No. 24-____

IN THE

Supreme Court of the United States

KRISTEN ELIZABETH WAGNER,

Petitioner,

v.

RICKY D. DIXON, SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit's denial of Petitioner's motion for certificate of appealability based on a single judge's assessment of the likelihood that Petitioner would succeed on merits violates this Court's established standard for certificates of appealability, under which a certificate may not be denied based on a court's belief that the applicant will not ultimately demonstrate an entitlement to relief on appeal?

PARTIES TO THE PROCEEDINGS

Kristen Elizabeth Wagner (Ms. Wagner or Petitioner) was the petitioner and appellant in the federal courts, on a petition for writ of habeas corpus under 28 U.S.C. § 2254. Respondent , the Secretary of the Florida Department of Corrections (Respondent) was the respondent in the district court and the appellee in the United States Court of Appeals for Eleventh Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

A certificate of appealability (COA), the fundamental prerequisite for a habeas corpus petitioner's exercise of the privilege to seek appellate review of an adverse decision by a district court, may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Ms. Wagner requested the issuance of a COA from the Eleventh Circuit Court of Appeals to seek review of the district court's final judgment denying her Petition for Writ of Habeas Corpus (the Petition). Ms. Wagner had sought habeas corpus relief to challenge the constitutional validity of her conviction for attempted first-degree murder of her husband during a domestic dispute, for which Ms. Wagner was sentenced to 35 years of imprisonment (including a 25-year minimum-mandatory term).

Ms. Wagner's defense at trial was that the shooting was accidental, as she was lawfully standing her ground in her own front yard and holding a weapon to defend herself against further potential violence by her husband. The Petition raised two claims, based on rulings that essentially crippled that defense: (i) the Florida state trial and appellate courts irrationally—and therefore unconstitutionally—excluded critical defense evidence that would have shown Ms. Wagner to have been suffering from Battered Spouse Syndrome (BSS), which evidence would have explained her actions at the time of the incident; and (ii) the Florida courts denied relief on Ms. Wagner's claim that her trial counsel failed to provide effective assistance by failing to object when the trial court neglected to charge the jury under Florida's Stand Your Ground law, despite having agreed—and indeed, having itself suggested—that the charge was

appropriate, such that the jury was never charged on the law governing Ms. Wagner's defense at trial.

The magistrate judge's Report and Recommendation (the Report) recommended that the first claim be denied for lack of exhaustion—specifically, that the exclusion of BSS evidence, although preserved at trial and raised on appeal in state court—was not presented on appeal as a federal constitutional question. On the second claim, the magistrate judge recommended that the claim be denied because the state appellate court, in reversing the initial grant of post-conviction relief by the state trial court, "correctly concluded" that Ms. Wagner "was under no 'imminent' threat of death, great bodily harm, or the commission of any forcible felony against herself or anyone else"—such that "counsel could not have been deficient (nor Wagner prejudiced) by counsel's failure to seek such an instruction or to object to the lack of such an instruction." App. 40a-41a.

The district court rejected Ms. Wagner's objections, adopted the recommendation, and denied the Petition. The district court also adopted the Magistrate Judge's recommendation that the court should deny a COA.

Ms. Wagner's application for a COA before the Eleventh Circuit met a similar fate. In a single-judge ruling (the COA Order), the Eleventh Circuit ruled that "reasonable jurists would not debate" the merits of the district court's rulings because: (i) "the district court properly found" that Ms. Wagner had not exhausted the claim raised in her first ground; and (ii) the state appellate court "properly reasoned that trial counsel was not deficient." App. 1a-2a.

No more striking a violation of this Court's adjuration that "a court of appeals should not decline

the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief," *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), can be demonstrated. To ensure that its clearly stated rules on COAs are applied as intended by district courts and the Courts of Appeals, this Court's intervention on certiorari is urgently needed.

OPINION BELOW

The Eleventh Circuit's February 24, 2025 Order denying Ms. Wagner a COA is unreported. It is reproduced at App. 1a. The district court's order denying Ms. Wagner's habeas corpus petition and a COA is reported at 2024 WL 4025994 and is reproduced at App. 3a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2253 states, in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

STATEMENT

I. Ms. Wagner's Habeas Corpus Claims.

a. Exclusion of defense evidence.

Ms. Wagner raised the exclusion of the BSS testimony on her direct appeal from the conviction, and Florida's First District Court of Appeal held that the testimony

was inadmissible because Ms. Wagner testified at trial that the gun had discharged accidentally as she was wielding it to protect herself against another assault by her husband. *Wagner v. State*, 240 So. 3d 795, 797-98 (Fla. 1st DCA 2017). The district court ruled that Ms. Wagner had failed to exhaust her federal claim because her state appellate counsel's brief "did not mention the Sixth and Fourteenth Amendments" and recommends that the claim be denied for failure to exhaust state remedies. App. 3a-4a. The principle upon which the district court relied is that "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 in order to find material." *Id.* at 8 (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)).

Ms. Wagner's argument for a COA was that the district court had misapplied *Baldwin*. App. 15a-20a (COA Motion). In that case, the petitioner's state-court post-conviction petition to the state supreme court challenged the representation afforded to him by both his trial counsel and his appellate counsel, but asserted federal constitutional violations only as to his trial counsel's representation. 541 U.S. at 29-30. The petition "did not say that his separate *appellate* 'ineffective assistance' claim violated *federal* law." *Id*. at 30 (original emphasis). This Court reversed the Ninth Circuit's holding that state remedies nonetheless had been exhausted because the state supreme court justices "had 'the *opportunity* to read . . . the lower . . . court decision claimed to be in error'"—and reading the lower court's decision would have revealed that the petitioner's ineffective-assistance-of-appellate counsel claim "rested upon federal law." *Id*. (citations omitted). The Court thus reversed upon a holding that

the petitioner had "failed to meet the 'fair presentation' requirement." *Id*. at 30-31. When the *Baldwin* holding is read in full to contextualize the passage upon which the district court relied, that decision's inapplicability is patent:

> We recognize that the justices of the Oregon Supreme Court did have an "opportunity" to read the lower court opinions in Reese's case. That opportunity means that the judges *could have* read them. But to say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges *must* read the lower court opinions—for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.
>
> For one thing, the requirement would force state appellate judges to alter their ordinary review practices. Appellate judges, of course, will often read lower court opinions, but they do not necessarily do so in every case. Sometimes an appellate court can decide a legal question on the basis of the briefs alone. That is particularly so where the question at issue is whether to exercise a discretionary power of review, *i.e.,* whether to review the merits of a lower court decision. In such instances, the nature of the issue may matter more than does the legal validity of the lower court decision. And the nature of the issue alone may lead the court to decide not to hear the case. Indeed, the Oregon Supreme Court

is a court with a discretionary power of review. And Oregon Rule of Appellate Procedure 9.05(7) (2003) instructs litigants seeking discretionary review to identify clearly in the petition itself the legal questions presented, why those questions have special importance, a short statement of relevant facts, and the reasons for reversal, "including appropriate authorities."

For another thing, the opinion-reading requirement would impose a serious burden upon judges of state appellate courts, particularly those with discretionary review powers. Those courts have heavy workloads, which would be significantly increased if their judges had to read through lower court opinions or briefs in every instance. See National Center for State Courts, *State Court Caseload Statistics 2002*, pp. 106–110 (Table 2) (for example, in 2001, Oregon appellate courts received a total of 5,341 appeals, including 908 petitions for discretionary review to its Supreme Court; California appellate courts received 32,273, including 8,860 discretionary Supreme Court petitions; Louisiana appellate courts received 13,117, including 3,230 discretionary Supreme Court petitions; Illinois appellate courts received 12,411, including 2,325 discretionary Supreme Court petitions).

