A P P E N D I X

APPENDIX

A-1

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-12002

Non-Argument Calendar

MEDGAR SAMUEL,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:17-cv-80722-KAM

Before WILSON, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Medgar Samuel, a Florida prisoner proceeding on appeal with counsel, appeals the district court's denial of his *pro se* petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. We granted a certificate of appealability ("COA") as to whether the district court erred in finding that any error in the state trial court's manslaughter instruction, which included an intent-to-kill element, was harmless. The government raises the issue of whether Samuel properly exhausted his claim in state court. Samuel argues that the issue of exhaustion was not properly on appeal because it was not included in the certificate of appealability and that, even if it was, the state waived the issue.

When examining a district court's denial of a § 2254 habeas petition, we review questions of law *de novo* and findings of fact for clear error. *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1259 (11th Cir. 2005). "[A]ppellate review is limited to the issues specified in the COA." *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998). However, we will also review procedural issues that must be resolved before we can reach the merits of the underlying claim, even if they were not addressed by the district court. *McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001). We "may affirm on any ground supported by the record." *Trotter v. Sec'y, Dep't of Corr.*, 535 F.3d 1286, 1291 (11th Cir. 2008)

(quoting *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1356 (11th Cir. 2007)).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal courts are precluded from granting habeas relief on claims that were previously adjudicated on the merits in state court, unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). AEDPA limits federal review of state prisoners' applications for habeas relief, imposing highly deferential standards for evaluating state court rulings. *Renico v. Lett*, 559 U.S. 766, 773 (2010); *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Before bringing a habeas action in federal court, the petitioner must exhaust all state court remedies that are available for challenging his conviction, either on direct appeal or in a state post-conviction motion. 28 U.S.C. § 2254(b), (c). The exhaustion requirement is not jurisdictional and may be waived by the state. 28 U.S.C. § 2254(b)(2); *Thompson v. Wainwright*, 714 F.2d 1495, 1502 (11th Cir. 1983). However, "[a] State shall not be deemed to have waived the exhaustion requirement . . . unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3); *McNair v. Campbell,* 416 F.3d 1291, 1306 (11th Cir. 2005).

"Exhaustion of state remedies requires that the state prisoner fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (quotation marks omitted, alteration in original). "It is not sufficient merely . . . that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made." *McNair*, 416 F.3d at 1302 (quoting *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1343 (11th Cir. 2004)). Further, "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). Thus, the state petition must make the state court aware that the claims asserted do, in fact, raise federal constitutional issues. *Snowden*, 135 F.3d at 735.

The exhaustion requirement is satisfied when the petitioner properly raised the issue in state court, even if the court did not rule on it. *Smith v. Digmon*, 434 U.S. 332, 333 (1978). In that case, no deference is owed under § 2254(d), and the claim is instead reviewed *de novo*. *Brewster v. Hetzel*, 913 F.3d 1042, 1051 (11th Cir. 2019). However, "when a petitioner has failed to exhaust his claim by failing to fairly present it to the state courts and the state court remedy is no longer available, the failure also constitutes a procedural bar." *McNair*, 416 F.3d at 1305. As with the exhaustion requirement, a procedural bar resulting from a petitioner's failure to

properly exhaust his state court remedies can only be waived expressly by the state. *Id.* at 1305-06.

However, where the petitioner failed to raise a claim in state court but overcomes that procedural default, we review the claim "without any § 2254(d)(1) deference, because there is no state court decision on the merits of [the] claim." *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1259 (11th Cir. 2002). Additionally, "[a] federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default and actual prejudice resulting from the alleged constitutional violation." *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010).

Where there is a trial error, habeas petitioners are not entitled to habeas relief based on the error unless they can establish that it resulted in "actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). "Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (quotation marks omitted). "There must be more than a reasonable possibility that the error was harmful," which reflects the view that states should not be "put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error." *Id.* at 2198 (quotation marks omitted, alterations in original). Questions of state law, moreover, rarely raise issues of federal constitutional significance. *Carrizales v. Wainwright*, 699 F.2d 1053, 1054–55 (11th Cir. 1983). An erroneous jury

instruction "raises an issue of constitutional dimension only if it renders the entire trial fundamentally unfair." *Id.* (quoting *Smith v. Smith*, 454 F.2d 572, 579 (5th Cir. 1971)).

In April 2010, the Florida Supreme Court held that intent to kill is not an element of manslaughter by act. *State v. Montgomery*, 39 So. 3d 252, 254 (Fla. 2010). It concluded that giving the manslaughter-by-act instruction (erroneously stating that an intent to kill was required) constituted fundamental error where the defendant was indicted and tried for first-degree murder and convicted of second-degree murder after the jury was erroneously instructed on the lesser included offense of manslaughter. *Id.* at 257-59. The court determined that this error was fundamental because manslaughter was a category one lesser included offense that was removed two steps from first-degree murder, and the jury had to be provided an opportunity to exercise its pardon power to convict the defendant of the next lower crime. *Id.*

In February 2013, the Florida Supreme Court held that giving the erroneous manslaughter-by-act instruction in a murder trial was a fundamental error where: (1) the jury also received instructions on manslaughter by culpable negligence; (2) the jury convicted the defendant of second-degree murder; (3) the evidence supported a guilty verdict for manslaughter by act; and (4) the evidence did not reasonably support a guilty verdict for manslaughter by culpable negligence. *Haygood v. State*, 109 So. 3d 735, 737, 741 (Fla. 2013). It concluded that a fundamental error occurred in Haygood's trial because the evidence did not support a finding of

culpable negligence, as Haygood admitted to striking, choking, and tripping the victim. *Id.* at 741-42.

In Florida, Rule 3.850 motions must be brought within two years of the finalized judgment or sentence. Fla. R. Crim. P. 3.850(b). Rule 3.850 motions may be brought after the two-year period if the right asserted was not established within the period, it has been held to apply retroactively, and the claim is brought within two years of the date of the decision announcing retroactivity. *Id.* at 3.850(b)(2).

As an initial matter, while the issue of exhaustion was not specifically articulated in the COA, we may review any procedural issues that must be resolved before reaching the merits of the claim, which would include exhaustion. The state did not waive any argument that the claim should be denied based on lack of exhaustion because it raised an argument below that Samuel failed to exhaust the claim.

Here, Samuel failed to properly exhaust his claim by failing to fairly present his federal claim to the state court. On his direct appeal, he argued only that the court erred in not rereading the instruction when the jury asked for clarification. When addressing the erroneous jury instruction in his first Rule 3.850 motion, he did not present the court with the particular legal basis of his current federal claim because he failed to raise the issue of constitutional error based on *Montgomery* and *Haygood*, instead raising the claim as an issue of ineffective assistance of counsel for accepting an erroneous jury instruction. In his second Rule 3.850 motion,

while he referred to "fundamental error," he pointed only to state law cases in support and did not refer to the constitution or any federal rights. While he cited to *Montgomery* and *Haygood*, neither of those cases talk about constitutional error. Moreover, he conceded in the district court that he did not properly exhaust this claim in any state proceeding. Further, Samuel would be barred from presenting the claims in state court because the remedy is no longer available in a Rule 3.850 motion, as more than two years passed since *Montgomery* and *Haygood* were decided, and his claim is therefore procedurally barred. Therefore, Samuel failed to exhaust this claim. Accordingly, we affirm.[1]

AFFIRMED.

[1] In light of our disposition, we need not address the several alternative grounds to affirm suggested by Appellee's brief.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 04, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-12002-AA
Case Style: Medgar Samuel v. Florida Department of Corr.
District Court Docket No: 9:17-cv-80722-KAM

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-80722-CIV-MARRA/REID

MEDGAR SAMUEL,

Petitioner,

vs.

JULIE JONES,

Respondent.
_____/

FINAL JUDGMENT DENYING HABEAS CORPUS RELIEF

Upon a *de novo* independent review of the file, and over Petitioner's Objections [DE 58], and for the reasons stated in the Report of Magistrate Judge [DE 55], it is hereby

ORDERED AND ADJUDGED as follows:

1. The Magistrate Judge's Report [DE 55] is hereby AFFIRMED in its entirety.

2. Petitioner's *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED.

3. Petitioner's request for an evidentiary hearing is denied.

4. In accordance with Rule 11(a) of the Rules Governing a Petition for a Writ of Habeas Corpus, the Court denies a certificate of appealability. Pursuant to Rule 22 of the Federal Rules of Appellate Procedure, the Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.

5. All pending motions not otherwise ruled upon are DENIED AS MOOT.

6. This case is CLOSED.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, this 30th day of March, 2020.

KENNETH A. MARRA
United States District Judge

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-80722-CV-MARRA
MAGISTRATE JUDGE REID

MEDGAR SAMUEL,

Petitioner,

v.

MARK INCH,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

This Cause is before the Court upon Petitioner's *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, which challenges the constitutionality of his conviction and sentence for manslaughter with a weapon by culpable negligence, following a jury trial in case no. 2007-CF-005216 in the state circuit court in and for Palm Beach County, Florida. [ECF 1]. For the reasons detailed in this Report, the Petition should be denied.

This Cause has been referred to the Undersigned for consideration and report, pursuant to S.D. Fla. Admin. Order 2019-02 and all applicable Rules Governing Habeas Corpus Petitions in the United States District Courts. [ECF 46].

