No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

TRAVIS LOUIS SHAW - PETITIONER

VS.

RICKY DIXON, SECRETARY,

FLORIDA DEPARTMENT OF CORRECTIONS,

RESPONDENT(S).

_____

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

_____

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-14326-F

TRAVIS LOUIS SHAW,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Travis Louis Shaw is a Florida prisoner serving a 25-year term of imprisonment for aggravated child abuse; shooting at, within, or into a building; possession of a firearm by a convicted felon; and knowingly giving false information to law enforcement during an investigation. In his instant, counseled 28 U.S.C. § 2254 habeas corpus petition, Shaw asserted that (1) his due-process rights were violated because the evidence was insufficient to prove beyond a reasonable doubt that he committed aggravated child abuse; (2) his trial counsel was ineffective by failing to move for a mistrial when the state elicited evidence that he was on probation at the time of the offenses; (3) he received ineffective assistance of counsel based on a conflict of interest; and (4) the state court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by assessing points

on his sentencing score sheet for severe victim injury. Shaw now moves for a certificate of appealability ("COA").

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied a constitutional claim on the merits, the movant must demonstrate 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 (2000) (quotation marks omitted).

Here, reasonable jurists would not debate the district court's denial of Ground One. First, given the victim's testimony at trial, any rational trier of fact could have found beyond a reasonable doubt that Shaw knowingly committed aggravated child abuse. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Second, Shaw cannot demonstrate that any alleged error in the jury instructions was so critical or important to the outcome of the trial that it rendered "the entire trial fundamentally unfair" because the trial court instructed the jury according to the standard jury instructions for aggravated child abuse in Florida. *See Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983).

Next, reasonable jurists would not debate the district court's determination that the state court's resolution of Ground Two was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or based on an unreasonable determination of the facts. Trial counsel immediately objected to and moved to strike the testimony about Shaw's probationary status, and the trial court sustained the objection and instructed the jury to disregard the testimony, which a jury is presumed to follow. *See Hammond v. Hall*, 586 F.3d 1289, 1334 (11th Cir. 2009) (explaining that jurors are presumed to follow the

trial court's instructions to disregard certain remarks, and attorneys reasonably can rely on that presumption). Further, Shaw has not shown a reasonable probability that, had counsel moved for a mistrial, it would have been granted. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Next, reasonable jurists would not debate the district court's determination that the state court's resolution of Ground Three was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or based on an unreasonable determination of the facts. After a lengthy discussion about the conflict between his attorneys about their theory of defense, Shaw stated that he desired to proceed with both attorneys. Thus, the state court reasonably could have concluded that Shaw waived the conflict between his attorneys. *See United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993). Further, given the victim and expert testimony at trial, Shaw cannot demonstrate that prejudice resulted from counsels' conflict. *See Strickland*, 466 U.S. at 687.

Last, reasonable jurists would not debate the district court's determination that the state court's resolution of Ground Four was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or based on an unreasonable determination of the facts. The trial court could have imposed the 25-year sentence based solely on the jury's verdict, so any error in assessing points for victim injury was constitutionally harmless because the trial court did not impose a sentence above the statutory maximum based on a fact not found by the jury. *See Apprendi*, 530 U.S. at 490.

Accordingly, Shaw's motion for a COA is DENIED

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TRAVIS LOUIS SHAW,

Petitioner,

v.

Case No.: 6:15-cv-2106-RBD-EJK

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

Respondents.
_____/

ORDER

This case is before the Court on Petitioner Travis Louis Shaw's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed by counsel pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition ("Response," Doc. 16) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 22).

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

I. PROCEDURAL HISTORY

The State charged Petitioner with aggravated child abuse with a firearm (Count One), shooting at, within, or into a building (Count Two), possession of a

firearm by a convicted felon (Count Three), and knowingly giving false information to law enforcement during an investigation (Count Four). (Doc. 17-1 at 58-60.) Petitioner proceeded to trial on Counts One and Two, and a jury found him guilty of both counts. (*Id.* at 75-77.) Petitioner subsequently entered a plea of guilty to Counts Three and Four. (*Id.* at 80-81, 165-66.) The trial court sentenced Petitioner to a twenty-five-year term of imprisonment for Count One, to a fifteen-year term of imprisonment for Count Two, to a three-year term of imprisonment for Count Three, and to a one-year term of imprisonment for Count Four with all sentences to run concurrently. (*Id.* at 155, 201-02.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (*Id.* at 858.)