Finally, we do not find such a requirement necessary to avoid imposing unreasonable procedural burdens upon state prisoners who may eventually seek habeas corpus. A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in

> a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."
>
> For these reasons, we believe that the requirement imposed by the Ninth Circuit would unjustifiably undercut the considerations of federal-state comity that the exhaustion requirement seeks to promote. We consequently hold that 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 in order to find material, such as a lower court opinion in the case, that does so.

541 U.S. at 31-32.

It is one thing to say, as this Court did in *Baldwin*, that essentially abandoning the federal aspects of a post-conviction claim on appellate review should have no consequences for exhaustion because appellate judges *must* review lower court decisions, and quite another to say—as the district court did here—that remedies have not been exhausted because an appellate brief cites to state law that *applies federal constitutional standards*. Indeed, *Baldwin* itself states that remedies are exhausted "by citing in conjunction with the claim the federal source of law on which [the applicant] relies *or a case deciding such a claim on federal grounds*." *Id*. at 32 (emphasis added; citation omitted).

Ms. Wagner's state appellate brief (App. 20a-21a. [D.E. 2-3:17]) relies on—and directly quotes from—

Mateo v. State, 932 So. 2d 376 (Fla. Dist. Ct. App. 2006), which decision specifically cites to federal constitutional law on the right to introduce defensive evidence:

> Florida law is clear that "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990). This principle is based, in part, on the U.S. Supreme Court's holding that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Thus, as a general proposition, any evidence that tends to support the defendant's theory of defense is admissible, and it is error to exclude it. *Dean v. State*, 916 So. 2d 962 (Fla. 4th DCA 2005); *Vannier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998).

Mateo, 932 So. 2d at 379-80. This passage is included in the state appellate brief, but with citations omitted. App. 21a.

The state appellate brief's reliance on *Mateo* thus plainly put the First District Court of Appeal on notice that Ms. Wagner's claim implicated federal constitutional principles. Ms. Wagner accordingly maintained that whether she nonetheless failed to exhaust her state remedies entitled her to a COA.

b. Ineffective assistance of trial counsel.

The district court ruled that Ms. Wagner's claim that her trial counsel was ineffective—who failed to object when the trial court neglected to include a jury charge

on Florida's Stand Your Ground defense—should be rejected because the state appellate court had "correctly concluded" that Ms. Wagner "was under no 'imminent' threat of death, great bodily harm, or the commission of any forcible felony against herself or anyone else." App. 40a-41a. Accordingly, "because the evidence did not support a stand your ground defense instruction, counsel could not have been deficient (nor Wagner prejudiced) by counsel's failure to seek such an instruction or to object to the lack of such an instruction." *Id*.

In seeking a COA, Ms. Wagner attempted to have the Eleventh Circuit see this issue in the context of her trial. The state trial court ruled that Ms. Wagner *was* entitled to a Stand Your Ground instruction because the instruction—which defense counsel *had requested*—"covers *the testimony of Ms. Wagner* in which she says . . . , in using the deadly force, although she also testified that she didn't mean to do it, it was an accidental discharge." App. 20a-21a (emphasis added). The record conclusively establishes that the final version of the jury charge—which was prepared by the prosecution—unaccountably *omitted* the Stand Your Ground instruction, and that defense counsel's failure to object to that omission was occasioned by counsel essentially having been "asleep at the switch" when the judge read the instructions to the jury.

Ms. Wagner's counsel requested that the jury be instructed on justifiable use of force pursuant to Florida Standard Jury Instructions (Criminal) 3.6(f), and the trial court agreed "[t]hat was her testimony." App. 22a. The prosecution requested that the jury be charged on justifiable use of force under Section 782.02, Florida Statutes, and the court agreed. App. 22a. The court then turned to the "Stand Your

Ground" instruction under Section 776.012(2), Florida Statutes, recognized that the Section 782.02 instruction is "less applicable factually" than the Section 776.012 instruction, and agreed to give both charges to the jury:

> Let me tell you why [Section] 776.012 makes more sense now. Because it covers the testimony of Ms. Wagner in which she says . . . , in using the deadly force, although she also testified that she didn't mean to do it, it was an accidental discharge. But the wielding of the gun to begin with. [Section] 776.012 does speak to imminent death or great bodily harm to herself or another, which would cover [Section 782.02] . . . .

App. 22a-23a.

The court ultimately ruled that *both* instructions would be given to the jury. App. 23a. The prosecutor prepared written instructions for the jury charge, which *omitted* the Stand Your Ground instruction. App. 23a. Ms. Wagner's counsel neither objected at the conclusion of the jury charge nor requested the omitted instruction be read to the jury.. The jury was provided with these incomplete instructions in writing. App. 23a.

At the post-conviction evidentiary hearing in state court, counsel testified that his defense at trial was that "Ms. Wagner brandished the firearm in self-defense discharging the firearm accidentally." App. 23a. Based on the trial court's rulings at the charge conference, counsel believed that the court would instruct the jury on "the no-duty-to-retreat portion of the stand-your-ground instruction." App. 23a. "There

was some discussion with regards to its applicability . . . in the case, and we left that charge conference with the understanding that it was going to be provided to the jury." *Id*.

Counsel reviewed the prosecution's printed instructions, "but at the time . . . did not realize . . . that portion of the stand-your-[ground] instruction was not included." App. 24a. Nor did he notice that the instruction was not ultimately read to the jury in the final charge. App. 24a. The state trial judge—the *same judge* who had presided over the trial—*granted* the post-conviction motion upon a ruling that Ms. Wagner had "demonstrated that trial counsel's performance was deficient and that she was prejudiced." App. 24a.

The state appellate court reversed the trial judge's ruling:

> The circuit court could have given a duty-to-retreat instruction only if the evidence supported it, and we find no such evidentiary predicate. That means counsel was not deficient in failing to ensure that the trial court gave the instruction. Further, because the evidence at trial did not support the giving of the retreat instruction, its omission did not prejudice [Ms. Wagner].

State v. Wagner (*Wagner II*), 353 So. 3d 94, 101 (Fla. Dist. Ct. App. 2022), *review denied*, No. SC2023-0184, 2023 WL 4670962 (Fla. July 21, 2023). The basis for the court's holding was that "no legitimate evidentiary basis existed to instruct the jury on the duty to retreat from an 'imminent' threat, since [Ms. Wagner's] husband posed no imminent threat" at the time of the shooting. *Id*. at 101-02.

On Ms. Wagner's COA motion, the dispositive question was whether the state appellate court's determination that she was not prejudiced by counsel's failure to ensure that a requested instruction was actually given to the jury, is a reasonable factual determination under Section 2254(d). The state appellate court focused myopically on the actual moment that the shooting occurred, 353 So. 3d at 101, and utterly *ignored* Ms. Wagner's testimony that she had armed herself and brandished the weapon *because* she was in reasonable fear of further violent acts by her husband. Ms. Wagner *never asserted* that she had been in fear for her life at the moment the firearm discharged—according to her testimony, accidentally; rather, she testified that the shooting occurred as she was bending down to pick up the keys that her husband had thrown across the lawn to her. As the state trial judge observed during trial, it was "the wielding of the gun to begin with" that entitled Ms. Wagner to the Stand Your Ground instruction. App. 22a. The First District's focus on the moment of the shooting led the court to anomalous conclusions, *e.g.,* "[t]here was always absolutely zero chance that her husband could outrun a bullet if he chose to advance on her," such that "[t]here was no threat." 353 So. 3d at 102. The district court adopted that ruling.