II. Claims

Construing the arguments liberally, as afforded to *pro se* litigants pursuant to *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), Petitioner raises the following claims:

> 1. Trial counsel was ineffective for failing to file a motion to suppress Petitioner's admissions;
>
> 2. Trial counsel was ineffective for not preparing an adequate motion for judgment of acquittal (a) as it related to the fatal wound and (b) as it relates to Florida's "Stand Your Ground" law;
>
> 3a. The trial court erred by presenting the jury with erroneous instructions, specifically an instruction for manslaughter by culpable negligence;
>
> 3b. Trial counsel was ineffective for failing to object or correct erroneous jury instructions;
>
> 3c. Trial counsel was ineffective for failing to move for a mistrial in light of the erroneous jury instructions;
>
> 4. Trial counsel was ineffective for failing file a motion to suppress "fabricated statements";
>
> 5. Trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments;
>
> 6. Trial counsel was ineffective for failing to redact or otherwise object to the admission of hearsay;
>
> 7. Trial counsel was ineffective for failing to stop the prosecution from shifting the burden of proof as to Petitioner's claim of justifiable or excusable use of force;
>
> 8. Trial counsel was ineffective for failing to object to erroneous jury instructions;

> 9. Trial counsel was ineffective for failing to file a motion to suppress or object to inadmissible evidence;
>
> 10. Trial counsel was ineffective for failing to investigate potential alibi witnesses;
>
> 11. Trial counsel was ineffective for misadvising him about the risk of testifying at trial;
>
> 12. Trial counsel was ineffective for failing to object to the charging document because the grand jury testimony was fraudulent;
>
> 13. The trial court erred by not giving the jury a complete definition of manslaughter after the jury requested clarification;
>
> 14. The trial court erred by denying trial counsel's motion for a 24-hour continuance after the prosecution amended the charging document;
>
> 15. The trial court erred when it instructed the jury as to the *mens rea* requirement for manslaughter;
>
> 16. The charging document lacked an essential element and, therefore, the trial court lacked jurisdiction to convict and sentence him; and
>
> 17. The charging document lacked an essential element necessary to enhance Petitioner's sentence.

[ECF 1; 1-1].

III. Factual and Procedural Background

A. Pertinent Factual Background

At trial, Ms. Bonnie White testified that to support herself she "work[ed] on the street" "dat[ing] people." [ECF 33-4, p. 10]. She appeared in a jail uniform, as she was arrested for failure to appear for an "open container charge" and for

possession of crack cocaine. [*Id.* pp. 9-10]. Ms. White testified that she was outside of a gas station and saw Mr. Jeffrey Campbell, the victim, ride up on his bicycle. [*Id.*]. Ms. White and Mr. Campbell, who were friends and previously lived together, began arguing. The two argued over the debt Ms. White owed, as Mr. Campbell had bonded her out of jail. [*Id.* p. 11]. They also argued about whether Ms. White would returne to live with Mr. Campbell. [*Id.*].

A man in a white SUV or truck pulled up while they argued. [*Id.* p. 12, 14]. Mr. Campbell reportedly said, "we're having a private conversation, do you mind?" [*Id.*]. According to Ms. White, the man responded, "yes, actually I do," opened the vehicle door, and came around to them. [*Id.* pp. 12-13]. The events happened quickly. [*Id.* pp. 13-14]. The man's vehicle was "a couple of feet" from Ms. White. [*Id.* p. 13]. After the man approached them, Mr. Campbell and the man were so close to one another Ms. White characterized it as "face-to-face" or "fighting close." [*Id.*].

Mr. Campbell pulled out a stun gun or taser. [*Id.* p. 16]. At that point, Ms. White ran away and hid behind bushes. [*Id.* p. 17]. She remained there until she heard an ambulance. [*Id.*].

Mr. Campbell died. [*Id.* pp. 66-72, 85]. A medical examiner testified that an injury to Mr. Campbell's neck was "more or less directly over [his] voice box, over his larynx." [*Id.* p. 66]. According to this testimony, the neck or voice box wound was so deep that it extended through muscle and punctured or cut "one of the main

arteries that supplies blood to the brain." [*Id*. pp. 66-67]. This wound also showed a partial cut to a companion vessel called "the internal jugular vein[,]" which permits much of the blood that passes through the brain to return to the heart. [*Id.*]. When asked what level of force would be needed to inflict this kind of injury, the medical examiner testified that the level of force would have been "substantial" and that this wound was sufficient to cause an individual to bleed to death. [*Id*. pp. 67-72, 85]. He also testified that the "mini" stun gun used by the victim was touch-based and, therefore, required contact to function. [*Id*. pp. 76-77]. This weapon differed from the kinds of tasers used by law enforcement, which activate after two barbs discharge from a distance. [*Id.*].

Detective Matias reviewed the gas station's surveillance video. [ECF 33-3, 132-34]; [ECF 33-4, pp. 140-41]. The surveillance video did not show where Mr. Campbell's body fell. [ECF 33-4, pp. 145-46]. Detective Matias testified that the video shows a Suzuki Grand Vataro hard shell cover and a white Suzuki Grand Vataro vehicle. [*Id.* p. 153]. Detective Matias further testified that a black male can be seen "right upon the victim" at one point and then, 11 seconds later, the black male leaves the scene. [*Id.* pp. 154-55]. According to Detective Matias, he was told Ms. White was one of two persons in the surveillance video. [*Id*. pp. 144-45, 149-50].

On the afternoon following the homicide, Detective Matias found Ms. White in the same clothing that she wore on the surveillance video. [*Id.* p. 156]. He reported that she was shaking and crying. [*Id.*]. Ms. White went to the police station. [*Id.* pp. 156-57]. She spoke with police, viewed a photo lineup, and signed a photograph identifying the perpetrator at the gas station. [*Id*. pp. 19-21].

Ms. White's physical disabilities, mental disabilities, and mental health issues were a feature at trial. [*Id*. pp. 23-25, 27]. Ms. White described a head injury and testified about her memory issues. [*Id.* pp. 23-27]. According to Ms. White's testimony, she had been awake for 6 days using crack cocaine on the day she spoke with police. [*Id.* pp. 26-27].

Detective Matias testified that Ms. White identified Petitioner in the photo line-up. [*Id*. pp. 182-83]. Detective Matias subsequently interviewed Petitioner. A recording of the interview was played for the jury. During the interview, Detective Matias told Petitioner he was under arrest and read Petitioner his *Miranda* rights. [ECF 33-5, 15-20]. During the *Miranda* warning, Petitioner asked, "Is this being recorded?" [*Id*. p. 18]. Detective Matias responded "no" and continued with the *Miranda* warnings. [*Id.*].

Petitioner was told that he was not charged with murder just that there were warrants to search pursuant to their investigation of a murder. [*Id.* pp. 33-35]. Initially, Petitioner stated that he did not hear of a murder taking place off of 53rd

Street and Broadway on Sunday. [*Id.* pp. 35-37]. Petitioner attempted to provide details as to where he was on that night. He claimed he picked up Ms. Keisha Samuel from the Olive Garden, drove to a liquor store, and went home with her. [*Id.* pp. 37-47]. Petitioner first said he was not driving the Suzuki that night and later retracted this statement. [*Id.* pp. 44-45]. Petitioner stated he did not get into a fight, did not kill anyone, and was not at the crime scene. [*Id.* pp. 49-50].

After Petitioner was told that he and his vehicle appeared in a surveillance video, he stopped the interview and asked to speak to an attorney. Petitioner spoke to an attorney for approximately 30 minutes, according to Detective Matias. [ECF 33-6, p. 8]. With the assistance of counsel, another interview was conducted, which was played for the jury. [*Id.* pp. 8-11].

Petitioner stated that, pursuant to his attorney's advice, he would speak with the officers again. [*Id.* p. 12]. Detective Matias again read Petitioner his *Miranda* rights. [*Id*. pp. 13-15]. Petitioner then stated that on the day of the incident he was driving along 54th Street and Broadway when he saw "a white prostitute on the right-hand side" of the road. [*Id.* p. 19]. He pulled over to hire her for oral sex. [*Id.*]. Petitioner exited his vehicle to speak with the woman. [*Id.* pp. 23-24].

According to Petitioner, while talking to this woman, a man came and told him to "mind [his business]." [*Id.* pp. 19, 24]. Petitioner stated he did not notice when this man first arrived. [*Id.* pp. 20-24]. The man allegedly used a taser on

Petitioner. [*Id.* p. 20]. Petitioner explained that because he believed the man would use the taser again "the knife got into [his] hand[.]" [*Id.*]. According to Petitioner, he usually kept a knife in his right pocket. [*Id.* p. 28]. Petitioner admitted that he swung one time, stabbed the man in the shoulder area, and drove away. [*Id.*].

Petitioner initially averred he did not know the knife's current location. [*Id.* p. 29]. Petitioner confessed that he used Clorox to bleach his yellow polo, which he wore during the incident. [*Id.* pp. 29-30]. According to Petitioner, he needed to do this because the shirt had previous bleach spots on it. [*Id.*]. Petitioner stated he was under the influence during the incident. [*Id.* pp. 31-34].

Detective Matias told Petitioner that the victim was found with his taser in its nylon case on his belt. [*Id.* p. 36]. Petitioner insisted that the taser was used on him. [*Id.* p. 37]. Detective Matias also told Petitioner of Ms. White's version of events, specifically that an unknown male exited his vehicle after being told to leave them alone. [*Id.* pp. 44-45]. Petitioner responded that he probably could not hear Mr. Campbell at that time. [*Id.* p. 46]. Additionally, Petitioner admitted to destroying his shoes by using acid and by cutting off the tops of the shoes. [*Id.* p. 59]. Contrary to his earlier statements, Petitioner confessed that the knife he used was thrown over a bridge in Singer Island. [*Id.* p. 64].

The defense called two witnesses. The first defense witness was Mr. Ramon Martinez, head of security at the hotel where Petitioner resided. [*Id.* pp. 130-31]. Mr.

