APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-14149-D

HENRY SOWERS,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Henry Sowers failed to pay the filing and docketing fees to the district court, or alternatively, file a motion to proceed in forma pauperis in district court within the time fixed by the rules.

Effective February 08, 2024.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

PROVIDED
TO SANTA ROSA C.I.
ON DEC 20 2023
FOR MAILING BY

HENRY SOWERS,
Plaintiff,

v. Case No.: 6:23-cv-166-ACC-LHP

SECRETARY DEPT. OF CORRECTIONS, et. al.,
Respondent.
_____/

NOTICE OF APPEAL

NOTICE IS HEREBY given that the Petitioner, Henry Sowers, appeals the Final Order issued on November 21, 2023 by the Honorable Anne L. Conway, U.S. District Judge, in the above-styled cause. The Petitioner appeals to the U.S. Court of Appeals Eleventh Circuit, the following:

- The amended petitioner is denied (all eight grounds) and the case was dismissed with prejudice
- The Certificate of Appealability was denied

Pursuant to Fed. R. App. Rule 22(b), this Notice of Appeal constitutes a request addressed to the Judges of the Court of Appeals for a Certificate of Appealability on the claims which the District Court has denied.

This Court should grant an application for certificate of Appealability only if the Petitioner makes a "substantial showing of denial of a constitutional right". To

make such a showing "the Petitioner must demonstrate that reasonable jurists would find the District Court's assessment of the Constitutional claims debatable or wrong". *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); See also *Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009).

When a District Court dismisses a Federal Habeas Petition on Procedural Grounds without reaching the underlying Constitutional claim, a Certificate of Appealability should be issued only when a Petitioner shows "that jurists of reason would find it debatable whether the Petitioner states a valid claim of the denial of a Constitutional Right and that jurists of reason would find it debatable whether the distric court was correct in its procedural ruling". *Lamarca*, 568 F.3d at 934. But a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

GROUND ONE

Double Jeopardy

This ground is a Fifth Amendment Due Process Violation United States Constitution.

The US District Court gives a convoluted and arduous response to the claim. (Doc 17, p. 8))

The two charges only are separated by the word union and touching

Sexual Battery requires "union"; and Lewd or Lascivious Molestation requires "touching".

Wherein both words mean "contact" and the US District Court's resolution of the Constitutional claim is debatable or wrong.

GROUND TWO

Sua Sponte

The Trial Court erred in it discretion by allowing jurors to remain on the panel after admittedly answering affirmative to questions which would demonstrate bias. This ground is a Sixth Amendment U.S. Constitution violation, the right to an impartial jury.

GROUND THREE

This ground is a Sixth and Fourteenth Amendment U.S. Constitution violation to the Petitioner.

The Petitioner was ordered to proceed Pro-Se in the current contested State Court conviction.

The Circuit court failed to properly conduct a Ferreta Hearing.

The Petitioner was having a hard time keeping up with the judicial proceedings due to lack of hearing equipment.

The Petitioner did notify the Trial Court of his circumstances and NO accommodations were made.

The Trial Court addressed the issue by telling the State to "speak up". (This did not include the Jury Pool on the jury inquest.)

Pursuant to 28 USC 1254 the Petitioner requests the US Court of Appeals certify the following question of law to the Supreme Court of the United States for clarity in adjudicating the Constitutional claim.

"Does the Trial Court violate a citizen's Sixth Amendment Right to and Fourteenth Amendment Due Process of Law U.S. Constitution when it fails to provide accommodations for the hearing impaired pursuant to 42 USC 1201 wherein the citizen in question was a self-represented defendant in a criminal judicial proceeding and was hindered in his ability to present his best possible defense, when the Trial Court failed to provide accommodations, and failed to provide assistance of counsel for his Defense"? Counsel was assigned for assistance for the Defendant's Hearing, and the understanding of the proceedings and motions, which Counsel failed to do.

GROUND FOUR

Judicial Bias

The Trial Judge in the criminal judicial proceeding against the Petitioner was demonstrated bias. Wherein the Judge's statements and actions greatly prejudiced the Petitioner's Right to Due Process.

This Ground is a Fourteenth Amendment Due Process violation to the Petitioner

GROUND FIVE

Motion to suppress evidence should have been granted

The Petitioner filed a pre-trial motion to suppress evidence (statements) made by the Petitioner with violation of 5th and 6th Amendments U.S. Constitution. The biased Trial Judge makes statements in the Order denying the Motion to Suppress Evidence to included knowing that the Petitioner was never given the warnings as required in *Miranda v. Arizona*.

GROUND SIX

Ineffective Assistance of Appellate Counsel (IAAC)

The Petitioner was denied his Sixth Amendment Right to have assistance of counsel for his defense and Fourteenth Amendment Due Process violation. Wherein the ineffective assistance of counsel on direct appeal prejudiced the Petitioner's right to raise claims on Federal review, due to the failure of Appellate Counsel to raise and preserve claims for federal review by raising the claims on direct appeal.