Under established Florida law, however, an *accidental* shooting that occurs after a defendant has acted to protect himself or herself from reasonably feared violence is *legitimate* self-defense, and an accidental shooting by one who lawfully is standing their ground entitles an accused to invoke the Stand Your Ground defense. *Foreman v. State*, 47 So. 2d 308, 309 (Fla. 1950) (recognizing "mixed defense of justifiable and accidental homicide—justifiable so far as the [defendant's] defense . . . against [an] assault . . . was concerned,

excusable so far as missing the [assailant] and killing another"); *Dwyer v. State*, 743 So. 2d 46, 48 n.3 (Fla. Dist. Ct. App. 1999) ("[t]he fact that [defendant] alleges he shot [victim] by accident while exercising the right of self-defense does not eliminate the 'self-defense against an aggressor' principle"); *Howard v. State*, 698 So. 2d 923, 924-25 (Fla. Dist. Ct. App. 1997) (defendant invoked battered-spouse syndrome in prosecution for manslaughter of her husband in support of defense that she had grabbed kitchen knives during a series of violent acts by her husband and had "waved the knives in front of her to shield her face as she was backed against a fence," at which point "her husband fell into her knife while lunging at her," causing his death; conviction reversed because trial court instructed only on justifiable use of deadly force, but not on justifiable use of non-deadly force); *Williams v. State*, 588 So. 2d 44, 45 (Fla. Dist. Ct. App. 1991) ("where there is evidence indicating that the accidental infliction of an injury and the defense of self defense . . . are so intertwined that the jury could reasonably find that the accident resulted from the justifiable use of force, an instruction on self defense . . . is not logically precluded"); *Mills v. State*, 490 So. 2d 204, 205 (Fla. Dist. Ct. App. 1986) ("proof that the shooting was accidental, as [defendant] maintains, does not disprove that [defendant] was acting in her own self defense"; trial court accordingly erred in refusing to instruct on self-defense). As one Florida court has stated:

> [A] critical difference exists between brandishing a gun and actually discharging it. Although brandishing a weapon does not constitute deadly force when its purpose is to threaten the use of deadly force if necessary, once the weapon is discharged, deadly force has been used. *The discharge, however, does not mean*

> *that a claim of accidental discharge is unavailable*. That remains a viable defense.

Hosnedl v. State, 126 So. 3d 400, 404-05 (Fla. Dist. Ct. App. 2013) (emphasis added; citation omitted).

This precedent is fully applicable to Florida's Stand Your Ground defense. In *Hair v. State*, 17 So. 3d 804 (Fla. Dist. Ct. App. 2009), the question was whether Stand Your Ground immunity applied to an accidental shooting while the defendant was acting in self-defense, and the state appellate court held that the trial court's ruling that Stand Your Ground did not apply because "the handgun accidentally fired while being used as a club, is erroneous as a matter of law." *Id.* at 806; *accord Reid v. State*, 213 So. 3d 1110, 1111 (Fla. Dist. Ct. App. 2017) (Stand Your Ground statute applied to shooting that occurred when defendant grabbed gun that she believed husband was about to wield at her and testified that "the firearm went off accidentally"). Under the facts set forth in her testimony, Ms. Wagner was entitled, under Florida law, to have the jury consider that she was not required to retreat from her front yard when confronting what she believed to be the threat of imminent harm.

The question whether the First District Court of Appeal's holding to the contrary was unreasonable presents a viable issue for appellate review. Her lawyer's failure to ensure that the jury was charged under Florida law "blocked consideration" of this crucial factor in the jury's deliberations, to Ms. Wagner's undeniable prejudice, and "[i]t was unreasonable for the state court to conclude otherwise." *Baer v. Neal*, 879 F.3d 769, 781 (7th Cir. 2018).

II. The Eleventh Circuit's COA Ruling.

The Eleventh Circuit tracked the district court's merits ruling in denying Ms. Wagner a COA:

> First, reasonable jurists would not debate the denial of Ground One as unexhausted in state court. Contrary to Wagner's argument, there was nothing in her direct appeal brief "clearly indicat[ing]" an intent to present Ground One as a federal claim because she primarily cited state law in arguing this claim. Thus, the district court properly found that she did not present the federal nature of this claim on direct appeal, and her claim was thus unexhausted.
>
> Second, reasonable jurists would not debate the denial of Ground Two. The First DCA properly reasoned that trial counsel was not deficient, nor was exclusion of the jury instruction prejudicial, because there was no evidence that this was a case that involved the stand your ground doctrine. Specifically, Wagner did not argue or present evidence at trial regarding her need to retreat or that she was standing her ground at the time of the incident, as she specifically argued that she accidentally shot her husband, who was unarmed, when she bent down to grab her keys.

App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's COA Order Conflicts with This Court's Precedent on COA Standards.

This Court has repeatedly emphasized that the COA standards *do not include* a determination whether the applicant will succeed on the merits of the claim that is sought to be raised on appeal from an order denying habeas corpus relief. The Courts of Appeal are to look to the district court's ruling "and ask whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Critically, this Court declared:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Id. at 336-37; *accord Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

In *Buck v. Davis*, 580 U.S. 100, 121 (2017), this Court applied the Section 2253(c)(2) standards to a thwarted appeal by a habeas petitioner from an order denying relief under Federal Rule of Civil Procedure 60(b)(6). Because the Rule 60(b)(6) ruling "would be reviewed for abuse of discretion during a merits appeal . . . the COA question is therefore whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Id*. at 122-23. That is *not* the same thing as determining entitlement to a COA based on whether the court

believes the applicant should prevail on appeal: the court must "limit its examination . . . to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Id*. at 1116 (quoting *Miller–El,* 537 U.S. at 327, 348). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. at 117 (quoting *Miller–El,* 537 U.S. at 338).

The Court continued:

> The dissent does not accept this established rule, arguing that a reviewing court that deems a claim nondebatable "must necessarily conclude that the claim is meritless." *Post,* at 781 (opinion of THOMAS, J.). Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court . . . inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337. *Miller–El* flatly prohibits such a

> departure from the procedure prescribed by § 2253. *Ibid.*

Buck, 580 U.S. at 116-17 (original emphasis).

Those words could have been written about the Eleventh Circuit's ruling on Ms. Wagner's entitlement to a COA—like the Court of Appeals in *Buck*, the Eleventh Circuit "invert[ed] the statutory order of operations." The court denied a COA on Ms. Wagner's first claim upon a ruling that "the district court properly found that she did not present the federal nature of this claim on direct appeal, *and her claim was thus unexhausted*." (App. 1a-2a (emphasis added)). And, addressing Ms. Wagner's ineffectiveness-of-counsel claim, the court did the same thing: "trial counsel was not deficient, nor was exclusion of the jury instruction prejudicial, because there was no evidence that this was a case that involved the stand your ground doctrine." *Id*. On the face of the COA Order, the Eleventh Circuit plainly ruled that Ms. Wagner would not succeed on her appeal, and therefore denied a COA. That approach flagrantly violates the proper analytical approach set forth by this Court. A single judge of the Eleventh Circuit essentially adjudicated the merits of Ms. Wagner's appeal in the guise of ruling on a COA motion.