Petitioner filed a motion to correct an illegal sentence under Rule 3.800(a) of the Florida Rules of Criminal Procedure. (*Id.* at 861-69.) The state court denied the motion. (*Id.* at 874-76.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 904.)

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (*Id.* at 983-93.) The state court denied one of Petitioner's claims and ordered an evidentiary hearing on one claim. (*Id.* at 1702-04.) The state court denied the remaining claim after the evidentiary hearing. (*Id.*

at 1765-66.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 1864.)

II. LEGAL STANDARDS

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

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

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

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

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption

may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

For claims adjudicated on the merits, "section 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

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

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the

state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de novo* only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief because his counsel provided ineffective assistance. 466 U.S. 668, 687-88 (1984). To prevail under *Strickland*, a petitioner must demonstrate "(1) that his trial 'counsel's performance was deficient' and (2) that it 'prejudiced [his] defense.'" *Whatley*, 927 F.3d at 1175

(quoting *Strickland*, 466 U.S. at 687).

Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

III. ANALYSIS

A. Ground One

Petitioner asserts his right to due process was violated because the evidence was insufficient to prove beyond a reasonable doubt that he committed aggravated child abuse. (Doc. 1 at 14-22.) According to Petitioner, the evidence did not establish that he had the requisite intent to commit the offense. (Doc. 22 at 2-3, 6-11.) Petitioner further appears to complain that the trial court erred by failing to give the jury a special instruction on specific intent from the standard burglary instruction. (*Id.* at 11-20.)

Petitioner raised both parts of this ground on direct appeal. The Fifth DCA affirmed Petitioner's convictions *per curiam*. (Doc. 17-1 at 858.)

Questions of state law generally do not raise issues of federal constitutional significance and, consequently, "'[a] state's interpretation of its own laws or rules

provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved.'" *Applewhite v. Sec'y, Dep't of Corr.*, 373 F. App'x 969, 971 (11th Cir. 2010) (quoting *Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983)). Claims that a jury instruction was incorrect under state law do not warrant federal habeas relief. *Id.* at 972 (citing *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991)). Federal courts review errors in state jury instructions "solely to determine whether the alleged errors were so critical or important to the outcome of the trial that they rendered 'the entire trial fundamentally unfair.'" *Id.* (quoting *Carrizales*, 699 F.2d at 1055).

The standard of review in a federal habeas corpus proceeding when the claim is one of sufficiency of the evidence was articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979). In considering a claim of insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *Johnson v. Alabama*, 256 F.3d 1156, 1172 (11th Cir. 2001). Federal courts may not reweigh the evidence. *Jackson*, 443 U.S. at 319. It is the duty of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id.*

In this case, Petitioner was charged with committing aggravated child abuse by "knowingly or willfully, . . . caus[ing] great bodily harm, permanent

disfigurement or permanent disability to [the victim], a child under 18 years of age, by intentionally committing an act or actively encouraging another person to commit an act which could reasonably be expected to result in physical or mental injury to [the victim]." (Doc. 17-1 at 58.) The standard criminal jury instruction for aggravated child abuse under Florida law provided in relevant part:

> [t]o prove the crime of Aggravated Child Abuse, the State must prove the following two elements beyond a reasonable doubt: . . . 1.e. (Defendant) knowingly or willfully committed child abuse upon (victim) and in so doing caused great bodily harm, permanent disability, or permanent disfigurement. [and] 2. (Victim) was under the age of 18 years.

In re Standard Jury Instructions In Crim. Cases, 911 So. 2d 766, 767–68 (Fla. 2005). The term "'[w]illfully' means knowingly, intentionally, and purposely." Likewise, "child abuse" is defined as "[the intentional infliction of physical or mental injury upon a child][,] [an intentional act that could reasonably be expected to result in physical or mental injury to a child][, or] [active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.]" *Id.* at 768.

The trial court instructed the jury in accordance with the standard jury instructions. (Doc. 17-1 at 82-83.) As to the two elements of aggravated child abuse, the jury was instructed with the exact language from the standard instruction. The trial court further defined the term "knowingly" per the standard instruction. With respect to the definition of "child abuse," the trial court instructed the jury

that it "means the intentional infliction of physical or mental injury upon a child or an intentional act that could reasonably be expected to result in physical or mental injury to a child." (*Id.* at 83.)