GROUND SEVEN

Exclusionary Rule of Evidence

The evidence allowed in Trial violates the fruit of the poisonous tree doctrine. The evidence [in custodial interrogation] should have been suppressed due to Fifth and

Sixth Amendment violations and failure to Mirandize the Petitioner by the State Agents in custodial interrogation.

This ground is a Fourth, Fifth, Sixth, and Fourteenth Amendment violation U.S. Constitution to the Petitioner.

GROUND EIGHT

The Petitioner claims that the Trial Court erred in failing to provide conflict-free Counsel.

The counsel for the Defendant (Jay Crocker) was appointed as standby counsel, after the Petitioner requested to fire the counsel and continue Pro-Se.

This ground is a Sixth Amendment U.S. Constitution violation to the Petitioner.

WHEREFORE, the Petitioner has demonstrated a denial of constitutional right and that jurists of reason would find the District Court's assessment of the constitutional claims debatable or wrong. Wherein the Petitioner requests that a Certificate of Appealability issue for the Constitutional claims.

This Request for Certificate of Appealability pursuant to Fed. R. App. Rule 22 is filed in good faith.

Respectfully submitted,

/s/ _____

HENRY SOWERS, pro se, DC#90154
Santa Rosa Correctional Institution Annex
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Appendix "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HENRY SOWERS,

Petitioner,

v. Case No. 6:23-cv-166-ACC-LHP

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Henry Sowers' Amended Petition for Writ of Habeas Corpus ("Amended Petition," Doc. 3) filed pursuant to 28 U.S.C. § 2254. Respondent filed a Response to the Amended Petition ("Response," Doc. 11) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 12).

Petitioner asserts eight grounds. For the following reasons, the Amended Petition is denied.

I. PROCEDURAL HISTORY

A jury found Petitioner guilty as charged of sexual battery of a victim younger than twelve years of age (Count One) and lewd or lascivious molestation of a victim younger than twelve (Counts Two). (Doc. 13-1 at 493-94.) The trial

court sentenced Petitioner to life in prison on both counts. (*Id.* at 519-21.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (*Id.* at 1116.)

Petitioner filed a state petition for writ of habeas corpus. (*Id.* at 1120-33.) The Fifth DCA summarily denied the petition. (*Id.* at 1158.)

Petitioner filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (*Id.* at 1177-87.) The state court denied the motion. (*Id.* at 1555-56.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 1581.)

II. LEGAL STANDARDS

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

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

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

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the

relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

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

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

> the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). If a state judge fails to resolve the merits of a claim, however, no deference is warranted under § 2254(d)(1). *Calhoun v. Sec'y, Fla. Dep't of Corr.*, 607 F. App'x 968, 970–71 (11th Cir. 2015) (citing *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003)).

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim

lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de novo* only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

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

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

The Eleventh Circuit Court of Appeals has applied *Strickland* to ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir.

1991). "'[T]he only question under the prejudice prong of the *Strickland* test is whether there was a reasonable probability that the appellate court, [had appellate counsel not been deficient,] . . . would have granted [the petitioner] a new trial.'" *Ferrell v. Hall*, 640 F.3d 1199, 1236 (11th Cir. 2011) (quoting *Clark v. Crosby*, 335 F.3d 1303, 1312 n. 9 (11th Cir. 2003)).

III. ANALYSIS

A. Ground One

Petitioner asserts his convictions on Counts One and Two violate his right against double jeopardy. (Doc. 3 at 5.) According to Petitioner, sexual battery and lewd or lascivious molestation contain the same statutory elements and his convictions were based on the same act. (*Id.*)

Petitioner raised this ground on appeal. (Doc. 13-1 at 1087-1105.) The Fifth DCA affirmed *per curiam*.[1] (*Id.* at 1116.)

The Double Jeopardy Clause of the United States Constitution "protects against multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498 (1984). To determine whether a double jeopardy violation has occurred based on multiple convictions stemming from the same conduct, but pursuant to

[1] Respondent contends Ground One is procedurally barred because Petitioner did not raise it in the state court as a federal issue. Review of Petitioner's initial appeal brief establishes that Petitioner did rely on federal law in raising Ground One on direct appeal in the state court. *See* Doc. 13-1 at 1097-1105.

separate statutes, the Court must undertake a two-part analysis. *See Williams v. Singletary*, 78 F.3d 1510, 1513 (11th Cir. 1996). First, the Court must determine "whether there exists a clear legislative intent to impose cumulative punishments, under separate statutory provisions, for the same conduct." *Id.* If a clear indication exists of such legislative intent, the double jeopardy bar does not apply. *Id.* However, "[i]f there is no clear indication of legislative intent to impose cumulative punishments, [courts] examine the relevant statutes under the same-elements test of *Blockburger* [*v. United States*, 284 U.S. 299 (1932)]." *Id.*

Pursuant to the "same-elements" test, "if each statutory offense requires proof of an element not contained in the other, the offenses are not the 'same' and double jeopardy is no bar to cumulative punishment." *Id.* Although federal law governs the evaluation of double jeopardy claims, state law governs the interpretation of state criminal statutes. *Tarpley v. Dugger*, 841 F.2d 359, 364 (11th Cir. 1988).