The Courts of Appeals generally have properly applied this Court's precedent. *E.g.*, *Williamson v. Wyoming Dep't of Corr. Wyoming State Penitentiary Warden*, No. 24-8015, 2025 WL 209880, at *7 (10th Cir. Jan. 16, 2025); *Brewer v. Lumpkin*, 66 F.4th 558, 562 (5th Cir. 2023), *cert. denied,* 144 S. Ct. 354 (2023); *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 283-84 (3d Cir. 2021); *Feliciano-Rodriguez v. United States*, 986 F.3d 30, 36 (1st Cir. 2021). So too has the Eleventh Circuit. *Barksdale v. Attorney Gen.*, No. 20-

10993, 2022 WL 22913236, at *1 (11th Cir. Sept. 7, 2022). But some COA orders' treatment of the merits have veered close to this Court's line of demarcation. *E.g.*, *Ahmed v. Shoop*, No. 21-3542, 2024 WL 5125984, at *2-3 (6th Cir. Nov. 5, 2024) (basing denial of COA on merits determination); *United States v. Scales*, No. 24-1779, 2024 WL 4635244, at *1 (3d Cir. Sept. 30, 2024) ("for the reasons given in the District Court's . . . memorandum opinion, there is indisputably no merit to Scales's claims . . . [w]e thus deny Scales's request for a [COA]").

Here, the Eleventh Circuit indisputably crossed that line. This Court's intervention is sought to protect Ms. Wagner's entitlement to appellate review of the order denying her habeas petition—and to ensure that the principles set forth in *Miller-El* and *Buck* are fully and fairly enforced.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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May 23, 2025

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-13079

KRISTEN ELIZABETH WAGNER,

Petitioner-Appellant,

v.

SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:23-cv-23972-LC-HTC

ORDER

Kristen Wagner is a Florida prisoner serving 35 years' imprisonment for the attempted first-degree murder of her husband. She moves this Court for a certificate of appealability ("COA"), to appeal the denial of her 28 U.S.C. § 2254 petition, which asserted two grounds: (1) the First District Court of Appeals ("First DCA") erred when it found that the state trial court properly had excluded evidence involving her defense of battered spouse syndrome; and (2) trial counsel was ineffective for failing to ensure that the jury received a stand your ground instruction.

To obtain a COA, Wagner must show that "reasonable jurists would find the district court's

assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

First, reasonable jurists would not debate the denial of Ground One as unexhausted in state court. *See id.* Contrary to Wagner's argument, there was nothing in her direct appeal brief "clearly indicat[ing]" an intent to present Ground One as a federal claim because she primarily cited state law in arguing this claim. Thus, the district court properly found that she did not present the federal nature of this claim on direct appeal, and her claim was thus unexhausted. *See Duncan v. Henry,* 513 U.S. 365, 365-66 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.").

Second, reasonable jurists would not debate the denial of Ground Two. The First DCA properly reasoned that trial counsel was not deficient, nor was exclusion of the jury instruction prejudicial, because there was no evidence that this was a case that involved the stand your ground doctrine, Specifically, Wagner did not argue or present evidence at trial regarding her need to retreat or that she was standing her ground at the time of the incident, as she specifically argued that she accidentally shot her husband, who was unarmed, when she bent down to grab her keys.

Accordingly, Wagner's motion for COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:23cv23972-LC-HTC

KRISTEN ELIZABETH WAGNER,

Petitioner,

v.

RICKY D. DIXON,

Respondent.

ORDER

The magistrate judge issued a Report and Recommendation on August 14, 2024 (ECF No. 12) recommending Petitioner's habeas petition (ECF No. 1) be denied without an evidentiary hearing. Petitioner was furnished a copy of the Report and Recommendation and afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1).

Having considered the Report and Recommendation and conducted a *de novo* review of the timely filed objections thereto, I have determined the Report and Recommendation should be adopted.

Accordingly, it is ORDERED:

1. The magistrate judge's Report and Recommendation (ECF No. 12) is adopted and incorporated by reference in this order.

2. The petition under 28 U.S.C. § 2254 (ECF Doc. 1) is DENIED.

3. A certificate of appealability is DENIED.

4. The clerk shall close the file.

DONE AND ORDERED this 3rd day of September, 2024.

/s/ L.A. Collier
LACEY A. COLLIER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

———

Case No. 24-13079-D

U.S.D.C. NO. 23-CV-23972-LC-HTC

———

KRISTEN ELIZABETH WAGNER,

Petitioner-Appellant,

vs.

RICKY D. DIXON, SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

———

PETITIONER'S APPLICATION
FOR CERTIFICATE OF APPEALABILITY

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Pro Bono Counsel for Petitioner-Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Petitioner submits this list, which includes all trial and magistrate judges, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this case:

1. Cannon, Honorable Hope Thai – U.S. Magistrate Judge
2. Clemente, Katherine M. – Counsel for Petitioner
3. Collier, Honorable Lacey A. – Senior US District Judge
4. Dixon, Ricky D. – Respondent-Appellee
5. McDermott, Michael – Senior Assistant Attorney General, Counsel for Respondent
6. Moody, Ashley – Attorney General, Counsel for Respondent
7. Scherker, Elliot H. – Counsel for Petitioner
8. Wagner, Kristen Elizabeth – Petitioner-Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, Respondent makes the following statement as to corporate ownership:

Respondent is an individual and does not have any parent corporation.

/s/ *Elliot H. Scherker*
Elliot H. Scherker

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

INTRODUCTION

Petitioner-Appellant, Kristen Elizabeth Wagner, pursuant to 28 U.S.C. § 2253(c)(2), requests the issuance of a Certificate of Appealability ("COA") to allow this Court to hear her appeal from the district court's September 3, 2024 Judgment (the "Judgment") denying Ms. Wagner's Petition for Writ of Habeas Corpus (the "Petition"). Ms. Wagner sought habeas corpus relief to challenge the constitutional validity of her conviction for attempted first-degree murder of her husband, for which Ms. Wagner was sentenced to 35 years of imprisonment (including a 25-year minimum-mandatory term).

The conviction arose from a domestic dispute between Ms. Wagner and her husband. Ms. Wagner's defense at trial was that the shooting that gave rise to the charge was committed accidentally, as she was lawfully standing her ground in her own front yard and holding a weapon to defend herself against further potential violence by her husband.

The Petition raised two claims: (i) the Florida state trial and appellate courts irrationally—and therefore unconstitutionally—excluded critical defense evidence that would have shown Ms. Wagner to have been suffering from Battered Spouse Syndrome ("BSS"), which evidence would have explained her actions at the time of the incident; and (ii) trial counsel denied Ms. Wagner effective assistance by failing to object when the trial court neglected to charge the jury under Florida's Stand Your Ground law, despite having agreed—and indeed, having itself suggested—that the charge was appropriate, such that the jury was never charged on the law governing Ms. Wagner's defense at trial. The Magistrate Judge's Report and Recommendation (the "Report")

recommended that the first claim be denied for lack of exhaustion specifically, that the exclusion of BSS evidence, although preserved at trial and raised on appeal in state court—was not presented on appeal as a federal constitutional question. On the second claim, the Magistrate Judge recommended that the claim be denied because the state appellate court, in reversing the grant of post-conviction relief by the state trial court, "correctly concluded" that Ms. Wagner "was under no 'imminent' threat of death, great bodily harm, or the commission of any forcible felony against herself or anyone else"—such that "counsel could not have been deficient (nor Wagner prejudiced) by counsel's failure to seek such an instruction or to object to the lack of such an instruction." Report (D.E.12) at 10-11.