The aggravated child abuse instruction used in this case paralleled the standard jury instruction. In Florida, "'[t]he standard jury instructions are presumed correct and are preferred over special instructions.'" *Brown v. State*, 11 So. 3d 428, 432 (Fla. 2nd DCA 2009) (quoting *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001)). Petitioner has not demonstrated that the trial court's refusal to include a portion of the standard burglary jury instruction in the aggravated child abuse instruction rendered his trial fundamentally unfair.

Furthermore, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that Petitioner knowingly or willfully committed child abuse and in so doing caused great bodily harm, permanent disability, or permanent disfigurement to the victim. The victim testified that when she was sixteen years old, Petitioner took two bullets out of the cylinder of the firearm he was holding, he closed the cylinder that visibly still held bullets, he put the gun against her head, and he then moved away from her at which time he aimed the gun at her head multiple times, indicated that he had good aim and could shoot her if he wanted to do so, and subsequently pulled the trigger, shooting her in the face. (Doc. 17-1 at 431, 461-64.) According to the victim,

immediately after Petitioner shot her, he said something like "it's going to be an open casket for you[.]" (*Id.* at 465.) The bullet entered the victim's mouth, hit her front teeth, fractured her hard palate and upper sinuses, lodged in her neck, and could not be removed. (*Id.* at 536-37.) This evidence was sufficient for the jury to find that Petitioner did an intentional act that could reasonably be expected to result in physical injury to a child and caused great bodily harm to the victim. Accordingly, Ground One is denied under § 2254(d).[1]

B. Ground Two

Petitioner contends counsel rendered ineffective assistance by failing to move for a mistrial when the State elicited evidence that Petitioner was on probation at the time of the offenses. (Doc. 1 at 14, 22-23.) To support this ground, Petitioner complains that when the State asked Detective Iannuzzi "who was with

---

[1] To the extent Petitioner argues that the standard jury instruction was incorrect because of the malice instruction, this argument is unavailing. First, Petitioner was not charged with committing aggravated child abuse by malicious punishment. *See* Fla. Stat. § 827.03(2)(b)(2011); *see also* Doc 17-1 at 58, 82. Consequently, the definition of "maliciously" included in the jury instructions was not relevant to the aggravated child abuse charge. Although the trial court instructed the jury on the definition of "maliciously," any error in doing so was harmless because the jury made a specific finding that Petitioner possessed and discharged a firearm, and as a result, caused great bodily harm to the victim in relation to Count One. (Doc. 17-1 at 76.) Thus, the jury found Petitioner guilty of aggravated child abuse under Section 827.03(2)(c) of the Florida Statutes. Finally, the standard aggravated child abuse jury instruction given was in accordance with Florida law. *See Kennedy v. State*, 59 So. 3d 376, 381 (Fla. 4th DCA 2011) ("*Reed* involved an early version of the aggravated abuse statute which did not define 'maliciously.' After *Reed*, the legislature amended section 827.03 and defined the term 'maliciously' as it now appears in the current standard jury instruction.").

him" at the time of the search of Petitioner's residence, Detective Iannuzzi responded "his probation officer". (*Id.* at 23.)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief after an evidentiary hearing. (Doc. 17-1 at 1765-66.) The state court reasoned that counsel acted reasonably by objecting and moving to strike Detective Iannuzzi's statement because the mention of Petitioner's probationary status was brief and unelaborated. (*Id.*) The state court further determined that prejudice did not result from counsel's performance. (*Id.* at 1766.) The Fifth DCA affirmed the denial of the ground *per curiam*. (*Id.* at 1864.)

The state courts' denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. Counsel immediately objected to Detective Iannuzzi's statement and moved to strike it. (Doc. 17-1 at 579.) The trial court sustained the objection and instructed the jury to disregard the statement. (*Id.*) Courts "must presume that juries follow their instructions to disregard specific remarks." *Hammond v. Hall*, 586 F.3d 1289, 1334 (11th Cir. 2009). There were no further references to Petitioner's probationary status. Counsel, therefore, could have reasonably decided that moving for a mistrial was not warranted. Moreover, a reasonable probability does not exist that the outcome of the trial would have been different had counsel moved for a mistrial. Accordingly, Ground Two is denied under § 2254(d).