In concluding that convictions for sexual battery and lewd or lascivious molestation do not violate the prohibition against double jeopardy, the Florida Supreme Court reasoned:

> Sexual battery is defined as "oral, anal, or vaginal penetration by, or union [3] with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." § 794.011(h), Fla. Stat. (2008). In contrast, lewd or lascivious molestation occurs when a person "intentionally touches in a lewd or lascivious

> manner [4] the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator [.]" § 800.04(5)(a), Fla. Stat. (2008).
>
> Although the conduct constituting capital sexual battery will as a practical matter ordinarily—if not always—also constitute lewd or lascivious molestation, the formal elements of these two crimes are quite distinct. And section 775.021(4) requires analysis based on the formal elements of the crimes. Establishing capital sexual battery—like any other sexual battery—requires proof of either penetration or oral, anal, or vaginal union with the sexual organ of another, while establishing lewd or lascivious molestation requires proof of intentional touching of the breasts, genitals, genital area, or buttocks, or the clothing covering those areas. Lewd or lascivious molestation requires proof that the touching was done with a lewd or lascivious intent, while sexual battery may be committed without any proof of a specific sensual intent. Each offense requires proof of an element that the other does not; therefore, they are "separate offenses" under section 775.021(4)(a).
>
> [3]"'Union' means contact." Fla. Std. Jury Instr. (Crim.) 11.1.
>
> [4]"The words 'lewd' and 'lascivious' mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act." Fla. Std. Jury Instr. (Crim.) 11.10(c).

Roughton v. State, 185 So. 3d 1207, 1209–10 (Fla. 2016) (footnote omitted).

The Florida Supreme Court determined that the sexual battery and lewd or lascivious conduct statutes require proof of an element not contained in the other. Review of Sections 794.011(2)(a) and 800.04(5)(a) of the Florida Statutes supports the state court's conclusion. Petitioner, therefore, has not established that the state court's denial of this ground is contrary to, or an unreasonable application of,

clearly established federal law. Accordingly, Ground One is denied under § 2254(d).

B. Grounds Two through Five and Seven and Eight

In Ground Two, Petitioner maintains that his Sixth Amendment right to an impartial jury was violated by the trial court's failure to *sua sponte* strike two jurors for cause. (Doc. 3 at 7.) In Ground Three, Petitioner asserts the trial court violated federal law by failing to provide him an accommodation for his hearing impairment. (*Id.* at 8.) Petitioner contends in Ground Four that he was deprived of due process because the trial judge was biased. (*Id.* at 10.) In Ground Five, Petitioner maintains the trial court violated his Fifth and Sixth Amendment rights by denying his motion to suppress. (*Id.* at 11.) Similarly, in Ground Seven Petitioner complains that the trial court violated his constitutional rights by admitting his statements from a custodial interrogation into evidence. (*Id.* at 13.) Finally, Petitioner contends in Ground Eight that the trial court violated his constitutional rights by denying his request for conflict-free counsel. (*Id.* at 14.) Respondent argues that these grounds are procedurally barred from review. (Doc. 11 at 9-10.)

Absent exceptional circumstances, federal courts are precluded from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–

43 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). A federal habeas court is also precluded from considering claims that are not exhausted but clearly would be barred if returned to state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (stating that if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

To satisfy the exhaustion requirement, a state petitioner must "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." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard*, 404 U.S. at 275–76) (internal quotation marks omitted). "Both the legal theory and the facts on which the federal claim rests must be substantially the same for it to be the substantial equivalent of the properly exhausted claim." *Henderson v. Campbell*, 353 F.3d 880, 898 n.25 (11th Cir. 2003). A federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman*, 501 U.S. at 750.

Procedural default will be excused only in two narrow circumstances. First,

a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Id.* To show the requisite "prejudice" to warrant review of a procedurally defaulted claim, a petitioner must demonstrate that there is at least a reasonable probability that the result of the proceeding would have been different if the claim had been raised in the state court. *Henderson*, 353 F.3d at 892.

The second exception to the procedural default bar involves a "fundamental miscarriage of justice." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). This exception only occurs in extraordinary cases where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* "A habeas petitioner asserting actual innocence to avoid a procedural bar must show that his conviction 'probably resulted' from 'a constitutional violation.'" *Arthur v. Allen*, 452 F.3d 1234, 1245 (11th Cir. 2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Schlup, 513 U.S. at 324. "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 615 (1998).