Martinez testified that he saw Petitioner the night of the incident with a low-cut hairstyle. [*Id.* p. 133]. He further confirmed that Petitioner did not have dreadlocks on the night of the incident. [*Id.* pp. 133-34].

The second was Mr. Jonathan Jones, who testified that he saw a white male staggering like he was drunk collapse before him. [*Id*. p. 146]. About 10 or 15 yards away, as Mr. Jones testified, he saw a black male with dreadlocks running away. [*Id.* pp. 146-47]. According to Mr. Jones, he saw the two men standing calmly before the white male collapsed. [*Id.* p. 149]. Mr. Jones identified Mr. Campbell as the white male that he saw that evening. [*Id.* pp. 147, 150-51].

On cross-examination, Mr. Jones had no recollection of seeing a white-and-grey-colored SUV leave the gas station. [*Id.* pp. 154-55]. Mr. Jones also testified that the white woman, who was with the white male, was across the street. [*Id.*]. When asked how he knew that the white woman was with the white male, Mr. Jones testified that an investigator for the public defender's office told him this information before his deposition. [*Id.* pp. 155-56].

B. Procedural Background

The initial indictment charged Petitioner with first-degree murder with a weapon. [ECF 32-1, p. 2]. A "Re-File Information and Continuation of Grand Jury Indictment" was filed, which had the effect of dismissing the initial charges against Petitioner and re-charging him with second-degree murder without a firearm. [ECF

32-1, p. 4]; [ECF 32-4, pp. 73-75]. After proceeding to trial, the jury returned a verdict of guilty on manslaughter with a weapon. [ECF 32-1, p. 7]. On November 1, 2007, Petitioner was sentenced to 25 years of imprisonment. [*Id*. p. 9].

The conviction and sentence were affirmed on appeal. *See Samuel v. State*, 19 So. 3d 326 (Fla. 4th DCA 2009). Rehearing was denied on November 6, 2009. [ECF 32-1, p. 48]. A petition for writ of certiorari was not filed.

To promote efficiency, and due to Petitioner's numerous filings in state court, Petitioner's postconviction motions shall be addressed within the Timeliness and Discussion sections of this Report.

V. Timeliness

Stated broadly, petitioners have a one-year period from the date a judgment becomes "final" to file a federal habeas petition challenging a state court conviction or sentence. 28 U.S.C. § 2244(d). The date on which a judgment becomes "final" is the day that (1) direct review concludes or (2) the time for seeking such review expires. *See Gonzalez v. Thaler*, 565 U.S. 134, 149-50 (2012) (citing 28 U.S.C. § 2244(d)(1)(A)).

The conclusion of direct review applies to petitioners who pursued direct review to the Supreme Court of the United States, meaning finality attaches when the Supreme Court denies a petition for writ of certiorari or otherwise affirmed a conviction on the merits. *See id.* at 150. For all other petitioners, the judgment

becomes final at the expiration of the time for seeking direct review either in the Supreme Court of the United States or in state court—whichever is latest. *See id.* at 150-51. As Petitioner did not file a petition for writ of certiorari to the Supreme Court of the United States, his date of finality falls into the second category. *See Phillips v. Warden*, 908 F.3d 667, 672 (11th Cir. 2018).

In this action, a previously referred Magistrate Judge issued a Report stating the Petition was time-barred. [ECF 10]. After objections, the Court re-referred the case to consider the matters addressed in Petitioner's objections to the Report. [ECF 21]. An Order to Show Cause was entered. [ECF 22]. In its Response, Respondent contested the timeliness of the Petition. [ECF 31, p. 14-17]. After careful review, and as will be explained, the Petition is timely.

After the Fourth District Court of Appeal affirmed Petitioner's conviction and sentence on direct appeal, his motion for rehearing was denied on November 6, 2009. [ECF 32-1, pp. 48]. Petitioner did not file a petition for writ of certiorari within 90 days from the date rehearing was denied. Because he did not do so, the judgment and sentence were **final on February 4, 2010**. *See Gonzalez*, 565 U.S. at 154; *see also Chavers v. Sec'y, Dep't of Corr.*, 468 F.3d 1273 (11th Cir. 2006) (explaining that the 90 days starts from the date of the appellate court's judgment on direct appeal, not the issuance of the mandate); *see also* Sup. Ct. R. 13 (setting forth the 90-day period of time after entry of judgment).

Under 28 U.S.C. § 2244(d)(2), the one-year time limitation is tolled during the pendency of a properly filed application for State postconviction review or other collateral review. *Rogers v. Sec'y, Dep't of Corr.*, 855 F.3d 1274, 1275 (11th Cir. 2017).

In this case, however, Petitioner had a postconviction motion pending in state court before the date of finality. Specifically, Petitioner filed a motion to correct illegal sentence pursuant to Fla. R. Crim. P. 3.800(a) [ECF 32-1, p. 125], which tolls the federal time limitations. *See Rogers*, 855 F.3d at 1278 (discussing Fla R. Crim. P. 3.800(c)); *see also Ford v. Moore*, 296 F.3d 1035, 1040 (11th Cir. 2002) (discussing Fla. R. Crim. P. 3.800(a)).

Ultimately, on June 29, 2012, the Fourth District Court of Appeal issued its mandate, affirming the denial of Petitioner's motion pursuant to Fla. R. Crim. P. 3.800. [ECF 32-1, p. 219]. Normally, the issuance of the mandate would cause time to run untolled. *See, e.g., Nyland v. Moore, Sec'y, Dep't. of Corr.*, 216 F. 3d 1264, 1266-67 (11th Cir. 2000) (holding that the affirmance of a state trial court's denial of a motion for postconviction relief is pending until the mandate issues, meaning the federal time limitations does not run until the mandate's issuance). However, Petitioner had another filing pending in state court at that time.

As of December 1, 2011, Petitioner filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. [ECF 32-1, pp. 221-250]. The State conditionally

conceded the motion's timeliness so long as all claims were denied on the merits without a hearing, as there were questions regarding whether an earlier filed version had been lost. [ECF 32-2, pp. 5-6]. After Petitioner's claims were denied on the merits in the state trial court and on appeal, the mandate issued on September 18, 2015. As there were no other filings pending on that date, **time ran untolled, for the first time, upon the issuance of that September 18, 2015 mandate**. *See, e.g.*, *Nyland*, 216 F. 3d at 1266-67.

On February 4, 2016, Petitioner filed a state habeas petition in the Third Judicial Circuit in and for Suwannee County, Florida. [ECF 32-3, p. 269]. Under Florida law, claims that are cognizable under Fla. R. Crim. P. 3.850 should be filed as a Rule 3.850 motion in the court of the county of conviction, not of confinement. *See Rafael v. Crews*, 154 So. 3d 505, 507 (Fla. 4th DCA 2015) (citing *Leichtman v. Singletary*, 674 So. 2d 889 (Fla. 4th DCA 1996)); *see also Collins v. State*, 859 So. 2d 1244, 1246 (Fla. 5th DCA 2003).

Respondent argues that the state habeas petition "should have been dismissed as unauthorized" under state law and, therefore, it "was not 'properly filed' within the meaning of the statutory tolling provisions of AEDPA[.]" [ECF 31, p. 11]. Under AEDPA, however, Petitioner's state habeas petition, filed in the Third Judicial Circuit Court, was "properly filed" even if the claims had a more appropriate procedural vehicle. *See Thompson v. Sec'y, Dep't of Corr.*, 595 F.3d 1233, 1236

(11th Cir. 2010) (deeming a state habeas petition was "properly filed," as defined by AEDPA, in the district of confinement even though the underlying claims should have been raised in a Rule 3.850 motion before the county of conviction). Thus, as of **February 4, 2016, the time limitations period was tolled again**.

On June 29, 2016, the Third Judicial Circuit Court denied relief. [ECF 32-3, pp. 285-86]. With regard to a motion for rehearing or clarification, it is well-settled in Florida that a party may file such motions within fifteen days of an order or within such other time set by the court. *See* Fla. R. App. P. 9.330(a); *see also* Fla. R. Civ. P. 1.530(b). Thus, a timely motion for rehearing should have been filed on or before July 14, 2016.

Petitioner, however, filed his motion for rehearing on July 15, 2016. "Under the prison mailbox rule, a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *United States v. Glover*, 686 F.3d 1203, 1205 (11th Cir. 2012) (citations and internal quotations omitted). "Absent evidence to the contrary, [courts] assume that a prisoner delivered a filing to prison authorities on the date that he signed it." *Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014) (quoting *Glover*, 686 F.3d at 1205); *see also Houston v. Lack*, 487 U.S. 266, 270-71 (1988) (extending "prison mailbox rule" to state prisoners filing in federal court). As evidenced by the institutional stamp on his motion for rehearing [ECF 11, p. 103], and the motion for rehearing's certificate of service [*Id.*

p. 107], there can be no dispute that it was filed on July 15, 2016. Consequently, his motion for rehearing was one day late.

Although an untimely filing normally does not continue the tolling effect, *see Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005), there are two caveats that continue the tolling effect of Petitioner's state habeas petition in the Thirteenth Judicial Circuit.

First, although the motion for rehearing was untimely under state law, this Court must give that motion for rehearing a tolling effect while it was pending. For purposes of AEDPA, an untimely motion for rehearing made in Florida's courts is considered tolled, regardless of whether the state court treated it as timely, because it is not a procedural rule that is "firmly established and regularly followed." *See Van Zant v. Fla. Parole Comm'n*, 308 F. App'x 332, 335 (11th Cir. 2009). Therefore, because the motion for rehearing was denied on July 21, 2016 [ECF 32-3, p. 288], the federal time limitations remained tolled at least until July 21, 2016.