C. Ground Three

Petitioner asserts he received ineffective assistance based on a conflict of interest. (Doc. 1 at 14.) To support this ground, Petitioner notes that he retained two attorneys, Leslie Sweet ("Sweet") and Joseph Morrell ("Morrell"), to represent him at trial, they had separate theories of defense, Sweet's defense and lack of preparedness undermined the defense that Petitioner and Morell wanted to present, Sweet refused to present the theory of defense Morell and Petitioner agreed to present, and he was forced to accept the conflict between the attorneys. (*Id.* at 14, 23-26.)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief, reasoning:

> At trial, the defendant was represented by two privately retained attorneys, Mr. Joseph Morrell and Ms. Leslie Sweet. Mr. Morrell officially began representation on March 23, 2010. Ms. Sweet filed a notice of appearance as co-counsel on March 1, 2011; although, the record indicates that she was retained at least four weeks prior to trial. The record also indicates that Ms. Sweet was retained for the sole purpose of cross-examining the victim. The court infers that Mr. Morrell wanted to pursue a theory consistent with the defendant's latter statements to police that the victim, either intentionally or accidentally, shot herself. Ms. Sweet, on the other hand, advocated a conflicting theory that the defendant unintentionally shot the victim. The defendant was well aware of this conflict at trial and that continuing to insist on dual representation might harm his defense; nevertheless, the defendant indicated he did not want either attorney to withdraw. Further, the defendant insisted that Ms. Sweet cross-examine the victim knowing that this would undermine Mr. Morrell's defense. The court finds no merit in the defendant's claim that Ms. Sweet was ineffective for failing to prepare cross-examination for the other witnesses or to present Mr. Morrell's theory. Not only did the defendant hire Ms. Sweet to perform a limited role at trial, he could have chosen to

> proceed under Mr. Morrell's theory and have Mr. Morrell conduct all aspects of the trial. The fact that the defendant ultimately elected a path that led to his conviction is not a basis for postconviction relief. Summary denial is warranted.

(Doc. 17-1 at 1703-04) (footnotes omitted). The Fifth DCA affirmed *per curiam*. (*Id.* at 904.)

Petitioner has not established that the state courts' denial of this ground is contrary to, or an unreasonable application of, clearly established federal law. A defendant is deprived of his right to effective assistance of counsel where an actual conflict of interest adversely affects his or her interest. *United States v. Aletto*, 645 F. App'x 894, 899 (11th Cir. 2016) (citing *United States v. Rodriguez*, 982 F.2d 474, 477 (11th Cir. 1993)). A defendant, however, "may waive his right to conflict-free counsel and choose to proceed with conflicted counsel." *Id.*

> An effective waiver of a constitutional right must be voluntary, knowing, and intelligent, and it must be "established by clear, unequivocal, and unambiguous language." *Garcia*, 517 F.2d at 276–78 (internal quotation marks omitted). "The record should show, in some way, that the defendant was aware of the conflict of interest; realized the conflict could affect the defense; and knew of the right to obtain other counsel." *Rodriguez*, 982 F.2d at 477.

Id.

In this case, prior to trial, Morrell opposed the State's motion in limine to exclude *inter alia* evidence that the victim said she had been raped and told this to Petitioner and another person so they would give her a gun for protection. (Doc. 17-1 at 211-21.) Morrell noted that part of the defense was that the victim shot

herself while trying to commit suicide. (*Id.* at 214.) The trial court reserved ruling on that portion of the motion. (*Id.* at 221.)

At trial, Sweet objected when the victim testified that she had asked Petitioner for a gun for protection. (*Id.* at 441-42.) At that time, Morrell notified the trial judge that he (Morrell) and Sweet had a conflict concerning the defense and Petitioner needed to decide how he wanted to proceed with his representation. (*Id.* at 443-45.) Morrell told the judge that they had spoken to Petitioner about the conflict, and Sweet said that Petitioner wanted them both to continue their representation. (*Id.* at 445-46.) Morrell then explained the conflict between him and Sweet in Petitioner's presence. (*Id.* at 447-48.) The trial court addressed Petitioner regarding the conflict and provided Petitioner an opportunity to speak with Sweet and Morrell, but Petitioner declined to do so. (*Id.* at 450-51.) Petitioner advised the trial court that he wanted to proceed with both attorneys, and Sweet noted that she was only hired to handle the jury selection and the victim's cross-examination. (*Id.* at 451-52.) Morrell noted that he did not think it was in Petitioner's best interest to have two different defense strategies. (*Id.* at 452.) Sweet and Morrell subsequently spoke to Petitioner after which Morrell advised the court that for Petitioner's benefit, he agreed with Sweet's decision regarding the motion in limine. (*Id.* at 456-57.)