Petitioner raised Ground Two in his Rule 3.850 Motion, and the state court found it to be procedurally barred. (Doc. 13-1 at 1555-56.) Petitioner did not raise Grounds Three, Four, Five, Seven, and Eight on direct appeal from his conviction. (*Id.* at 1084-1105.) Consequently, these grounds are procedurally barred from review absent an exception to the procedural default bar.

Petitioner concedes he did not properly raise or preserve Grounds Four and Seven in the state courts. (Doc. 12 at 9, 12-13.) To overcome his procedural default of Grounds Five and Eight, Petitioner argues that appellate counsel was ineffective for failing to raise these issues on direct appeal. (*Id.* at 10, 14.) Petitioner also argues that he raised Ground Five on appeal from the denial of his Rule 3.850 Motion. (*Id.* at 10.) Finally, Petitioner maintains that he exhausted Ground Two by raising it in his Rule 3.850 Motion and that Ground Three was denied by the state court in the order denying his Rule 3.850 Motion. (*Id.* at 8-9.)

Cause to overcome a procedural default may be established by "ineffective assistance of counsel at a stage where the petitioner had a right to counsel." *Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir. 2008) (citing *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001)). However, the ineffective assistance of counsel claim must have been "presented to the state courts as an independent claim before it may be used

to establish cause for a procedural default." *Murray*, 477 U.S. at 489. A procedurally defaulted claim of ineffective assistance of counsel cannot overcome the procedural bar of a separate claim unless the petitioner can satisfy the cause and prejudice standard with respect to the ineffective assistance of counsel claim. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Petitioner filed a state habeas petition alleging that appellate counsel was ineffective for not arguing that the trial court erred by failing to *sua sponte* strike two biased jurors for cause. (Doc. 13-1 at 1122-32.) Petitioner, however, did not argue that appellate counsel was ineffective for failing to raise Grounds Five and Eight. Further, Petitioner has not shown cause and prejudice to overcome his failure to raise these ineffective assistance of appellate counsel claims in the state court.[2]

Additionally, under Florida law, "[a]n issue not raised in a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief may not be asserted for the first time on appeal." *Tolliver v. State*, 309 So. 3d 718, 720 (Fla. 5th DCA 2021) (citing *Connor v. State*, 979 So. 2d 852, 866 (Fla. 2007)); *Harris v. Sec'y, Fla. Dep't of Corr.*, 709 F. App'x 667, 668 (11th Cir. 2018) ("A party cannot raise a new claim for

[2] To the extent Petitioner attempts to overcome his procedural default of Grounds Three, Four, and Seven based on appellate counsel's failure to raise these grounds on direct appeal, he did not raise these ineffective assistance of appellate counsel claims in his state habeas petition. Further, Petitioner has not shown cause or prejudice to excuse his failure to do so.

the first time in an appeal from a post-conviction motion in a Florida appellate court."). Petitioner, therefore, cannot demonstrate he exhausted Ground Five in the state court by raising it on appeal from the denial of his Rule 3.850 Motion.

Moreover, although Petitioner raised Ground Two in his Rule 3.850 Motion, the state court found it was procedurally barred because it could not be raised in a 3.850 proceeding. Under Florida law, "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Muhammad v. State*, 603 So. 2d 488, 489 (Fla. 1992) (citing *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983)); *see also Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001) ("A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion. . . ."). Given Florida law, this Court must abide by the state court's determination that Ground Two was procedurally barred.[3]

Finally, Petitioner did not raise Ground Three in his Rule 3.850 Motion. (Doc. 13-1 at 1177-87.) Contrary to Petitioner's argument otherwise, the state court did not deny Ground Three in the Rule 3.850 Order. *See id.* at 1556.

In sum, Petitioner has not established cause and prejudice or actual

[3] To the extent Petitioner relies on ineffective assistance of appellate counsel to establish cause and prejudice to overcome his procedural default of Ground Two, Petitioner has not established either deficient performance or prejudice as discussed *infra* in Ground Six. Consequently, he has not shown cause and prejudice to overcome the procedural bar.

innocence to overcome his procedural default of Grounds Two, Three, Four, Five, Seven, and Eight. Accordingly, these grounds are procedurally barred and denied.

C. Ground Six

Petitioner asserts appellate counsel rendered ineffective assistance by failing to raise numerous meritorious issues. (Doc. 3 at 12.) Respondent argues that this ground is insufficiently pled and procedurally barred. (Doc. 11 at 10-11.)

Petitioner does not specify what issues appellate counsel failed to raise or provide any factual basis for why appellate counsel was deficient for failing to raise those issues. "Federal habeas petitioners are. . . required to fact plead their claims." *Frazier v. Bouchard*, 661 F.3d 519, 527 n.10 (11th Cir. 2011); *see also McFarland v. Scott*, 512 U.S. 849, 856 (1994) ("Habeas corpus petitions must meet heightened pleading requirements. . . ."). Consequently, this ground is vague and conclusory.