This is where the second caveat presents itself and further extends the tolling period. Petitioner filed his notice of appeal on August 2, 2016. [ECF 32-4, p. 17]; [ECF 11, p. 114]. Under Florida law, a notice of appeal must be filed within thirty days from rendition of the adverse order. *See* Fla. R. App. P. 9.140(b)(3). Thus, if a timely motion for rehearing is filed and then denied, litigants in the State of Florida have thirty days from the denial of rehearing, not from the underlying order to be

reviewed. *See, e.g.*, *Luttrell v. Fla. Parole Comm'n*, 578 So. 2d 11, 12 (Fla. 1st DCA 1991). In the event that a motion for rehearing was untimely filed, Florida law dictates that the "untimely motion for rehearing does not suspend rendition of the order to be reviewed and thus does not extend the time for filing the notice of appeal." *Id.* at 12 (citing *King v. State*, 426 So. 2d 980 (Fla. 4th DCA 1982)).

However, in *Van Zant*, a filing titled "third petition" was functionally a notice of appeal on an untimely motion for rehearing, and it tolled the time limitations even though it was filed after 30 days from entry of the adverse judgment. *See Van Zant*, 308 F. App'x at 335. In finding the construed notice of appeal tolled the limitations period, the Eleventh Circuit concluded the time to file a "properly filed" notice of appeal after an untimely motion for rehearing was 30 days from denial of rehearing, not rendition of the order to be reviewed. *See id.*

As applied to this case, under *Van Zant*, the 30 days to file a notice of appeal started from the denial of rehearing (*i.e.*, July 25, 2016). Petitioner filed his notice of appeal on August 2, 2016, meaning it tolled the limitations period. *See id.*

While his notice of appeal was pending, the First District Court of Appeal requested Petitioner to file a response as to why the appeal should not be dismissed as untimely filed. [ECF 32-3, pp. 291-92]. Petitioner conceded that he failed to file his motion for rehearing in a timely fashion. [ECF 32-4, pp. 4-6]. Without a reasoned opinion, the First District Court of Appeal dismissed the appeal on October 19, 2016.

See Samuel v. Jones, 206 So. 3d 698 (Fla. 1st DCA 2016). In *Sweet*, the Eleventh Circuit emphasized that "when a state court unambiguously rules that a post-conviction petition is untimely under state law, [federal courts] must respect that ruling and conclude that the petition was not 'properly filed' for purposes of § 2244(d)(2), regardless of whether the state court also reached the merits of one of the claims." *Sweet v. Sec'y, Dep't of Corr.*, 467 F. 3d 1311, 1318 (11th Cir. 2006). In *Van Zant*, the Eleventh Circuit concluded the limitations period was tolled until the mandate issued even though the state appellate court dismissed the petitioner's appeal without a reasoned opinion. *See Van Zant*, 308 F. App'x at 355.

The dismissal was similarly without a reasoned opinion, and Petitioner's state procedural history mirrors that of the petitioner in *Van Zant*.[1] The mandate issued on January 12, 2017 [ECF 32-4, p. 19], meaning the limitations period ran untolled as of that date. *See, e.g.*, *Nyland*, 216 F. 3d at 1266-67. True, Petitioner filed another motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 on January 10, 2017 before the mandate issued. [ECF 32-4, p. 21]. Because the postconviction court issued its order concluding that the motion was untimely [ECF 32-4, pp. 36-39], this recent motion for postconviction relief did not toll the limitations period. *See Gorby v. McNeil*, 530 F.3d 1363, 1366 (11th Cir. 2008) (explaining that an untimely

[1] For Mr. Van Zant, in Case No. 1D04-2641, Florida's First District Court of Appeal had briefing reflecting that it viewed his notice of appeal as untimely because, like Petitioner in this action, Mr. Van Zant did not file within 30 days of issuance of the order to be reviewed.

motion, or any other untimely filing, does not toll the federal time limitations because its untimeliness renders it not "properly filed").

Petitioner filed in this Court on June 5, 2017. [ECF 1]. Thus, from the date of the last mandate's issuance (*i.e.*, January 12, 2017) to the filing of the instant Petition, **144 untolled days** elapsed. The only other interval of time where time ran untolled was the period between the mandate issuance on Petitioner's Rule 3.800 motion (*i.e.*, September 18, 2015) and the filing of the state habeas petition in the Thirteenth Judicial Circuit (*i.e.*, February 4, 2016). For this interval, **139 untolled days** elapsed. In sum, **a total of 283 untolled days** elapsed. The instant Petition is, therefore, timely.

VI. Exhaustion

Pursuant to 28 U.S.C. § 2254(b)-(c), petitioners must exhaust their claims before presenting them in a federal habeas petition. When petitioners do not properly present their claims to a state court by exhausting those claims and complying 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). A review of the record confirms that Petitioner's claims have been exhausted.

In this proceeding, Respondent submits that Grounds Fifteen and Sixteen were unexhausted and that all other claims were properly exhausted. [ECF 31, p. 27]. Thus, with the exception of Grounds Fifteen and Sixteen, Respondent waived its

affirmative defense. *See* 28 U.S.C. § 2254(b)(3). 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. *See Berguis v. Thompkins*, 560 U.S. 370, 390 (2010). To promote judicial efficiency, the merits of the allegedly unexhausted claims have been addressed within this Report.

VII. Standard of Review

This Court's review of Petitioner's claim is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214 (1996). *See Abdul–Kabir v. Quarterman*, 550 U.S. 233, 246 (2007). Several limits exist on the power of a federal court to grant a petition for a writ of habeas corpus on behalf of a state prisoner. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

The most restrictive limit is that found in § 2254(d). Pursuant to § 2254(d), a federal court may grant habeas relief from a state court judgment only if the state court's decision on the merits of the issue was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d).

"A state court's decision is 'contrary to' federal law if the 'state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 844 (11th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (internal brackets omitted). A state court's decision involves an unreasonable application of federal law "if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. (quoting *Williams*, 529 U.S. at 413). Importantly, AEDPA's deferential standard under § 2254(d) applies only when the state court adjudicated a claim on the merits. *See Cullen*, 563 U.S. at 181.

To qualify as an adjudication on the merits, very little is required. In fact, federal courts should presume that § 2254(d)'s deference applies. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

Even where there was a summary denial and no reasons for the denial of relief were articulated by the state trial court, such a ruling is also presumed to be an

adjudication on the merits. *Id.* at 100; *see also Gill v. Mecusker*, 633 F. 3d 1272, 1288-89 (11th Cir. 2011).

"The presumption [in favor of a merits ruling existing] may be overcome" only "when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 562 U.S. at 99-100 (citing *Ylst v. Nunnemarker*, 501 U.S. 797, 803 (1991)).

Recently, in *Wilson v. Sellers*, 584 U.S. ___, ___,138 S. Ct. 1188, 1192-94 (2018), the Supreme Court held there is a "look through" presumption in federal habeas corpus law, as silence implies consent. This means federal courts should rely upon the "last related state-court decision" that provides a relevant rationale when the highest state court's adjudication on the merits of a claim is unaccompanied by an explanation. Put into practice, *Wilson* clarifies the reasoning that is presumptively afforded § 2254(d)'s deference.

Federal courts may also deny § 2254 petitions if the claims would fail under *de novo* review, a more favorable standard, as a habeas petitioner would surely not be entitled to a writ under § 2254(d) if their claim would fail under that standard. *See, e.g.*, *Berghuis*, 560 U.S. at 390; *see also Hittson v. GDCP Warden*, 759 F.3d 1210, 1248 (11th Cir. 2014). In doing so, federal courts may decline to resolve whether § 2254(d) applies. *See Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1109-10 (11th Cir. 2012).

VIII. Generally Applicable Law

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel" for his defense. U.S. Const. amend. VI. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

To prevail on a claim of ineffective assistance of counsel, a habeas litigant must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *See id.* at 687. An ineffective assistance of counsel claim may be raised with respect to errors made by trial counsel or direct appeal counsel, and both are governed by *Strickland*. *See, e.g.*, *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016).

In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. *See Strickland*, 466 U.S. at 689. The presumption of counsel's adequate performance wields "particular force where" the ineffective-assistance claim is based "solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or

misguided action by counsel had a sound strategic motive.'" *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)).

To demonstrate prejudice, petitioners must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A probability that is reasonable is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

If a petitioner cannot meet one of *Strickland*'s prongs, a court need not address the other prong. *See, e.g.*, *Dingle v. Sec'y, Fla. Dep't of Corr.*, 480 F.3d 1092, 1100 (11th Cir. 2007) (citing *Strickland*, 466 U.S. at 697).

IX. Discussion

A. Ground One

In Ground One, Petitioner claims his trial counsel was constitutionally ineffective for not filing a motion to suppress certain recorded statements made to officers. [ECF 1, pp. 6-7]. In support, he explains that he held a reasonable expectation of privacy when Detective Matias told him that he was not recording the interview. As a reminder, Petitioner was informed he was under arrest and given *Miranda* warnings. [*Id.*].

The state circuit court identified *Strickland v. Washington* as the controlling federal law and denied relief by concluding there was no prejudice. [ECF 32-3, pp. 187-89]. It reasoned as follows:

> Florida law does not require or support the suppression of evidence on the simple fact that law enforcement was untruthful regarding the recording of the statement. *Blake v. State*, 972 So. 2d 839, 843-45 (Fla. 2007). In *Blake*, the [Florida Supreme] Court found no basis for suppression of statement/confession where detectives secretly videotapes statement after unsuccessfully asking for defendant's consent. *Id.* The request to tape and subsequent denial does not constitute coercive police activity to render the defendant's free will had been overcome [sic]. *Id.* Here, the Defendant stated the police had no right to record him because it violated his right to privacy. There was no alleged coercive action by the State to induce the Defendant to confess. **Because Defendant is unable to prove with a reasonable probability that but for the deficiency, the result of the proceeding would have been different, Ground One is DENIED**.