Ms. Wagner timely objected to the Magistrate Judge's recommendations. The district court rejected the objections, adopted the recommendation, and entered its Judgment denying the Petition. The district court also adopted the Magistrate Judge's recommendation that the court should deny a COA. Ms. Wagner submits that this Court should issue a COA on both of her denied claims.

First, the district court's ruling that Ms. Wagner's Sixth and Fourteenth Amendment claim, arising from the trial court's exclusion of BSS evidence and the state appellate court's ruling on that exclusion, be denied for failure to exhaust (Report at 7-9), is legally unsustainable. Far from presenting the state appellate court with "makeshift needles in the haystack" or "[o]blique references" (Report at 7-8), Ms. Wagner's state appellate counsel plainly put the First District Court of Appeal on notice that Ms. Wagner's claim

implicated both state-law *and* federal constitutional principles.

Second, the ruling that Ms. Wagner's ineffectiveness-of-counsel claim be denied because the state appellate court reasonably determined that there was no basis for the Stand Your Ground instruction that the trial judge omitted from his jury charge perpetuates the state court's unreasonable determination of the facts. The state trial judge ruled that Ms. Wagner *was entitled* to the Stand Your Ground instruction and, when the trial judge's jury charge omitted that instruction, Ms. Wagner's trial counsel failed to object or request the trial judge to augment his jury charge with the omitted instruction. In post-conviction proceedings, the state trial judge ruled that these omissions constituted prejudicial ineffective assistance of counsel. The state appellate court's decision, which failed even to note the trial judge's ruling on Ms. Wagner's entitlement to the omitted jury charge, unreasonably determined that there was no basis for the charge in the first instance.

STANDARD OF REVIEW

To obtain a COA, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA inquiry" under 28 U.S.C. § 2253(c)(2) "is not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. 100, 115 (2017). Rather, "[a]t the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (citation and internal quotation marks omitted). "This threshold question should be decided without

full consideration of the factual or legal bases adduced in support of the claims." *Id*. (citation and internal quotation marks omitted); *accord Lambrix v. Sec'y, DOC*, 872 F.3d 1170, 1179 (11th Cir. 2017).

"This Court limits its examination at the COA stage to a threshold inquiry into the underlying merit of the claims and asks only whether the district court's decision was debatable." *Whipple v. Fla. Dep't of Corr.*, No. 16-16581-E, 2017 WL 11637289, at *2 (11th Cir. Oct. 25, 2017). While a 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); *accord Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1236 (11th Cir. 2015), the petitioner is not required to show ultimate appellate success. *Miller–El v. Cockrell*, 537 U.S. 322, 337 (2003). As this Court has said, "when we consider an application for a COA, '[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate,' . . . and we 'should not decline the application for a COA merely because [we] believe[] the applicant will not demonstrate an entitlement to relief.'" *Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (quoting *Miller*, 537 U.S. at 337, 342; alterations in original); *accord Barksdale v. Att'y Gen. Ala.*, No. 20-10993-P, 2020 WL 9256555, at *3 (11th Cir. June 29, 2020).

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF PETITIONER'S CLAIM THAT THE EXCLUSION OF BATTERED SPOUSE SYNDROME EVIDENCE VIOLATED HER FEDERAL CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AT TRIAL UPON A RULING THAT PETITIONER FAILED TO EXHAUST THE CLAIM PRESENTS A VIABLE APPELLATE ISSUE THAT WARRANTS ISSUANCE OF A CERTIFICATE OF APPEALABILITY.

Ms. Wagner raised the exclusion of the BSS testimony on her direct appeal from the conviction, and Florida's First District Court of Appeal held that the testimony was inadmissible because Ms. Wagner testified at trial that the gun had discharged accidentally as she was wielding it to protect herself against another assault by her husband. Report at 3, 8. The district court adopted the Report's recommendation that the claim be denied for lack of exhaustion because Ms. Wagner's state appellate counsel's brief "did not mention the Sixth and Fourteenth Amendments" and recommends that the claim be denied for failure to exhaust state remedies. *Id*. at 8-9. The principle upon which the district court relied is that "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 in order to find material." *Id.* at 8 (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)).

The district court misapplied *Baldwin*. In that case, the petitioner's state-court post-conviction petition to the state supreme court challenged the

representation afforded to him by both his trial counsel and his appellate counsel, but asserted federal constitutional violations only as to his trial counsel's representation. 541 U.S. at 29-30. The petition "did not say that his separate *appellate* 'ineffective assistance' claim violated *federal* law." *Id*. at 30 (original emphasis). The United States Supreme Court reversed the Ninth Circuit's holding that state remedies nonetheless had been exhausted because the state supreme court justices "had 'the *opportunity* to read . . . the lower . . . court decision claimed to be in error'"—and reading the lower court's decision would have revealed that the petitioner's ineffective-assistance-of-appellate counsel claim "rested upon federal law." *Id*. (citations omitted). The Court thus reversed upon a holding that the petitioner had "failed to meet the 'fair presentation' requirement." *Id*. at 30-31.

When the *Baldwin* holding is read full to contextualize the passage upon which the district court relied, that decision's inapplicability is patent:

> We recognize that the justices of the Oregon Supreme Court did have an "opportunity" to read the lower court opinions in Reese's case. That opportunity means that the judges *could have* read them. But to say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges *must* read the lower court opinions—for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.

For one thing, the requirement would force state appellate judges to alter their ordinary review practices. Appellate judges, of course, will often read lower court opinions, but they do not necessarily do so in every case. Sometimes an appellate court can decide a legal question on the basis of the briefs alone. That is particularly so where the question at issue is whether to exercise a discretionary power of review, *i.e.,* whether to review the merits of a lower court decision. In such instances, the nature of the issue may matter more than does the legal validity of the lower court decision. And the nature of the issue alone may lead the court to decide not to hear the case. Indeed, the Oregon Supreme Court is a court with a discretionary power of review. And Oregon Rule of Appellate Procedure 9.05(7) (2003) instructs litigants seeking discretionary review to identify clearly in the petition itself the legal questions presented, why those questions have special importance, a short statement of relevant facts, and the reasons for reversal, "including appropriate authorities."

For another thing, the opinion-reading requirement would impose a serious burden upon judges of state appellate courts, particularly those with discretionary review powers. Those courts have heavy workloads, which would be significantly increased if their judges had to read through lower court opinions or briefs in every instance. See National Center for State Courts, State Court Caseload Statistics 2002, pp. 106–110

(Table 2) (for example, in 2001, Oregon appellate courts received a total of 5,341 appeals, including 908 petitions for discretionary review to its Supreme Court; California appellate courts received 32,273, including 8,860 discretionary Supreme Court petitions; Louisiana appellate courts received 13,117, including 3,230 discretionary Supreme Court petitions; Illinois appellate courts received 12,411, including 2,325 discretionary Supreme Court petitions).