Further, Petitioner's state habeas petition raised only one ground of ineffective assistance of appellate counsel predicated on counsel's failure to argue that the trial court erred by failing to *sua sponte* strike two biased jurors for cause. (Doc. 13-1 at 1122-32.) Thus, any additional grounds of ineffective assistance of appellate counsel Petitioner may be attempting to raise are unexhausted. Petitioner has not demonstrated cause and prejudice or actual innocence to

overcome his procedural default of these additional grounds of ineffective assistance of appellate counsel. Therefore, Ground Six is procedurally barred to the extent it is predicated on any additional claims of ineffective assistance of appellate counsel other than the one asserted in the state court.

Assuming Ground Six is the same one that was raised in the state court, Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, clearly established federal law. Petitioner insisted on representing himself despite knowing he had a hearing impairment. *See* 13-1 at 15-17, 19. The trial court allowed Petitioner to represent himself and directed the prosecutor to speak louder at Petitioner's request.[4] (*Id.*) Petitioner did not challenge either of the two purported biased jurors or object to them being on the jury.

"[A] defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel." *Behr v. Bell*, 665 So. 2d 1055, 1056-57 (Fla. 1996). Under Florida law, "'to preserve challenges for cause to prospective jurors, the defendant must 'object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible.'" *Salazar v. State*, 188

[4] From the Court's review of the record, it does not appear that Petitioner requested an accommodation for his hearing impairment other than for the prosecutor to speak louder.

So. 3d 799, 820 (Fla. 2016) (quoting *Matarranz v. State*, 133 So. 3d 473, 482 (Fla. 2013)). Appellate counsel is not deficient for failing to raise an unpreserved juror issue. *Id.* at 821. Finally, "there is no Supreme Court precedent establishing an obligation for a trial court judge to dismiss a juror for bias where no party objects." *Washington v. Thaler*, 714 F.3d 352, 355 (5th Cir. 2013)

Petitioner chose to represent himself despite having a hearing impairment. There is no indication that Petitioner notified the trial court that he was unable to hear either of the purported biased jurors' responses during *voir dire*, and he did not challenge either juror. *See* Doc. 13-1 at 136-38. Further, the jurors did not indicate that they could not be fair and impartial when asked. (*Id.* at 142-44.)

Given that the jurors were not challenged for cause and there is no constitutional requirement for a judge to *sua sponte* dismiss a purportedly biased juror, appellate counsel was not deficient for failing to raise this unpreserved issue. In addition, Petitioner has not demonstrated that prejudice resulted from appellate counsel's failure to raise the issue. *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) (To demonstrate prejudice under *Strickland*, "the defendant must demonstrate that a juror was actually biased."). Accordingly, Ground Six is denied.

Any allegations not specifically addressed lack merit.

IV. CERTIFICATE OF APPEALABILITY

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

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

denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

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

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

DONE and **ORDERED** in Orlando, Florida on November 21, 2023.

ANNE C. CONWAY
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HENRY SOWERS,

Petitioner,

v. Case No. 6:23-cv-166-ACC-LHP

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Henry Sowers' Amended Petition for Writ of Habeas Corpus ("Amended Petition," Doc. 3) filed pursuant to 28 U.S.C. § 2254. Respondent filed a Response to the Amended Petition ("Response," Doc. 11) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 12).

Petitioner asserts eight grounds. For the following reasons, the Amended Petition is denied.

I. PROCEDURAL HISTORY

A jury found Petitioner guilty as charged of sexual battery of a victim younger than twelve years of age (Count One) and lewd or lascivious molestation of a victim younger than twelve (Counts Two). (Doc. 13-1 at 493-94.) The trial

court sentenced Petitioner to life in prison on both counts. (*Id.* at 519-21.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (*Id.* at 1116.)

Petitioner filed a state petition for writ of habeas corpus. (*Id.* at 1120-33.) The Fifth DCA summarily denied the petition. (*Id.* at 1158.)

Petitioner filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (*Id.* at 1177-87.) The state court denied the motion. (*Id.* at 1555-56.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 1581.)

II. LEGAL STANDARDS

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

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

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

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the

relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

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

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

> the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). If a state judge fails to resolve the merits of a claim, however, no deference is warranted under § 2254(d)(1). *Calhoun v. Sec'y, Fla. Dep't of Corr.*, 607 F. App'x 968, 970–71 (11th Cir. 2015) (citing *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003)).

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim

lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de novo* only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

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

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

The Eleventh Circuit Court of Appeals has applied *Strickland* to ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir.