After the State presented most of its witnesses, Morrell moved for a mistrial

at Petitioner's behest because Morrell and Sweet had two different theories of defense. (*Id.* at 675.) A lengthy conversation occurred during which the parties discussed and detailed the conflict after which the trial judge again questioned Petitioner about how he wanted to proceed. (*Id.* at 677-84.) Petitioner indicated he wanted to proceed with both attorneys, and after speaking with counsel, he wanted Sweet to do the closing argument. (*Id.* at 684-89.) From this record, the state court reasonably could have concluded that Petitioner understood the conflict between counsel and that it could affect his defense yet knowingly and voluntarily chose to proceed with both attorneys despite the conflict.

Furthermore, Petitioner has not demonstrated that prejudice resulted from counsels' conflict. *See Schwab v. Crosby*, 451 F.3d 1308, 1321-27 (11th Cir. 2006) (noting that the presumption of prejudice standard articulated in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) has not been applied to cases outside of concurrent multiple representation situations and applying the *Strickland* prejudice standard to conflict-of-interest claim). The jury heard that Petitioner told police in his second statement that the victim shot herself. The victim, however, testified that Petitioner shot her after pointing the gun at her various times. A firearms expert testified that the handgun used in the offense required more than ten pounds of force to pull the trigger and that when she (the expert) first began handling firearms, she had to use two fingers to pull the trigger on guns requiring ten or more pounds of force

to pull the trigger. (*Id.* at 662-67.) Given the evidence presented, a reasonable probability does not exist that the outcome of the trial would have been different had Petitioner proceeded solely on Morrell's defense theory that the victim shot herself. Accordingly, Ground Three is denied under § 2254(d).

D. Ground Four

Petitioner asserts that the state court violated *Apprendi*[2] by assessing forty points on his sentencing score sheet for severe victim injury. (Doc. 1 at 14, 26-29.) According to Petitioner, victim injury was not charged as an element of aggravated child abuse, the jury was not instructed on it, and there was no special verdict from the jury regarding it. (*Id.*)

Petitioner raised this ground in his Rule 3.800(a) motion. The state court concluded that any error was harmless because the trial court could have imposed the twenty-five-year sentence without considering the victim injury points, based on the jury's finding that Petitioner possessed and discharged a firearm, which caused great bodily harm to the victim. (Doc. 17-1 at 875-76.) The Fifth DCA affirmed *per curiam*. (*Id.* at 904.)

The state courts' denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. The Supreme Court of the United States has held that "the Federal Constitution's jury trial guarantee proscribes a

---

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." *Cunningham v. California*, 549 U.S. 270, 274 75 (2007) (citing *Apprendi*, 530 U.S. 466). "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

Under Florida law, a first degree felony is reclassified to a life felony if "during the commission of such felony the defendant carries, displays, uses, threatens to use, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery. . . ." Fla. Stat. § 775.087(1)(a). Further, a person convicted of aggravated child abuse who discharged a firearm during the offense resulting in death or great bodily harm "shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison." Fla. Stat. § 775.087(2)(a)3.

The jury found that Petitioner committed aggravated child abuse and actually possessed and discharged "a firearm, and as a result did cause great bodily harm to [the victim][.]" (Doc. 17- 1 at 75-76.) Therefore, the trial court could have imposed the twenty-five-year sentence based solely on the jury's verdict.

Accordingly, Ground Four is denied under § 2254(d).

Any allegations not specifically addressed lack merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. But a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not shown that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural

rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED** and **ADJUDGED:**

1. The Petition (Doc. 1) is **DENIED**, and this case is **DISMISSED with prejudice**.
2. Petitioner is **DENIED** a Certificate of Appealability.
3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on November 12, 2021.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:
Counsel of Record