following was raised:

"Defense counsel's performance was deficient, when counsel agreed with the State that lewd and lascivious molestation was a lesser included offense of capital sexual battery. *Counsel's* performance was also deficient, when he failed to request an instruction on the lesser included offense of unnatural and lascivious acts. Although the record does reflect that counsel informed defendant about proceeding to retrial on one charge, counsel never explained to defendant that lewd and lascivious molestation was a life felony. Any reasonable attorney would not have agreed to a lesser included offense, which essentially was equal in punishment as the main ch*arge".*

"In addition, any reasonably competent, unbiased attorney would have known that unnatural and lascivious acts was the optimum lesser included, a second degree misdemeanor, rather than lewd and lascivious molestation which he clearly should have known was a life felony.
Therefore, no professional attorney would have agreed to such a lesser included offense that was equal in punishment as the main charge. If anything, counsel didn't agree to a lesser included, but rather an "equally included" offense".

COUNSEL'S REPRESENTATION CONTRARY TO CLEARLY ESTABLISHED LAW

Here, defense counsel's representation was contrary to clearly established law when he agreed with the state that lewd or lascivious molestation was a lesser included offense of capital sexual battery. Counsel's performance was also deficient, when he failed to request an instruction on the lesser included offense of unnatural and lascivious acts. Although the record does reflect that counsel informed petitioner about proceeding to retrial on one charge, counsel never explained to petitioner that lewd and lascivious molestation was a life felony. Furthermore, counsel was constitutionally deficient when he failed to advise petitioner that lewd or lascivious

molestation is not a lesser included offense of capital sexual battery. Therefore, no professional attorney would have agreed to such a lesser included offense that was equal in punishment as the main charge. If anything counsel didn't agree to a lesser included, but rather an "equally included" offense. See petitioner's motion, at pgs. 13-14 (DE#403).

The State also incorrectly argued that Petitioner's' second claim of ineffective assistance counsel, that counsel was ineffective in failing to request instruction on lesser offense of unnatural and lascivious acts, is meritless. See, State's response, at 7 (DE#420). However as pointed out in petitioner's motion for post- conviction relief, any reasonably competent, unbiased attorney would have known that unnatural and lascivious acts was the optimum lesser included, a second degree misdemeanor, rather than lewd and lascivious molestation which he clearly should have known was a life felony.

STATE COURT CORRECTNESS

Although petitioner's ineffective assistance of counsel claim was raised on appeal, the trial court incorrectly overlooked the fact that, the State argued in its answer brief that Petitioner failed to establish deficient performance on the part of counsel when he agreed with the trial court and the State that "lewd and lascivious molestation" was a permissive lesser included offense of sexual battery, as charged in the information, under the facts and evidence as presented at trial in this case.

Therefore, since the state argued that petitioner's ineffective assistance of counsel claim was not properly preserved for appellate review, the state court's decision in denying the claim during the post conviction proceedings is not entitled to any deference or correctness, as being contrary to clearly established law.

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Petitioner requests an evidentiary hearing since the state argued that petitioner's trial counsel agreed with the state that lewd or lascivious molestation is a lesser included offense of capital sexual battery, and petitioner argued that he was misadvised regarding same, and nothing of record provided by the state during post conviction proceedings refutes petitioner's argument that he was misadvised by defense counsel regarding lesser included offenses.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One: Yes.**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion in a state trial court? Yes.

(2) If your answer to Question (d) (1) is "yes," state:

Type of motion or petition: Motion for post – conviction.

Name and location of Court where the motion or petition was filed: The Fifteenth Judicial Circuit in and for Palm Beach, County Florida.

Docket or case number (if you know): 2008CF009777AXXX

(3) Did you receive a hearing on your motion or petition: No.

(4) Did you appeal from the denial of your motion or petition: Yes?

(5) If your answer to Question (d) (4) is "Yes," did you raise this issue in the appeal? Yes.

(6) If your answer to Question (d) (4) is "Yes," state:

Name and location of the court where the appeal was filed: Fourth District Court of Appeal.

Docket or case number (if you know):4D19- 1502

Date of court's decision. September 12th 2019,Rehearing denied October 10,2019.