Finally, we do not find such a requirement necessary to avoid imposing unreasonable procedural burdens upon state prisoners who may eventually seek habeas corpus. A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

For these reasons, we believe that the requirement imposed by the Ninth Circuit would unjustifiably undercut the considerations of federal-state comity that the exhaustion requirement seeks to promote. We consequently hold that 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 in order to find material, such as a lower court opinion in the case, that does so.

541 U.S. at 31-32.

It is one thing to say, as the Court did in *Baldwin*, that essentially abandoning the federal aspects of a post-conviction claim on appellate review should have no consequences for exhaustion because appellate judges *must* review lower court decisions, and quite another to say—as the district court did here—that remedies have not been exhausted because an appellate brief cites to state law that *applies federal constitutional standards*. Indeed, *Baldwin* itself states that remedies are exhausted "by citing in conjunction with the claim the federal source of law on which [the applicant] relies *or a case deciding such a claim on federal grounds*." *Id*. at 32 (emphasis added); *accord Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 457 (11th Cir. 2015). "[A] petitioner need not use magic words or talismanic phrases to present his federal claim to the state courts" and "is *not* required to cite 'book and verse on the federal constitution.'" *Preston*, 785 F.3d at 457 (emphasis added; citation omitted).

To be sure, as the Magistrate noted (Report at 7-8), "[t]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record." *McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005) (citation and internal quotation marks omitted). But that is an unfair charge to level at Ms. Wagner: the question here devolves to whether Ms. Wagner's state appellate counsel—who undisputedly challenged the exclusion of the BSS evidence on direct appeal—fairly presented that claim as one of federal constitutional dimension. The controlling authority on this question (which the district court failed to acknowledge) is that where a state appellate court does not "specifi-

cally address . . . [a] claim in federal constitutional terms," a habeas court "must look to [petitioner's] state court briefs to determine whether [petitioner] mentioned 'the federal source of law on which he relies *or a case deciding such a claim on federal grounds*, or . . . label[ed] the claim 'federal.'" *Lucas v. Sec'y, Dep't of Corrs.*, 682 F.3d 1342, 1352 (11th Cir. 2012) (quoting *Baldwin*, 541 U.S. at 32).

Ms. Wagner's state appellate brief (D.E. 2-3:17) relies on—and directly quotes from—*Mateo v. State*, 932 So. 2d 376 (Fla. Dist. Ct. App. 2006), which decision specifically cites to federal constitutional law on the right to introduce defensive evidence:

> Florida law is clear that "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990). This principle is based, in part, on the U.S. Supreme Court's holding that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Thus, as a general proposition, any evidence that tends to support the defendant's theory of defense is admissible, and it is error to exclude it. *Dean v. State*, 916 So. 2d 962 (Fla. 4th DCA 2005); *Pannier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998).

Mateo, 932 So. 2d at 379-80.[1]

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[1] The passage set forth in the text is included in the state appellate brief, but with citations omitted. (D.E. 2-3:17).

The state appellate brief's reliance on *Mateo* thus plainly put the First District Court of Appeal on notice that Ms. Wagner's claim implicated federal constitutional principles. *Morris v. Buss*, 776 F. Supp. 2d 1293, 1304 (N.D. Fla. 2011) (petitioner's reliance on state appellate decision that "may be reasonably characterized as 'a case deciding [a lack of representation] claim on federal grounds'" was fairly sufficient to present federal constitutional claim to state court). The question whether Ms. Wagner nonetheless failed to exhaust her state remedies entitles her to a COA.

II. THE DISTRICT COURT'S RULING THAT PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL PRESENTS A VIABLE APPELLATE ISSUE ON WHETHER THE STATE APPELLATE COURT'S RULING THAT PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL IS BASED ON AN UNREASONABLE DE-TERMINATION OF THE FACTS.

The district court adopted the Report's recommendation on Ms. Wagner's claim that her trial counsel—who failed to object when the trial court neglected to include a jury charge on Florida's Stand Your Ground defense because the First District "correctly concluded" that Ms. Wagner "was under no 'imminent' threat of death, great bodily harm, or the commission of any forcible felony against herself or anyone else"—was ineffective. Report at 10-11. Accordingly, "because the evidence did not support a stand your ground defense instruction, counsel could not have been deficient (nor Wagner prejudiced) by counsel's failure to seek such an instruction or to object to the lack of such an instruction." *Id*. at 11.

To place this issue in proper context, the Court should begin with the state trial court's ruling at trial that Ms. Wagner *was* entitled to a Stand Your Ground instruction because the instruction—which defense counsel *had requested*—"covers *the testimony of Ms. Wagner* in which she says . . . , in using the deadly force, although she also testified that she didn't mean to do it, it was an accidental discharge." (T:614-15 (emphasis added)).[2] The record conclusively establishes that the final version of the jury charge—which was prepared by the prosecution unaccountably *omitted* the Stand Your Ground instruction, and that defense counsel's failure to object to that omission was occasioned by counsel essentially having been "asleep at the switch" when the judge read the instructions to the jury.

Ms. Wagner's counsel requested that the jury be instructed on justifiable use of force pursuant to Florida Standard Jury Instruction (Criminal) 3.6(f), and the trial court agreed "[t]hat was her testimony." (T:603-04). The prosecution requested that the jury be charged on justifiable use of force under Section 782.02, Florida Statutes, and the court agreed. (T:604-05).

The court then turned to the "Stand Your Ground" instruction under Section 776.012(2), Florida Statutes. (T:606). After initially suggesting that the instruction was inapplicable (T:607), the trial court recognized that the Section 782.02 instruction is "less applicable factually" than the Section 776.012

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[2] Part 1 of the appendix to the Petition (D.E.2-1) is the state record on appeal, which will be referred to with the symbol "R." The symbol "T" will be used to designate the trial transcript, which was submitted as Part 2 of the Appendix to the Petition. (D.E. 2-2).

instruction, and agreed to give both charges to the jury. (T:613-14). The court explained:

> Let me tell you why [Section] 776.012 makes more sense now. Because it covers the testimony of Ms. Wagner in which she says . . . , in using the deadly force, although she also testified that she didn't mean to do it, it was an accidental discharge. But the wielding of the gun to begin with. [Section] 776.012 does speak to imminent death or great bodily harm to herself or another, which would cover [Section 782.02] . . . .

(T:614-15).

The court ultimately ruled that *both* instructions would be given to the jury. (T:621-22). The prosecutor prepared written instructions for the jury charge, which *omitted* the Stand Your Ground instruction. (R:773-88, 1022-23; T:621-22, 732-33). Ms. Wagner's counsel neither objected at the conclusion of the jury charge nor requested the omitted instruction be read to the jury. (T:744-45). The jury was provided with these incomplete instructions in writing. (T:745; R:785). At the post-conviction evidentiary hearing in state court, counsel testified that his defense at trial was that "Ms. Wagner brandished the firearm in self-defense discharging the firearm accidentally." (R:1021). Based on the trial court's rulings at the charge conference, counsel believed that the court would instruct the jury on "the no-duty-to-retreat portion of the stand-your-ground instruction." (R:1022). "There was some discussion with regards to its applicability . . . in the case, and we left that charge conference with the understanding that it was going to be provided to the jury." (R:1022).

Counsel reviewed the prosecution's printed instructions, "but at the time . . . did not realize . . . that portion of the stand-your-[ground] instruction was not included." (R:1023). Nor did he notice that the instruction was not ultimately read to the jury in the final charge. (R:1022). The state trial judge—the *same judge* who had presided over the trial—*granted* the post-conviction motion upon a ruling that Ms. Wagner had "demonstrated that trial counsel's performance was deficient and that she was prejudiced." (R:1036).