[*Id.* at pp. 188-89] (emphasis added).

The Fourth District Court of Appeal affirmed, meaning it presumptively adjudicated the claim on the merits and § 2254(d) applies. *See, e.g.*, *Richter*, 562 U.S. at 99-100. Under the "look through" standard, the state circuit court's denial on the merits is presumptively the reasoning of the Fourth District Court of Appeal. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

To understand whether such a motion to suppress would have been granted, it necessarily requires a discussion on *Miranda*. The Fifth Amendment states "no

person… shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As such, an individual must be clearly informed, prior to custodial questioning, that he has, *inter alia*, "the right to remain silent." *Florida v. Powell*, 559 U.S. 50, 53 (2010) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).[2]

An "interrogation" exists if there is either express questioning or "the police should know" that their words or actions "are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980).

"Volunteered statements of any kind are not barred by the Fifth Amendment." *Holland v. Florida*, 775 F.3d 1294, 1321 (11th Cir. 2014) (quoting *Miranda*, 384 U.S. at 478). As such, "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297-98 (1990).

Here, the mere fact that Petitioner believed his confession was not recorded does not render his statements any less voluntary. *See id.* Consequently, as trial counsel had almost no likelihood to prevail on a motion to suppress, Petitioner cannot show the state courts reached a conclusion that was contrary to or an

[2] "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479

unreasonable application of clearly established federal law. *See Consalvo*, 664 F.3d at 844. This claim, therefore, should be denied.

B. Ground Two

In Ground Two, Petitioner contends his trial counsel was ineffective for not preparing an adequate motion for judgment of acquittal. [ECF 1, p.8]. According to Petitioner, the prosecution never established that he caused a fatal wound. [*Id.*]. Even if the prosecution did meet its burden, Petitioner avers the prosecution failed to prove that Florida's "Stand Your Ground" law was inapplicable. [*Id.*].

Counsel for Respondent erroneously contended this claim was exhausted. [ECF 31, p. 27]. A review of the record shows that Petitioner only exhausted the sub-claim challenging trial counsel's general handling of the motion for judgment of acquittal as it related to the wound causing the victim's death, not the sub-claim relating to Florida's "Stand Your Ground" law. [ECF 32-1, pp. 262-65]. Pursuant to 28 U.S.C. § 2254(b)(3), the State, through counsel, must expressly waive the exhaustion requirement. Respondent explicitly waived this defense. [ECF 31, p. 27].

Therefore, without an adjudication on the merits as to the sub-claim relating to Florida's "Stand Your Ground" law, this sub-claim is reviewed *de novo*. With respect to the other sub-claim, challenging the adequacy of the motion for judgment of acquittal as it pertains to the victim's cause of death, § 2254(d) applies because the claim was adjudicated on the merits. *See, e.g.*, *Richter*, 562 U.S. at 99-100.

i. Motion for Judgment of Acquittal: "The Fatal Wound"

In denying this sub-claim related to counsel's general handling of the motion for judgment of acquittal, the state circuit court identified *Strickland v. Washington* as the controlling federal law and denied relief by concluding there was no prejudice. [ECF 32-3, pp. 187-90]. It reasoned:

> The trial transcript conclusively shows that counsel moved for a judgment of acquittal at the close of the State's evidence, and renewed the motion at the close of the defense case. (State's Exhibit "O", Excerpts of Trial. Transcript, Vol. 8, pp. 832-33, 883) The Defendant's claim that counsel's argument was insufficient does not satisfy the standard as outlined in *Strickland*…Defense counsel made a sufficient argument for a motion for judgment of acquittal. There is no reasonable probability that the motion would have been granted and the Defendant would have been acquitted. Ground Two is DENIED.

[ECF 32-3, pp. 188-90]. Under the "look through" standard, the state circuit court's denial on the merits is presumptively the reasoning of the Fourth District Court of Appeal. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

A Florida defendant may move for a judgment of acquittal at the close of the state's case. *See* Fla. R. Crim. P. 3.380. A motion for a judgment of acquittal shall be granted if "the court is of the opinion that the evidence is insufficient to warrant a conviction." *Id.* "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime

beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Fitzpatrick v. State*, 900 So. 2d 495, 507 (Fla. 2005).

In his statement to police, Petitioner admitted to reaching for a knife, swinging his arm, and hitting the victim in the shoulder area after the victim allegedly used a taser or stun gun on him. [ECF 33-6, pp. 19-20]. The medical examiner testimony testified the level of force was "substantial" and that the injury to Mr. Campbell's neck would have been sufficient to cause death. [ECF 33-4, pp. 66-72, 85].

Thus, to the extent Petitioner contends trial counsel's motion for judgment of acquittal should have been granted, Petitioner cannot meet his burden. There were inferences permitting a conclusion that Petitioner's swinging a knife caused the victim to bleed to death, making denial of a judgment of acquittal appropriate. Thus, the outcome of the *Strickland* claim was not contrary to and does not reflect an outcome that was an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d). This sub-claim should be denied.

ii. Motion for Judgment of Acquittal: "Stand Your Ground" / Self-Defense

As to the sub-claim contending trial counsel should have addressed Florida's "Stand Your Ground" law during the motion for judgment of acquittal, this claim lacks merit for two reasons.

First, to be entitled to that immunity, Petitioner would have been required to show he was permitted to use deadly force as defined by Fla. Stat. § 776.012. [3] Under that statute, Petitioner would have been required to show that he "reasonably believe[d] that [swinging a knife into the victim's shoulder or neck was] necessary to prevent imminent death or great bodily harm to himself." *See* Fla. Stat. § 776.012(1) (2007).

For context, the events happened near Petitioner's vehicle while the victim had a bicycle. Petitioner was allegedly capable of stabbing the victim after having a stun gun or similar device used on him. In addition, the stun gun was touch-based and did not launch barbs into Petitioner or onto his clothing. [ECF 33-4, pp. 76-77]. Thus, under the circumstances, Petitioner cannot show prejudice, even under *de novo* review, because he could not reasonably believe deadly force was necessary as defined by Fla. Stat. § 776.012(1). The jury likely reached the same conclusion after it was instructed on justifiable uses of deadly force. [ECF 32-2, pp. 250-51]. The Court need not address the performance prong. *See, e.g.*, *Dingle*, 480 F.3d at 1100.

C. Ground Three

[3] Florida's "Stand Your Ground" statute provides:

> A person who uses or threatens to use force *as permitted in s. 776.012*, s. 776.013 or s. 776.031 *is justified* in using such force and is immune from criminal prosecution…

Fla. Stat. § 776.032.

In Ground Three, Petitioner raises three sub-claims. [ECF 1, pp. 10-11]. First, he contends the trial court erred by presenting the jury with erroneous instructions, specifically an instruction for manslaughter by culpable negligence. [*Id.*]. Therefore, and as his second sub-claim, Petitioner contends trial counsel was ineffective for failing to object or otherwise correct this error. [*Id.*]. Lastly, Petitioner claims trial counsel failed to move for a mistrial in light of this error. [*Id.*].

Pursuant to 28 U.S.C. § 2254(b)(3), Respondent waived any applicable exhaustion defense as to these sub-claims. [ECF 31, p. 27]. In truth, only the first and second sub-claims were raised in the state circuit court. [ECF 32-1, pp. 265-67]. Therefore, without an adjudication on the merits as to Petitioner's contention that trial counsel should have moved for a mistrial in light of this alleged error in the jury instructions, the third sub-claim is reviewed *de novo*. The first two sub-claims were, however, adjudicated on the merits. *See Samuel v. State*, 173 So. 3d 984, 984 (Fla. 4th DCA 2015); [ECF 32-3, p. 190].

i. Trial Court Error Regarding Jury Instructions

Errors of state law do not form the basis for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Thus, "the fact that [a jury] instruction was allegedly incorrect under state law" will not suffice. *Id.* at 71-72. "Unlike state appellate courts, federal courts on habeas review are constrained to determine only whether the challenged instruction, viewed in the context of both the entire charge

and the trial record, so infected the entire trial that the resulting conviction violated due process." *Jamerson v. Sec'y for Dep't of Corr.*, 410 F.3d 682, 688 (11th Cir. 2005) (quoting *Estelle*, 502 U.S. at 72) (internal quotation marks omitted) (alterations in original).

In denying this sub-claim, the state circuit court stated, "[t]he trial court properly instructed the jury on the category 1 lesser included offense of Manslaughter, and within that offense instructed the jury that it could find the Defendant guilty of Manslaughter [if it found the victim's death was caused by Petitioner's] culpable negligence[.]" [ECF 32-3, p. 190].

Under Florida law, where a homicide has taken place, "the proper jury instructions are restricted to all degrees of murder, manslaughter, and justifiable and excusable homicide." *Daugherty v. State*, 211 So. 3d 29, 33 n.2 (Fla. 2017) (quoting *Martin v. State*, 342 So. 2d 501, 503 (Fla. 1977), *superseded on other grounds by*, Fla. R. Crim. P. 3.490). Of course, the evidence must also support the instruction. *See Pope v. State*, 679 So. 2d 710, 715 (Fla. 1996).