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(7) If your answer to Question (d) (4) or Question (d) (5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, ect.) that you have used to exhaust your state remedies on Ground One: Ground one exhausted through filing of post conviction motion.

GROUND TWO: TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO FILE A MOTION FOR JUDGMENT OF ACQUITTAL OR ARREST OF JUDGMENT ON THE LEWD OR LASCIVIOUS MOLESTATION CONVICTION ON DOUBLE JEOPARDY GROUNDS [MARTINEZ CLAIM]

(a)[Supporting Facts.]

Petitioner was previously convicted after a jury trial on both counts. (SRI 27, SR8 790-1). During sentencing, the State requested that Count 2 be dismissed because it would constitute a double jeopardy violation. (SR9 850). The Court granted the State's motion and dismissed Count 2. (SR9- 858). On Count I, the Court sentenced petitioner to Life in Prison. (SR1 34; SR9 858-9).

The re-trial on remand began December 10, 2013 (Vol. 4 of 7, T. 1). After the jury was selected, and prior to opening statements, the court inquired whether petitioner was going to trial on one or two counts. The court indicated that Count 2 was dismissed and not revived by the mandate. (T3 354-65).While the State insisted that on remand the case was back to the original charges (Vol. 6 of 7, T. 355-356), the state ultimately asserted that because of the way the information was prepared, Count II was a lesser included offense of Count I, which is why petitioner could not be sentenced on both. (Vol. 6 of 7, T. 356-359).The petitioner was ultimately convicted of lewd or lascivious molestation, a presumed lesser included offense.

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TRIAL COUNSEL'S REPRESENTATION CONTRARY TO CLEARLY ESTABLISHED LAW

Trial counsel's representation was contrary to clearly established law, where he was ineffective in failing to move for a judgment of acquittal or an arrest of judgment on the petitioner's lewd or lascivious molestation conviction on double jeopardy grounds, especially where all parties knew that the lewd or lascivious molestation charge was dismissed at the previous trial, at the behest of the state because it would amount to a double jeopardy violation to convict and sentenced petitioner on both counts. (SR9 850).

Counsel's failure to move for a judgment of acquittal, or an arrest of judgment was prejudicial and especially egregious, where jeopardy had already attached to the lewd or lascivious charge at the previous trial and the court indicated that Count 2 was dismissed and not revived by the mandate. (T3 354-65).The lewd or lascivious molestation charge was the same charge that petitioner was prosecuted for at the previous trial, and double jeopardy protections prohibited petitioner's conviction for the Lewd or lascivious charge that was not a lesser included offense and which was dismissed at the previous trial.

Therefore, since the state requested dismissal of the lewd or lascivious molestation charge, jeopardy clearly attached and petitioner was constitutionally entitled to trial counsel to file a motion for judgment of acquittal or arrest of judgment.

(b) If you did not exhaust your state remedies on Ground Two, explain why: see cause and prejudice, below on page16.

(c)Direct Appeal of Ground Two: No.

(1) If you appealed from the judgment of conviction, did you raise this issue? No.

(d)Post-Conviction Proceedings:

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(1) Did you raise this issue through a post-conviction motion in a state trial court? NO.

(2) If your answer to Question (d) (1) is "yes," state:

(3) Did you receive a hearing on your motion or petition: No.

(4) Did you appeal from the denial of your motion or petition: NA.

(5) If your answer to Question (d) (4) is "Yes," did you raise this issue in the appeal? No.

(6) If your answer to Question (d) (4) is "Yes," state: N/A.

(7) If your answer to Question (d) (4) or Question (d) (5) is "No," explain why you did not raise this issue: See cause and prejudice on page 16.

(e) Other Remedies: Describe any other procedures that you have used to exhaust your state remedies on Ground Two: see cause and prejudice below.

GROUND THREE:

(c) **Direct Appeal of Ground Three:** N/A.

(1) If you appealed from the judgment of conviction, did you raise this issue? No.

(2) If you did not raise this issue in your direct appeal, explain why: N/A.

(d)Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion in a state trial court? N/A.