> The First District's reversal rejected the trial judge's ruling:
>
> > The circuit court could have given a duty-to-retreat instruction only if the evidence supported it, and we find no such evidentiary predicate. That means counsel was not deficient in failing to ensure that the trial court gave the instruction. Further, because the evidence at trial did not support the giving of the retreat instruction, its omission did not prejudice [Ms. Wagner].

State v. Wagner (*Wagner II*), 353 So. 3d 94, 101 (Fla. Dist. Ct. App. 2022*), review denied*, No. SC2023-0184, 2023 WL 4670962 (Fla. July 21, 2023). The basis for the court's holding was that "no legitimate evidentiary basis existed to instruct the jury on the duty to retreat from an 'imminent' threat, since [Ms. Wagner's] husband posed no imminent threat" at the time of the shooting. *Id*. at 101-02.

The dispositive question is whether the state appellate court's determination that Ms. Wagner was not prejudiced by counsel's failure to ensure that a requested instruction was actually given to the jury,

is a reasonable factual determination under Section 2254(d). *See, e.g.*, *Jennings v. Sec'y, Fla. Dep't of Corr.*, 55 F.4th 1277, 1293-94 (11th Cir. 2022). The district court adopted the First District's analysis, and incorrectly so.

The state appellate court focused myopically on the actual moment that the shooting occurred, *Wagner II*, 353 So. 3d at 101, and utterly *ignored* Ms. Wagner's testimony that she had armed herself and brandished the weapon *because* she was in reasonable fear of further violent acts by her husband. *Wagner v. State* (*Wagner I*), 240 So. 3d 795, 796 (Fla. Dist. Ct. App. 2017). Ms. Wagner *never asserted* that she had been in fear for her life at the moment the firearm discharged—according to her testimony, accidentally; rather, she testified that the shooting occurred as she was bending down to pick up the keys that her husband had thrown across the lawn to her. *Id*. As the state trial judge observed during trial, it was "the wielding of the gun to begin with" that entitled Ms. Wagner to the Stand Your Ground instruction. (T:614-15). The First District's focus on the moment of the shooting led the court to anomalous conclusions, *e.g.,* "[t]here was always absolutely zero chance that her husband could outrun a bullet if he chose to advance on her," such that "[t]here was no threat." *Wagner II*, 353 So. 3d at 102.

Under established Florida law, an *accidental* shooting that occurs after a defendant has acted to protect himself or herself from reasonably feared violence is *legitimate* self-defense, and an accidental shooting by one who lawfully is standing their ground entitles an accused to invoke the Stand Your Ground defense. *Foreman v. State*, 47 So. 2d 308, 309 (Fla. 1950) (recognizing "mixed defense of justifiable

and accidental homicide—justifiable so far as the [defendant's] defense . . . against [an] assault . . . was concerned, excusable so far as missing the [assailant] and killing another"); *Dwyer v. State*, 743 So. 2d 46, 48 n.3 (Fla. Dist. Ct. App. 1999) ("[t]he fact that [defendant] alleges he shot [victim] by accident while exercising the right of self-defense does not eliminate the 'self-defense against an aggressor' principle"); *Howard v. State*, 698 So. 2d 923, 924-25 (Fla. Dist. Ct. App. 1997) (defendant invoked battered-spouse syndrome in prosecution for manslaughter of her husband in support of defense that she had grabbed kitchen knives during a series of violent acts by her husband and had "waved the knives in front of her to shield her face as she was backed against a fence," at which point "her husband fell into her knife while lunging at her," causing his death; conviction reversed because trial court instructed only on justifiable use of deadly force, but not on justifiable use of non-deadly force); *Williams v. State*, 588 So. 2d 44, 45 (Fla. Dist. Ct. App. 1991) ("where there is evidence indicating that the accidental infliction of an injury and the defense of self defense . . . are so intertwined that the jury could reasonably find that the accident resulted from the justifiable use of force, an instruction on self defense . . . is not logically precluded"); *Mills v. State*, 490 So. 2d 204, 205 (Fla. Dist. Ct. App. 1986) ("proof that the shooting was accidental, as [defendant] maintains, does not disprove that [defendant] was acting in her own self defense"; trial court accordingly erred in refusing to instruct on self-defense). As one Florida court has stated:

> [A] critical difference exists between brandishing a gun and actually discharging it. Although brandishing a weapon does not

> constitute deadly force when its purpose is to threaten the use of deadly force if necessary, once the weapon is discharged, deadly force has been used. *The discharge, however, does not mean that a claim of accidental discharge is unavailable*. That remains a viable defense.

Hosnedl v. State, 126 So. 3d 400, 404-05 (Fla. Dist. Ct. App. 2013) (emphasis added; citation omitted).

This precedent is fully applicable to Florida's Stand Your Ground defense. In *Hair v. State*, 17 So. 3d 804 (Fla. Dist. Ct. App. 2009), the question was whether Stand Your Ground immunity applied to an accidental shooting while the defendant was acting in self-defense, and the state appellate court held that the trial court's ruling that Stand Your Ground did not apply because "the handgun accidentally fired while being used as a club, is erroneous as a matter of law." *Id.* at 806; *accord Reid v. State*, 213 So. 3d 1110, 1111 (Fla. Dist. Ct. App. 2017) (Stand Your Ground statute applied to shooting that occurred when defendant grabbed gun that she believed husband was about to wield at her and testified that "the firearm went off accidentally"). Under the facts set forth in her testimony, Ms. Wagner was entitled, under Florida law, to have the jury consider that she was not required to retreat from her front yard when confronting what she believed to be the threat of imminent harm.

The question whether the First District Court of Appeal's holding to the contrary was unreasonable presents a viable issue for appellate review, entitling Ms. Wagner to a COA. Her lawyer's failure to ensure that the jury was charged under Florida law "blocked consideration" of this crucial factor in the jury's

deliberations, to Ms. Wagner's undeniable prejudice, and "[i]t was unreasonable for the state court to conclude otherwise." *Baer v. Neal*, 879 F.3d 769, 781 (7th Cir. 2018).

CONCLUSION

Ms. Wagner requests the Court to grant a Certificate of Appealability.

Respectfully submitted,

By: /s/ *Elliot H. Scherker*
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Pro Bono Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this application conforms to the word-count limits set forth in Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure and Rule 32-4 of the Rules of this Court, in that it contains 4,507 words according to the word-count feature of Microsoft Word.

/s/ *Elliot H. Scherker*
Elliot H. Scherker

CERTIFICATE OF SERVICE

I certify that on October 7, 2024, I electronically filed the foregoing Petitioner's Application for Certificate of Appealability with the Clerk of Court using the CM/ECF and that the foregoing document is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ *Elliot H. Scherker*
Elliot H. Scherker

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:23cv23972-LC-HTC

KRISTEN ELIZABETH WAGNER,

Petitioner,

v.

RICKY D. DIXON,

Respondent.