Manslaughter is, in turn, the unlawful "killing of a human being by the act, procurement, or culpable negligence of another." Fla. Stat. § 782.07(1). Culpable negligence is met if the conduct reflects a "reckless disregard of human life, or of the safety of persons exposed to its dangerous effects[.]" *In re Standard Jury Instructions in Criminal Cases-Instruction in Manslaughter Cases*, 911 So. 2d 1220,

1221 (Fla. 2005). The defendant must know or reasonably should have known the conduct would cause death or great bodily injury. *See id.*

Petitioner admitted to police that he swung a knife into the victim's shoulder area after a stun gun was used on him. His concession, therefore, supported his own disregard of Mr. Campbell's safety. The state court's adjudication of this claim on the merits did not violate § 2254(d). *See also Jamerson*, 410 F.3d at 688 (requiring that the entire trial and that the resulting conviction violated due process). Accordingly, this claim should be denied.

ii. Ineffective-Assistance for Failure to Object or Correct Jury Instructions

Petitioner further claims counsel failed to object to erroneous jury instructions. As this claim was adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, Petitioner must satisfy § 2254(d). Without a reasoned opinion, the Court must consider the next reasoned decision. *See Wilson*, 138 S. Ct. at 1192-94.

In denying this claim, the state circuit court concluded that trial counsel did not provide deficient performance and Petitioner was not prejudiced because the instructions were proper. [ECF 32-3, p. 190]. The state circuit court's analysis does not reflect an unreasonable determination of the facts or demonstrate that the outcome was somehow contrary to or an unreasonable application of clearly established federal law. This sub-claim should therefore be denied.

iii. Ineffective-Assistance for Failure to Move for Mistrial due to Jury Instructions

As this last sub-claim within Ground Three was not raised in the state courts, and there is no adjudication on the merits, it is not subject to § 2254(d). However, because the instructions were proper under state law, as the state circuit court explained, Petitioner cannot establish prejudice even under *de novo* review.

Although Petitioner assumes the jury was confused by the instructions, *Strickland*'s prejudice prong presumes the jury understood the instructions and followed the law. *See Strickland*, 466 U.S. at 695 (explaining prejudice does not consider "luck of a lawless decisionmaker"). Thus, the argument suggesting the jury attempted to exercise its jury nullification power, or the like, is beyond the permissible scope of the prejudice inquiry. *See id.* The Court need not address the performance prong, *see Dingle*, 480 F.3d at 1100, as this sub-claim should be denied.

D. Ground Four

In Ground Four, Petitioner claims trial counsel was ineffective for failing to file a motion to suppress "fabricated statements" obtained from an illegal search warrant. [ECF 1, p. 12-13]. As pled, the claim is conclusory and devoid of supporting facts to demonstrate that any inconsistencies were caused by fabrication.

A more detailed version of this claim was raised in the state circuit court. [ECF 32-1, pp. 287-89]. Ultimately, the claim was denied in *Samuel*, 173 So. 3d at 984, with an unreasoned opinion. *See also* [ECF 32-3, pp. 224-25, 262, 267]. Pursuant to

the look through standard, the state circuit court's reasoning is the presumptive reasoning of the Fourth District Court of Appeal. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

In denying this claim, the state circuit court concluded Petitioner would be unable to show deficient performance or prejudice because the motion would not have been granted. [ECF 32-3, pp. 190-91]. In support, the state circuit court explained that "any discrepancies between Ms. White's recorded statements and the affidavit supporting the search warrant are insignificant" and further stated those inconsistencies "do not refute the existence of additional descriptive facts given off the record." [*Id.*]. In support, the state circuit court also relied upon Ms. White's statements to police and the affidavit.

Ms. White initially stated a black male pulled into the area where she and the victim were conversing and exited his vehicle. [*Id*. pp. 122-25]. Ms. White added that the victim used a taser on this black male. [*Id.*]. In a later interview, Ms. White again described a black male, who exited his SUV and interrupted her conversation with the victim; however, she stated the victim had a taser in his hand. [*Id*. pp. 159-61, 169]. In the probable cause affidavit, Ms. White allegedly told officers that she was conversing with the victim when a black male in an SUV pulled up, exited his vehicle, and initiated a confrontation. [*Id*. p. 95]. Importantly, as the state circuit court emphasized, Petitioner's identity was never an issue. [*Id*. p. 191].

In sum, because Petitioner has not pointed to any fraudulent or fabricated statements, and his identity was never an issue due to his confession, the state circuit court's handling of this claim does not satisfy § 2254(d). This claim should be denied.

E. Ground Five

In Ground Five, Petitioner contends counsel was ineffective for not objecting to prosecutorial misconduct. [ECF 1, p. 19]. In support, Petitioner asserts the prosecution's rebuttal during closing arguments relied on facts that were not in evidence in order to inflame the jurors' emotions. [*Id.*].

As this claim was adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, § 2254(d) applies. *See Richter*, 562 U.S. at 99-100; [ECF 32-3, pp. 211-14]. Without a reasoned opinion, the Court must consider the next reasoned decision. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

In denying this claim on the merits, the state circuit court explained that Petitioner failed to point to a specific prosecutorial remark to support his contentions. It further explained that prosecutors may argue "reasonable inferences from the evidence" and can "argue the credibility of a witness so long as the argument is based on the evidence." [ECF 32-3, p. 192] (citing *Miller v. State*, 926

So. 2d 1243, 1254-55 (Fla. 2006)). Thus, as the state circuit court reasoned, there were "no prosecutorial comments necessitating objections." [*Id*.].

A review of Petitioner's state postconviction motion confirms the state circuit court's findings were correct;Petitioner failed to point to a specific prosecutorial remark. [ECF 32-1, pp. 271-72]. Additionally, because the closing arguments during the prosecution's rebuttal do not reflect any improper argumentation [ECF 33-7, pp. 10-19], the state's court's analysis was consistent with Supreme Court precedent. *See Strickland*, 466 U.S. at 688, 690-91. This claim should, therefore, be denied because Petitioner cannot meet his burden under § 2254(d).

F. Ground Six

In Ground Six, Petitioner contends trial counsel was ineffective for failing to redact or otherwise object to the admission of hearsay. [ECF 1, p. 20]. Petitioner provides no specific allegations or details for this claim. [*Id.*].

In the state circuit court, Petitioner asserted the hearsay statements were "made by Detective Meyers." [ECF 32-1, pp. 273-74]. According to Petitioner, by not redacting Detective Meyers' audio-recorded statements, his own responses of "Right" and "Uh huh" had a prejudicial effect because they could be viewed as admissions of guilt. [*Id.*].

As this claim was adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, § 2254(d) applies. *See Richter*, 562 U.S. at

99-100; [ECF 32-3, pp. 214-15]. Without a reasoned opinion, the Court must consider the next reasoned decision. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

The state courts, therefore, denied the claim by emphasizing that admissions of guilt are admissible under Florida's rules of evidence. [ECF 32-3, p. 192]. As admissions of guilt are admissible as exceptions to hearsay under state law and admissible as non-hearsay under the Federal Rules of Evidence, the state circuit court's resolution of the prejudice prong was consistent with federal law. *See Strickland*, 466 U.S. at 688, 690-91 (requiring the alleged error to have an effect on the outcome of the trial). After all, Petitioner's statements where he conceded to being at the scene, stabbing the victim, and disposing of the knife he used were sufficiently inculpatory. Consequently, the claim should be denied because Petitioner cannot meet his burden under § 2254(d).

G. Ground Seven

In Ground Seven, Petitioner claims counsel was ineffective for allowing the prosecution's closing arguments to shift the burden of proof on Petitioner's theory of self-defense. [ECF 1, p. 21].

Because this claim was adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, § 2254(d) applies. *See Richter*, 562 U.S. at 99-100; [ECF 32-3, pp. 215-17]. Without a reasoned opinion, the Court must

consider the next reasoned decision. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

The state circuit court denied this claim on the merits by explaining state law permits prosecutors "to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument where the defense has invited the response." [ECF 32-3, p. 193]. Thus, consistent with the state circuit court's reasoning, Petitioner's concession that he left the scene after having a stun gun used on him, acted in self-defense, and someone else must have killed the victim afterwards invited the State's rebuttal.

The record reflects the entire trial strategy was to argue Petitioner acted in self-defense, someone else killed the victim, or both. The prosecution's comments were, therefore, in response to trial counsel's theory of the case.

When § 2254(d) applies, trial counsel's performance is "doubly" deferential. *See Richter*, 562 U.S. at 105. To overcome this doubly deferential standard, habeas litigants must there is no reasonable argument permitting a conclusion that counsel's performance satisfied *Strickland*'s deferential standard. *See id.*

Within this proceeding, Petitioner insists he acted in self-defense. Thus, as Petitioner has never disagreed with trial counsel's strategy, he cannot show the state courts resolved the performance prong contrary to or in a manner that reflects an unreasonable application of clearly established federal law. Similarly, the resolution

of the prejudice prong was consistent with federal law. *See Chandler v. Moore*, 240 F.3d 907, 916-17 (11th Cir. 2001) (failing to object where no objection was needed does not satisfy the prejudice prong). See also *Strickland*, 466 U.S. at 688, 690-91 (requiring the alleged error to have an effect on the outcome of the trial). Accordingly, this claim should be denied.

H. Ground Eight

In Ground Eight, Petitioner claims counsel was ineffective for failing to object to erroneous jury instructions, specifically an instruction that explained participation in "unlawful activity" imposed a duty to retreat. [ECF 1, p. 22]. Liberally construed, Petitioner contends the instructions required the jury to believe the very charges against him imposed a duty to retreat. [*Id.*]. According to Petitioner, had trial counsel objected, it would have changed the outcome of the trial.

On this claim, the Court need not resolve whether § 2254(d)'s additional limitation applies, as this claim could be denied under the more favorable *de novo* review.