(2) If your answer to Question (d)(1) is "yes," state:

Type of motion was filed:

Name and location of the court where the motion was filed:

Docket or case number:

Date of the court's decision:

Result:

(3) Did you receive a hearing on your motion or petition: No.

(4) Did you appeal from the denial of your motion or petition: NO.

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(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? No.

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number:

Date of the court's decision:

Result:

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies**: Describe any other procedures that you have used to exhaust your state remedies on Ground Three/A

Ground four/A

(b) If you did not exhaust your state remedies on round Four, explain why: N/A.

(c)

(1) If you appealed from the judgment of conviction, did you raise this issue? N/A

(2) If you did not raise this issue in your direct appeal, explain why:

(d)**Post-Conviction Proceedings: No.**

(1) Did you raise this issue through a petition for habeas corpus in a state trial court? N/A

(2) If your answer to Question (d) (1) is "yes," state:

Type of motion or petition was filed:

Name and location of the court where the motion or petition was filed:

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Date of the court's decision:

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(3) Did you receive a hearing on your motion or petition: N/A

(4) Did you appeal from the denial of your motion or petition: N/A.

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number:

Date of the court's decision:

Result:

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies**: Describe any other procedures (such as habeas corpus, administrative remedies, ect.) that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a)Have all grounds for relief that you have raised in this petition been presented to the highest state curt having jurisdiction? Yes.

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A.

(b)Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition: No.

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If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of the court opinion or order, if available. N/A.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging:

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Jeff T.Gorman

(b) At arraignment and plea: Same as above

(c) At trial: same as above

(d) At sentencing: Same as above

(e) On appeal: Mara C. Herbert

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? No.

(a) If so, give name and location of court that imposed the other sentences you will serve in the future:N/A

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

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(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? [ ]Yes [x]No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C.§ 2244(d) does not bar your petition.

CAUSE AND PREJUDICE

First, petitioner contends that all claims is considered exhausted. Petitioner submits that he is excused from the procedural default under ***Martinez v. Ryan***, 132 S.Ct. 1309, 1320 (2012). There is a narrow non-constitutional equitable exception to excuse the procedural default of claims of ineffective assistance of trial counsel. "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Therefore, relief is available if (1) state procedures make it virtually impossible to actually raise ineffective assistance of trial counsel claims on direct appeal, and (2) the Petitioner's state collateral counsel was ineffective for failing to raise ineffective assistance of trial counsel claims in the state proceedings.

The claims raised within this Petition falls squarely within the *Martinez* exception. Petitioner prepared his initial Rule 3.850 motion *pro se*. Defense counsel was ineffective in failing to raise the claims at trial. Therefore, because the claims warrant relief he can demonstrate cause and prejudice arising from the lack of counsel during the initial Rule 3.850 proceeding or from the lack of counsel during the filing of post conviction; Petitioner submits that "the underlying ineffective-assistance-of-trial counsel claim is a substantial one", meaning it

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has at least "some merit," which satisfies the second part of the *Martinez* test. *Id.*, 132 S.Ct. at 1318 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed 2d 931 (2003))

In addition, petitioner respectfully seeks equitable tolling on the substantive claims herein, as the failure to correct his unjust incarceration would result in a fundamental miscarriage of justice; see Engle v. Isaac, 456 Us 107, 135, 102 S.c ct. 1558, 71 L. Ed. 2d 783 (1982) ("In appropriate cases, principles of comity must yield to imperative of correcting a fundamentally unjust incarceration").

In order that the writ of habeas corpus not be impaired, the court has emphasized its scope and flexibility. Therefore the requirements that it be administered with the initiative and flexibility are essential to ensure that a "miscarriage of justice" within its reach are surfaced and corrected; Adderly v. Wainwright, 58 F.R.D. 389 (Fla.. M.D. 1972), 28 USC 2243.

Based upon the above premises, Petitioner respectfully requests this Court expedite this matter and immediately release him from his unjust incarceration where he has been twice put in jeopardy for the same offense.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on.

Executed (signed) on Oct. 14, 2019 (date).

Darrell M. Woods DOC W39711

Signature of Petitioner

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