1991). "'[T]he only question under the prejudice prong of the *Strickland* test is whether there was a reasonable probability that the appellate court, [had appellate counsel not been deficient,] . . . would have granted [the petitioner] a new trial.'" *Ferrell v. Hall*, 640 F.3d 1199, 1236 (11th Cir. 2011) (quoting *Clark v. Crosby*, 335 F.3d 1303, 1312 n. 9 (11th Cir. 2003)).

III. ANALYSIS

A. Ground One

Petitioner asserts his convictions on Counts One and Two violate his right against double jeopardy. (Doc. 3 at 5.) According to Petitioner, sexual battery and lewd or lascivious molestation contain the same statutory elements and his convictions were based on the same act. (*Id.*)

Petitioner raised this ground on appeal. (Doc. 13-1 at 1087-1105.) The Fifth DCA affirmed *per curiam*.[1] (*Id.* at 1116.)

The Double Jeopardy Clause of the United States Constitution "protects against multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498 (1984). To determine whether a double jeopardy violation has occurred based on multiple convictions stemming from the same conduct, but pursuant to

[1] Respondent contends Ground One is procedurally barred because Petitioner did not raise it in the state court as a federal issue. Review of Petitioner's initial appeal brief establishes that Petitioner did rely on federal law in raising Ground One on direct appeal in the state court. *See* Doc. 13-1 at 1097-1105.

separate statutes, the Court must undertake a two-part analysis. *See Williams v. Singletary*, 78 F.3d 1510, 1513 (11th Cir. 1996). First, the Court must determine "whether there exists a clear legislative intent to impose cumulative punishments, under separate statutory provisions, for the same conduct." *Id.* If a clear indication exists of such legislative intent, the double jeopardy bar does not apply. *Id.* However, "[i]f there is no clear indication of legislative intent to impose cumulative punishments, [courts] examine the relevant statutes under the same-elements test of *Blockburger* [*v. United States*, 284 U.S. 299 (1932)]." *Id.*

Pursuant to the "same-elements" test, "if each statutory offense requires proof of an element not contained in the other, the offenses are not the 'same' and double jeopardy is no bar to cumulative punishment." *Id.* Although federal law governs the evaluation of double jeopardy claims, state law governs the interpretation of state criminal statutes. *Tarpley v. Dugger*, 841 F.2d 359, 364 (11th Cir. 1988).

In concluding that convictions for sexual battery and lewd or lascivious molestation do not violate the prohibition against double jeopardy, the Florida Supreme Court reasoned:

> Sexual battery is defined as "oral, anal, or vaginal penetration by, or union [3] with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." § 794.011(h), Fla. Stat. (2008). In contrast, lewd or lascivious molestation occurs when a person "intentionally touches in a lewd or lascivious

> manner [4] the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator [.]" § 800.04(5)(a), Fla. Stat. (2008).
>
> Although the conduct constituting capital sexual battery will as a practical matter ordinarily—if not always—also constitute lewd or lascivious molestation, the formal elements of these two crimes are quite distinct. And section 775.021(4) requires analysis based on the formal elements of the crimes. Establishing capital sexual battery—like any other sexual battery—requires proof of either penetration or oral, anal, or vaginal union with the sexual organ of another, while establishing lewd or lascivious molestation requires proof of intentional touching of the breasts, genitals, genital area, or buttocks, or the clothing covering those areas. Lewd or lascivious molestation requires proof that the touching was done with a lewd or lascivious intent, while sexual battery may be committed without any proof of a specific sensual intent. Each offense requires proof of an element that the other does not; therefore, they are "separate offenses" under section 775.021(4)(a).
>
> [3]"'Union' means contact." Fla. Std. Jury Instr. (Crim.) 11.1.
>
> [4]"The words 'lewd' and 'lascivious' mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act." Fla. Std. Jury Instr. (Crim.) 11.10(c).

Roughton v. State, 185 So. 3d 1207, 1209–10 (Fla. 2016) (footnote omitted).

The Florida Supreme Court determined that the sexual battery and lewd or lascivious conduct statutes require proof of an element not contained in the other. Review of Sections 794.011(2)(a) and 800.04(5)(a) of the Florida Statutes supports the state court's conclusion. Petitioner, therefore, has not established that the state court's denial of this ground is contrary to, or an unreasonable application of,

clearly established federal law. Accordingly, Ground One is denied under § 2254(d).

B. Grounds Two through Five and Seven and Eight

In Ground Two, Petitioner maintains that his Sixth Amendment right to an impartial jury was violated by the trial court's failure to *sua sponte* strike two jurors for cause. (Doc. 3 at 7.) In Ground Three, Petitioner asserts the trial court violated federal law by failing to provide him an accommodation for his hearing impairment. (*Id.* at 8.) Petitioner contends in Ground Four that he was deprived of due process because the trial judge was biased. (*Id.* at 10.) In Ground Five, Petitioner maintains the trial court violated his Fifth and Sixth Amendment rights by denying his motion to suppress. (*Id.* at 11.) Similarly, in Ground Seven Petitioner complains that the trial court violated his constitutional rights by admitting his statements from a custodial interrogation into evidence. (*Id.* at 13.) Finally, Petitioner contends in Ground Eight that the trial court violated his constitutional rights by denying his request for conflict-free counsel. (*Id.* at 14.) Respondent argues that these grounds are procedurally barred from review. (Doc. 11 at 9-10.)