The jury instructions required the jury to consider whether Petitioner "reasonably believed that it was necessary" to apply deadly force. [ECF 32-2, p. 250]. To do so, the jury had to consider "the circumstances by which [Petitioner] was surrounded at the time the force was used" and inquire whether "the appearance of danger" was "so real that a reasonably cautious and prudent person under the same

circumstances would have believed that the danger could be avoided *only through the use of that force*." [*Id.*] (emphasis added).

As already stated, Petitioner was by his vehicle while the victim had a bicycle. Petitioner, by his own account, was able to reach for a knife and stab the victim despite supposedly having a stun gun used on him. The stun gun was touch-based and, therefore, required contact. [ECF 33-4, pp. 76-77].

Consequently, there is no reasonable probability of a different outcome even if the instructions contained the error alleged by Petitioner. A jury still would have concluded that a "cautious and prudent person under the same circumstances" would have believed any danger could have been avoided without deadly force. As Petitioner cannot satisfy the prejudice prong even under *de novo* review, he certainly cannot satisfy § 2254(d). The Court need not consider the performance prong, *see Dingle*, 480 F.3d at 1100, as this claim should be denied.

I. Ground Nine

In Ground Nine, Petitioner claims counsel was ineffective for not moving to suppress or object to inadmissible evidence. [ECF 1, p. 23]. According to Petitioner, the box cutters, the blood-stained towel, and a shoe print were inadmissible. In the Petition, Petitioner provided no explanation why the evidence was inadmissible.

However, in state court, Petitioner argued the items were inadmissible for lack of relevance. [ECF 32-1, pp. 280-82]; [ECF 32-3, pp. 219-20]. As this claim was

adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, § 2254(d) applies. *See Richter*, 562 U.S. at 99-100; [ECF 32-3, pp. 214-15]. Without a reasoned opinion, the Court presumptively accepts the state circuit court's reasoning as that of the Fourth District Court of Appeal. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

In denying this claim, the state circuit court explained that the items were relevant because the prosecution argued that Petitioner returned to a hotel room to destroy his sneakers and hide them above ceiling tiles in the bathroom. [ECF 32-3, pp. 194-95] (citing [ECF 33-7, p. 13]). Thus, as the state circuit court concluded, the motion to suppress would have been denied and, therefore, counsel cannot be ineffective. [*Id*.].

As this claim was adjudicated on the merits by the Fourth District Court of Appeal, it is subject to § 2254(d)'s additional limitation. Under Florida law, relevant evidence is "evidence tending to prove or disprove a material fact." Fla. Stat. § 90.401. The evidence supported an inference that Petitioner's attempts to destroy the sneakers was inconsistent with the conduct of someone who lawfully acted in self-defense. Thus, the resolution of the prejudice prong was not contrary to or an unreasonable application of clearly established federal law. The Court need not address the performance prong, *see Dingle*, 480 F.3d at 1100, as this claim should be denied.

J. Ground Ten

In Ground Ten, Petitioner claims trial counsel was ineffective for not investigating potential alibi witnesses. [ECF 1, p. 24]. In state court, Petitioner argued that his attorney should have investigated a cyclist who appeared on the surveillance video. [ECF 32-1, pp. 283-84]. Petitioner believed this was Mr. Larry Oliver, a friend of the victim, as Mr. Oliver's bicycle was near the crime scene. [*Id.*].

This claim was raised in [ECF 32-3, p. 220-21] and adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, § 2254(d) applies. *See Richter*, 562 U.S. at 99-100. Without a reasoned opinion, the Court presumptively accepts the state circuit court's reasoning as that of the Fourth District Court of Appeal. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

In the state circuit court, it denied relief by relying upon Petitioner's statements that he was at the crime scene and used a knife on the victim, which "precluded the possibility of a viable alibi defense[.]" [ECF 32-3, p. 195]. "Given his statement," as the state circuit court explained, "there can be no reasonable probability…the outcome of this case would have been different[.]" [*Id.*].

Even if Petitioner presented an alibi, the jury would have been unlikely to believe it given Petitioner's admissions and the physical evidence permitting an inference of his guilt. The state court's resolution of the prejudice prong was, therefore, not contrary to or an unreasonable application of clearly established

federal law. The performance prong need not be addressed, *see Dingle*, 480 F.3d at 1100, as Petitioner cannot satisfy § 2254(d). Accordingly, this claim should be denied.

K. Ground Eleven

In Ground Eleven, Petitioner contends his counsel was ineffective for "advising [him] that if he took the stand [to testify] the state could pry into his prior convictions." [ECF 1, p. 25]. While in state court, Petitioner submitted that the prosecution may only inquire whether a criminal defendant has any prior felonies or other prior offenses involving crimes of dishonesty. [ECF 32-1, p. 286]. Liberally construed, Petitioner argued he was misadvised about his right to testify at trial. [*Id.*].

Because this claim was raised in [ECF 32-3, p. 222-23] and adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, § 2254(d) applies. *See Richter*, 562 U.S. at 99-100. Without a reasoned opinion, the Court presumptively accepts the state circuit court's reasoning as that of the Fourth District Court of Appeal. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

The state circuit court concluded there was no prejudice because Petitioner failed to explain "how 'his side of the story' would vary in any significant manner from the extensive statement defense counsel presented to the jury." [ECF 32-3, p. 196].

Criminal defense attorneys must advise their clients about their right to testify or not testify, discuss the strategic implications, and allow their clients to decide whether to testify. *See McGriff v. Dep't of Corr.*, 338 F.3d 1231, 1237 (11th Cir. 2003). When raised in conjunction with an ineffective assistance of counsel claim, a habeas petitioner must show their proposed testimony would have impacted the outcome of the trial. *See Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1124-24 (11th Cir. 2012) (reasoning the proposed testimony would not have changed the sentencing proceeding).

While in state court, Petitioner provided no proposed testimony. The state circuit court's resolution of the prejudice prong was, therefore, not contrary to or an unreasonable application of clearly established federal law. Consequently, Petitioner cannot satisfy § 2254(d). The Court need not address the performance prong, *see Dingle*, 480 F.3d at 1100, as this Claim should be denied.

L. Ground Twelve.

In Ground Twelve, Petitioner contends trial counsel rendered ineffective assistance for failing to object to the Information because the grand jury testimony was fraudulent. [ECF 1, p. 26].

Because this claim was raised in [ECF 32-3, p. 224-25] and adjudicated on the merits by the Fourth District Court of Appeal, *see Samuel*, 173 So. 3d at 984, § 2254(d) applies. *See Richter*, 562 U.S. at 99-100. Without a reasoned opinion, the

Court presumptively accepts the state circuit court's reasoning as that of the Fourth District Court of Appeal. *See Wilson*, 584 U.S. at ___, 138 S. Ct. at 1192-94.

The state circuit court summarily denied this claim by finding Petitioner's allegations "conclusory and unsupported[.]" [ECF 32-3, p. 196-97]. It further explained that the trial record, including Petitioner's admission, supported the manslaughter conviction. [*Id.*].

Petitioner cannot show the state courts' resolution of the prejudice prong was contrary to or the result of an unreasonable application of clearly established federal law. As Petitioner cannot satisfy § 2254(d), the performance prong need not be addressed. *See Dingle*, 480 F.3d at 1100. This claim should be denied.

M. Ground Thirteen and Ground Fifteen

Although raised as separate grounds, Grounds Thirteen and Fifteen are related. In Ground Thirteen, Petitioner contends the trial court erred by not giving the jury a complete definition of manslaughter after the jury requested clarification. [ECF 1, p. 27]. As for Ground Fifteen, after a liberal construction, Petitioner contends the trial court erred when it instructed the jury as to the *mens rea* requirement for manslaughter. To the extent they are separate claims, both were raised on direct appeal as one claim.[4] [ECF 32-1, pp. 11-27].

[4] Respondent agrees that these two claims were raised on direct appeal, [ECF 31, p. 22], but submits Ground Fifteen was not properly exhausted. [*Id.* p. 24]. Pursuant to 28 U.S.C. § 2254(b)(2), the Court declines to resolve that question and instead addresses the merits.

At trial, after closing arguments, the state trial court handed each of the jurors a copy of the jury instructions and instructed the jury. [ECF 33-7, p. 19-37]. After some deliberation, the jury asked: "Clarification: Manslaughter 2a + 2b -OR- 2a or 2b." The state trial court observed that it was simply a question whether the second element had two requirements or could be established by one of two methods. [*Id.* p. 46]. The attorneys agreed that the second element could be met by one of the two listed methods (*i.e.*, intentionally causing death or culpable negligence). [*Id.* pp. 46-48]. Trial counsel agreed that the jury should hear that either option was correct. [*Id.* pp. 48-49].

Accordingly, the trial court brought the jurors into the courtroom and answered the jury's narrow question as follows:

> [THE COURT]: There was a question or maybe a request for clarification from the Jury. And it says "clarification; Manslaughter, 2A plus 2B or 2A or 2B."
>
> And we are assuming that you are referring to the Manslaughter Jury Instruction where there's element 1, and then element 2 that has an A and a B .
>
> So the 2A or 2B, correct?
>
> [TRIAL COUNSEL]: Right.
>
> [THE STATE]: Yes, Your Honor.

[*Id.* pp. 49-50]. Soon after, the jury found Petitioner guilty of manslaughter. [*Id.* pp. 53-54].

On appeal, Petitioner claimed the trial court committed reversible and fundamental error for not providing a complete definition on manslaughter, which would have included instructions on justifiable and excusable homicide. [ECF 32-1, p. 23]. In its answer brief, the State argued that the trial court "properly limit[ed] the repetition of instructions" because "the judge answered the question [for clarification] with a correct and complete statement of the law, relative to the jury inquiry." [*Id.* p. 38].