Absent exceptional circumstances, federal courts are precluded from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–

43 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). A federal habeas court is also precluded from considering claims that are not exhausted but clearly would be barred if returned to state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (stating that if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

To satisfy the exhaustion requirement, a state petitioner must "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." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard*, 404 U.S. at 275–76) (internal quotation marks omitted). "Both the legal theory and the facts on which the federal claim rests must be substantially the same for it to be the substantial equivalent of the properly exhausted claim." *Henderson v. Campbell*, 353 F.3d 880, 898 n.25 (11th Cir. 2003). A federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman*, 501 U.S. at 750.

Procedural default will be excused only in two narrow circumstances. First,

a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Id.* To show the requisite "prejudice" to warrant review of a procedurally defaulted claim, a petitioner must demonstrate that there is at least a reasonable probability that the result of the proceeding would have been different if the claim had been raised in the state court. *Henderson*, 353 F.3d at 892.

The second exception to the procedural default bar involves a "fundamental miscarriage of justice." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). This exception only occurs in extraordinary cases where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* "A habeas petitioner asserting actual innocence to avoid a procedural bar must show that his conviction 'probably resulted' from 'a constitutional violation.'" *Arthur v. Allen*, 452 F.3d 1234, 1245 (11th Cir. 2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Schlup, 513 U.S. at 324. "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 615 (1998).

Petitioner raised Ground Two in his Rule 3.850 Motion, and the state court found it to be procedurally barred. (Doc. 13-1 at 1555-56.) Petitioner did not raise Grounds Three, Four, Five, Seven, and Eight on direct appeal from his conviction. (*Id.* at 1084-1105.) Consequently, these grounds are procedurally barred from review absent an exception to the procedural default bar.

Petitioner concedes he did not properly raise or preserve Grounds Four and Seven in the state courts. (Doc. 12 at 9, 12-13.) To overcome his procedural default of Grounds Five and Eight, Petitioner argues that appellate counsel was ineffective for failing to raise these issues on direct appeal. (*Id.* at 10, 14.) Petitioner also argues that he raised Ground Five on appeal from the denial of his Rule 3.850 Motion. (*Id.* at 10.) Finally, Petitioner maintains that he exhausted Ground Two by raising it in his Rule 3.850 Motion and that Ground Three was denied by the state court in the order denying his Rule 3.850 Motion. (*Id.* at 8-9.)

Cause to overcome a procedural default may be established by "ineffective assistance of counsel at a stage where the petitioner had a right to counsel." *Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir. 2008) (citing *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001)). However, the ineffective assistance of counsel claim must have been "presented to the state courts as an independent claim before it may be used

to establish cause for a procedural default." *Murray*, 477 U.S. at 489. A procedurally defaulted claim of ineffective assistance of counsel cannot overcome the procedural bar of a separate claim unless the petitioner can satisfy the cause and prejudice standard with respect to the ineffective assistance of counsel claim. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Petitioner filed a state habeas petition alleging that appellate counsel was ineffective for not arguing that the trial court erred by failing to *sua sponte* strike two biased jurors for cause. (Doc. 13-1 at 1122-32.) Petitioner, however, did not argue that appellate counsel was ineffective for failing to raise Grounds Five and Eight. Further, Petitioner has not shown cause and prejudice to overcome his failure to raise these ineffective assistance of appellate counsel claims in the state court.[2]

Additionally, under Florida law, "[a]n issue not raised in a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief may not be asserted for the first time on appeal." *Tolliver v. State*, 309 So. 3d 718, 720 (Fla. 5th DCA 2021) (citing *Connor v. State*, 979 So. 2d 852, 866 (Fla. 2007)); *Harris v. Sec'y, Fla. Dep't of Corr.*, 709 F. App'x 667, 668 (11th Cir. 2018) ("A party cannot raise a new claim for

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[2] To the extent Petitioner attempts to overcome his procedural default of Grounds Three, Four, and Seven based on appellate counsel's failure to raise these grounds on direct appeal, he did not raise these ineffective assistance of appellate counsel claims in his state habeas petition. Further, Petitioner has not shown cause or prejudice to excuse his failure to do so.

the first time in an appeal from a post-conviction motion in a Florida appellate court."). Petitioner, therefore, cannot demonstrate he exhausted Ground Five in the state court by raising it on appeal from the denial of his Rule 3.850 Motion.