In *Chapman v. California*, 386 U.S. 18, 24 (1967), the Supreme Court held that on direct review a federal constitutional error is harmless only if the reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt." Under § 2254(d)(1), however, "federal habeas relief may only be granted if the state court's application of the *Chapman* harmless error standard on direct review was objectively unreasonable." *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1307 (11th Cir. 2012) (internal quotations omitted). This has been referred to as the "AEDPA/*Chapman*" standard. *See Fry v. Pliler*, 551 U.S. 112, 120 (2007). Of course, the AEDPA/*Chapman* standard applies only when there has been an adjudication on the merits.

Additionally, because this claim involves trial court error reviewed on collateral review, the *Brecht* standard also governs. *See, e.g., Vining v. Sec'y, Dep't of Corr.*, 610 F.3d 568, 571 (11th Cir. 2010) (citing *Brecht v. Abrahamson*, 507 U.S.

619 (1993)). Under *Brecht*, in § 2254 proceedings, a federal constitutional error is harmless unless there is "actual prejudice," which means the error had a "substantial injurious effect or influence" on the jury's verdict. *Mansfield*, 679 F.3d at 1307 (quoting *Brecht*, 507 U.S. at 637).

Thus, when there has been an adjudication on the merits, the Court has "two different standards for evaluating harmless error: the AEDPA/*Chapman* standard and the *Brecht* standard." *Id.* The Court, however, need not address both standards if the constitutional error is harmless solely under the *Brecht* standard. *Id.* at 1307-08.

As previously mentioned, the jury was instructed on excusable and justifiable homicide. Further, the jury's narrow request for clarification does not suggest the jury failed to consider Petitioner's self-defense theory. Consequently, because Petitioner cannot show a "substantial injurious effect or influence" on the jury's verdict, he cannot satisfy the *Brecht* standard. Accordingly, Grounds Thirteen and Fifteen should be denied.

N. Ground Fourteen

In Ground Fourteen, Petitioner contends the trial court should have granted trial counsel's motion for a 24-hour continuance when the state amended the charge just before the commencement of trial. [ECF 1, p. 28]. Erroneously, Respondent argues this claim is an ineffective assistance of appellate counsel claim. [ECF 31, p.

81-82]. While that may have been the underlying basis for a different claim raised in state court, *see* [ECF 32-1, pp. 57-61], that is not the claim presently before the Court because it is not in the Petition.

In light of Respondent's error, Respondent waived any exhaustion defense as to this claim. [ECF 31, p. 27]. The Court need not address whether § 2254(d) applies, however. Instead, because this claim relates to trial court error, the *Brecht* standard controls. *See, e.g.*, *Vining*, 610 F.3d at 571. Petitioner must, therefore, prove that he endured actual prejudice. *See Mansfield*, 679 F.3d at 1307 (citing *Brecht*, 507 U.S. at 637).

The record reflects that trial counsel did not request a continuance prior to the trial's commencement. [ECF 32-4, pp. 73-74]. Before the jurors were called in, the prosecution informed the Court that it determined Petitioner's case did not warrant first-degree murder charges. [*Id.* p. 74]. The prosecution stated it had advised trial counsel of its position and explained its intention to file a "Re-File Information and Continuation of Grand Jury Indictment" for second-degree murder with a weapon. [*Id*. pp. 74-75]. In effect, this new charging document would charge petitioner with second-degree murder and dismiss the indictment on the higher charges. [*Id.*].

Petitioner cannot meet the *Brecht* standard. Trial counsel never requested a continuance, refuting the underlying factual basis for Petitioner's claim.[5] Petitioner is, therefore, not entitled to relief because he has not shown any trial court an error that had a "substantial injurious effect or influence" on the outcome of the proceedings. *See Mansfield*, 679 F.3d at 1307 (citing *Fry*, 551 U.S. at 121-22). This claim should be denied.

O. Ground Sixteen

In Ground Sixteen, Petitioner claims the state court indictment lacked an essential element and, therefore, he was not on notice of the charges against him. [ECF 1, p. 30]. According to Petitioner, the trial court was without jurisdiction to convict him. [*Id.*]. Respondent argues that this claim is procedurally barred and, in the alternative, should be denied on the merits because it does not relate to clearly established federal law as required by § 2254(d). [ECF 31, pp. 85-86].

Pursuant to 28 U.S.C. § 2254(b)(2), the Court need not consider whether this claim was properly exhausted or whether § 2254(d) applies. Instead, the claim could be denied even under *de novo* review. *See, e.g.*, *Berguis*, 560 U.S. at 390.

[5] Similarly, even if Petitioner had attempted to assert the previously raised ineffective assistance of appellate counsel claim, *see* [ECF 32-1, pp. 57-61], the record reflects Petitioner's appellate counsel would have had no grounds to do so without a factual predicate for the claim. Therefore, appellate counsel would not have been deficient. *See Searcy v. Sec'y, Fla. Dep't of Corr.*, 485 F. App'x 992, 997 (11th Cir. 2012).

"The sufficiency of a state indictment is an issue on federal habeas corpus only if the indictment was so deficient that the convicting court was deprived of jurisdiction." *Sneed v. Fla. Dep't of Corr.*, 496 F. App'x 20, 23 (11th Cir. 2012) (quoting *Heath v. Jones*, 863 F.2d 815, 821 (11th Cir. 1989)). To adequately inform a defendant of the charges against them, it is enough if the "indictment specifically refers to the statute on which the charge was based[.]" *Id*. Additionally, the constitutionality of an indictment is met if the indictment "tracks the wording of the statute" and includes "the essential elements of the crime." *Id.*

The "Re-File Information and Continuation of Grand Jury Indictment," charging Petitioner of second-degree murder with a weapon, cited to Fla. Stat. 782.04(2). [ECF 32-1, pp. 4-5]. The statute required (1) an unlawful killing of a human being; (2) when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life; and (3) without any premeditated design to cause death. *See* Fla. Stat. § 782.04(2). The charging document tracked this language. [ECF 32-1, pp. 4-5].

Viewed together, Petitioner was adequately notified of the charges against him and all essential elements were in the charging document. *See Sneed*, 496 F. App'x at 23. The charging document was, therefore, constitutionally adequate even under *de novo* review.

True, Petitioner was ultimately convicted of manslaughter, not second-degree murder. But under Florida law, a defendant may be convicted "of any offense that as a matter of law is a necessarily included offense[6]…of the offense charged in the indictment or information" provided that it is "supported by the evidence." Fla. R. Crim. P. 3.510. Manslaughter, under Florida law, is a "necessarily lesser included offense" of second-degree murder. *State v. Montgomery*, 39 So. 3d 252, 255 (Fla. 2010). Lastly, as already mentioned within this Report, the evidence supported the jury verdict.

Thus, at least under state law, this appears to be adequate notice. *Cf. Hudson v. Sec'y Dep't of Corr.*, No. 1:10-CV-00190-MP-GRJ, 2014 WL 4428123, at *9 (N.D. Fla. Sept. 9, 2014) (failing to show indictment was defective merely because "manslaughter by culpable negligence" was not in the first-degree murder indictment in an ineffective-assistance context). However, as further inquiry would delve into pure issues of state law, which are not cognizable on federal habeas review, relief should be denied. *See, e.g., Swarthout v. Cooke*, 562 U.S. 216, 219 (2011); *see also Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988).

P. Ground Seventeen

[6] *See generally Sanders v. State*, 944 So. 2d 203, 206 (Fla. 2006) ("[N]ecessarily lesser included offenses are offenses in which the statutory elements of the lesser included offense are always subsumed within those of the charged offense.").

In Ground Seventeen, Petitioner claims the charging document was defective because the enhancement to his sentence was an essential element to manslaughter with a weapon. [ECF 1, p. 31]. Respondent correctly argues that this claim is not cognizable for federal habeas review because it amounts to a state court's alleged failure to adhere to its own sentencing provisions. [ECF 31, p. 89].

Here, Petitioner did not invoke any constitutional provision on this claim.[7] Therefore, it appears Petitioner merely raises issues of state law by challenging the state court's application of its reclassification statute. *See, e.g.*, *Swarthout*, 562 U.S. at 219; *Branan*, 861 F.2d at 1508. As this claim is not cognizable, whether § 2254(d) applies is immaterial. The claim should be denied.

X. Evidentiary Hearing

Pursuant to 28 U.S.C. § 2254(e)(2), federal courts "shall not hold an evidentiary hearing" "unless the application shows" that his claim relies upon "a new rule of constitutional law, made retroactive to cases on collateral review" or "a factual predicate that could not have been previously discovered through the exercise of due diligence[.]" As neither provision applies, the Court cannot grant a hearing. *See, e.g.*, *Cullen*, 563 U.S. at 184-86 (reasoning a federal evidentiary hearing is barred even if § 2254(d)'s deferential bar does not apply).

[7] Notably, the jury unanimously found Petitioner used "a weapon." [ECF 32-1, p. 7]. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (Holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).

XI. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). See 28 U.S.C. § 2253(c)(1); *see also Harbison v. Bell*, 556 U.S. 180, 183 (2009). This Court should issue a COA only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Reasonable jurists would not find the merits debatable in this action. The Court should, therefore, not issue a COA.

XII. Conclusion

Based upon the foregoing it is recommended that:

1. the federal habeas petition be DENIED [ECF 1];
2. an evidentiary hearing be DENIED;
3. a certificate of appealability should NOT ISSUE; and,
4. the case be CLOSED.

Objections to this report may be filed with the District Court Judge within fourteen (14) days of receipt of a copy of the report. Failure to file timely objections

shall bar petitioner from a *de novo* determination by the District Court Judge of an issue covered in this Report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the District Court Judge, except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985).

Signed this 24th day of February, 2020.

UNITED STATES MAGISTRATE JUDGE

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