Moreover, although Petitioner raised Ground Two in his Rule 3.850 Motion, the state court found it was procedurally barred because it could not be raised in a 3.850 proceeding. Under Florida law, "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Muhammad v. State*, 603 So. 2d 488, 489 (Fla. 1992) (citing *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983)); *see also Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001) ("A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion. . . ."). Given Florida law, this Court must abide by the state court's determination that Ground Two was procedurally barred.[3]

Finally, Petitioner did not raise Ground Three in his Rule 3.850 Motion. (Doc. 13-1 at 1177-87.) Contrary to Petitioner's argument otherwise, the state court did not deny Ground Three in the Rule 3.850 Order. *See id.* at 1556.

In sum, Petitioner has not established cause and prejudice or actual

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[3] To the extent Petitioner relies on ineffective assistance of appellate counsel to establish cause and prejudice to overcome his procedural default of Ground Two, Petitioner has not established either deficient performance or prejudice as discussed *infra* in Ground Six. Consequently, he has not shown cause and prejudice to overcome the procedural bar.

innocence to overcome his procedural default of Grounds Two, Three, Four, Five, Seven, and Eight. Accordingly, these grounds are procedurally barred and denied.

C. Ground Six

Petitioner asserts appellate counsel rendered ineffective assistance by failing to raise numerous meritorious issues. (Doc. 3 at 12.) Respondent argues that this ground is insufficiently pled and procedurally barred. (Doc. 11 at 10-11.)

Petitioner does not specify what issues appellate counsel failed to raise or provide any factual basis for why appellate counsel was deficient for failing to raise those issues. "Federal habeas petitioners are. . . required to fact plead their claims." *Frazier v. Bouchard*, 661 F.3d 519, 527 n.10 (11th Cir. 2011); *see also McFarland v. Scott*, 512 U.S. 849, 856 (1994) ("Habeas corpus petitions must meet heightened pleading requirements. . . ."). Consequently, this ground is vague and conclusory.

Further, Petitioner's state habeas petition raised only one ground of ineffective assistance of appellate counsel predicated on counsel's failure to argue that the trial court erred by failing to *sua sponte* strike two biased jurors for cause. (Doc. 13-1 at 1122-32.) Thus, any additional grounds of ineffective assistance of appellate counsel Petitioner may be attempting to raise are unexhausted. Petitioner has not demonstrated cause and prejudice or actual innocence to

overcome his procedural default of these additional grounds of ineffective assistance of appellate counsel. Therefore, Ground Six is procedurally barred to the extent it is predicated on any additional claims of ineffective assistance of appellate counsel other than the one asserted in the state court.

Assuming Ground Six is the same one that was raised in the state court, Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, clearly established federal law. Petitioner insisted on representing himself despite knowing he had a hearing impairment. *See* 13-1 at 15-17, 19. The trial court allowed Petitioner to represent himself and directed the prosecutor to speak louder at Petitioner's request.[4] (*Id.*) Petitioner did not challenge either of the two purported biased jurors or object to them being on the jury.

"[A] defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel." *Behr v. Bell*, 665 So. 2d 1055, 1056–57 (Fla. 1996). Under Florida law, "'to preserve challenges for cause to prospective jurors, the defendant must 'object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible.'" *Salazar v. State*, 188

[4] From the Court's review of the record, it does not appear that Petitioner requested an accommodation for his hearing impairment other than for the prosecutor to speak louder.

So. 3d 799, 820 (Fla. 2016) (quoting *Matarranz v. State*, 133 So. 3d 473, 482 (Fla. 2013)). Appellate counsel is not deficient for failing to raise an unpreserved juror issue. *Id.* at 821. Finally, "there is no Supreme Court precedent establishing an obligation for a trial court judge to dismiss a juror for bias where no party objects." *Washington v. Thaler*, 714 F.3d 352, 355 (5th Cir. 2013)

Petitioner chose to represent himself despite having a hearing impairment. There is no indication that Petitioner notified the trial court that he was unable to hear either of the purported biased jurors' responses during *voir dire*, and he did not challenge either juror. *See* Doc. 13-1 at 136-38. Further, the jurors did not indicate that they could not be fair and impartial when asked. (*Id.* at 142-44.)

Given that the jurors were not challenged for cause and there is no constitutional requirement for a judge to *sua sponte* dismiss a purportedly biased juror, appellate counsel was not deficient for failing to raise this unpreserved issue. In addition, Petitioner has not demonstrated that prejudice resulted from appellate counsel's failure to raise the issue. *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) (To demonstrate prejudice under *Strickland*, "the defendant must demonstrate that a juror was actually biased."). Accordingly, Ground Six is denied.

Any allegations not specifically addressed lack merit.

IV. CERTIFICATE OF APPEALABILITY

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

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

denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

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

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

DONE and **ORDERED** in Orlando, Florida on November 21, 2023.

ANNE C. CONWAY
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

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