REPORT AND RECOMMENDATION

Kristen Elizabeth Wagner, through counsel, filed a petition under 28 U.S.C. § 2254 raising two grounds challenging her conviction in Okaloosa County Circuit Court Case 2014 CF 1697. Doc. 1. After considering the petition, Wagner's memorandum, Doc. 2, the record, the Secretary's response, Doc. 9, and Wagner's reply, Doc. 11, the undersigned finds the petition should be DENIED without an evidentiary hearing.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

Wagner was charged and found guilty of the attempted murder with a firearm of her then-husband, Ricky Wagner, after a heated argument turned violent. The following statement of facts is taken from the First District Court of Appeals' ("First

DCA") written opinion affirming Wagner's conviction on direct appeal. *Wagner v. State*, 240 So. 3d 795 (Fla. 1st DCA 2017).

On the night of July 26, 2014, Wagner and her husband got into an argument. Wagner had been drinking (she said she had two rum-and-cokes; he said she had as many as five), and the husband claimed that she was the aggressor. However, the husband admitted that during the argument, he held Wagner down on the bed, pushed her to the floor, and threw her cell phone against the wall.

After the husband's son intervened in the argument, Wagner left the house and went across the street to a neighbor's house. When the neighbor did not answer the door, Wagner returned to her house and demanded her keys from her husband, who was standing on the front porch about 25 to 30 feet away from Wagner. Wagner's husband told her to come get the keys, but she pulled a gun (a Ruger .380– caliber semi-automatic pistol with a laser sight) from her shorts, pointed it at the husband, and told him to throw her the keys. The husband underhand-tossed the keys towards Wagner and they landed 3 to 4 feet in front of her. He then turned around and closed the glass front door behind him as he went back inside the house.

Then, according to Wagner's testimony, as she bent down to pick up the keys with her left hand, the gun that she was holding in her right hand accidentally discharged. She could not remember if her finger was on the trigger, but she testified that she "absolutely [did] not" intentionally pull the trigger and that she was not aiming at anything when the gun went off. The bullet went through the glass front door and struck her husband in the lower back. Her husband

made it to their son's room where he collapsed on the floor and told the son to lock the door and call 911.

Meanwhile, Wagner retrieved the keys and went to her car. She put the gun in the center console of the car, but she did not immediately leave. Instead, she returned to the house (without the gun) to look for her glasses, wallet, and phone. When she was unable to find these items, she took her husband's phone and wallet from the master bedroom. Then, she left the house and drove away in her car. She was apprehended by the police a short time later.

B. Procedural History

The State charged Wagner in a one-count information with first degree attempted murder with a firearm, Doc. 10-2 at 142, and after the jury found her guilty, Doc. 10-5 at 102, the trial court sentenced Wagner to 35 years in prison with a 25–year mandatory minimum based on the jury's finding that she discharged a firearm and caused great bodily harm to the husband. Doc. 10-5 at 150.

Wagner filed a timely direct appeal, which resulted in a written opinion affirming her conviction. In its written opinion, the First DCA addressed only one issue – Wagner's argument that the trial court erred in striking her notice of intent to rely on battered spouse syndrome ("BSS") evidence at trial and precluding the admission of such evidence. *Wagner v. State*, 240 So. 3d 795 (Fla. 1st DCA 2017). As will be discussed below, Ground One of the petition is premised on this alleged trial court error.

Wagner also filed a Motion for Postconviction Relief. Doc. 10-30 at 20. The trial court granted relief and ordered that a new trial be set. Doc. 10-34 at 372. However, on appeal by the State, the First DCA

reversed and reinstated Wagner's conviction. Disagreeing with the trial court, the First DCA determined that counsel was not deficient in failing to ensure that the trial court gave a no-duty-to-retreat instruction from the Stand Your Ground statute and that Wagner was not prejudiced by the omission of that instruction. *State v. Wagner*, 353 So. 3d 94 (Fla. Dist. Ct. App. 2022), *reh'g denied* (Jan. 6, 2023), *review denied*, No. SC2023-0184, 2023 WL 4670962 (Fla. July 21, 2023). As will be discussed below, Ground Two of the petition raises the same ineffective assistance of counsel argument.

Although Wagner's judgment and conviction became final for federal habeas purposes on October 9, 2019, the one-year deadline for her to file a federal habeas petition was tolled from February 25, 2020, when she filed her post-conviction motion in state court, until July 21, 2023, when the Florida Supreme Court denied her petition for writ of certiorari. Because Wagner filed the instant petition August 29, 2023, it is timely filed.

II. LEGAL STANDARDS

A. The Antiterrorism and Effective Death Penalty Act ("AEDPA")

Under the AEDPA, which governs a state prisoner's petition for habeas corpus relief, relief may only be granted on a claim adjudicated on the merits in state court if the adjudication:

> (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). This standard is both mandatory and difficult to meet. *White v. Woodall*, 572 U.S. 415, 419 (2014). "Clearly established federal law" consists of the governing legal principles set forth in the decisions of the United States Supreme Court when the state court issued its decision. *Id.* A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson*, 234 F.3d at 531 (quoting *Williams v. Taylor*, 529 U.S. 362, 406 Case No. 3:23cv23972-LC-HTC (2000)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's

decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

One of Wagner's grounds for relief is premised on ineffective assistance of counsel ("IAC"). An IAC claim requires a showing that (1) counsel's performance during representation fell below an objective standard of reasonableness, and (2) prejudice resulted, *i.e.*, that a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *Id.* at 689. The petitioner bears the burden of proving that counsel's performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688-89.

Strickland's prejudice prong requires a petitioner to allege more than simply that counsel's conduct might have had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. The petitioner must show a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Bare allegations the petitioner was prejudiced by counsel's performance are not enough. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir. 1987).

III. DISCUSSION

A. Wagner Has Failed to Exhaust Ground One

In Ground One, Wagner argues the trial court denied her rights under the Sixth and Fourteenth

Amendments by precluding her from arguing the BSS. Doc. 2 at 20. The Secretary argues Wagner failed to exhaust this claim by failing to fairly present it as a federal claim on direct appeal. Doc. 9 at 7-11. The Secretary also argues, even if exhausted, the claim fails on the merits. *Id.* Because the undersigned finds Ground Two has not been exhausted, the undersigned does not address the claim on the merits.

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving 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) (per curiam) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including appellate review), thereby alerting each court to the federal nature of the claim. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan*, *supra*, at 365-366; *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). The petitioner must alert the state court to the federal nature of the claim, and failing to do so deprives the state court of a meaningful opportunity to review the claim. *See Baldwin*, 541 U.S. at 29; *Kelley v. Sec'y, Dep't of Corr.*, 377 F.3d 1317, 1345 (11th Cir. 2004) (a petitioner cannot "scatter some makeshift needles in the haystack of the state court record. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.").

Here, although Wagner raised a similar claim on direct appeal, Doc. 10-12, she argued only state law and did not mention the Sixth and Fourteenth Amendments. Wagner, for example, relied heavily on *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA 2000) and Fla. R. Crim. P. 3.201. Nowhere does she reference or discuss any federal law.

In her reply to the Secretary's answer, Wagner argues that one of the Florida state cases she cited, *Mateo v. State*, 932 So. 2d 376, 379-80 (Fla. 2nd DCA 2006), was sufficient to alert the Court that she was making a Sixth and Fourteenth Amendment claim because within that case, the court cited *Chambers v. Mississippi*, 410 U.S. 284 (1973) for the proposition that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." However, "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 in order to find material." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). Moreover, a single reference to federal law in a state case cited by Wagner is "exactly the type of 'needle[ ] in the haystack'" that the Eleventh Circuit has previously held is insufficient to satisfy the exhaustion requirement. *See McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005). Such "[o]blique references which hint that a theory may be lurking in the woodwork" are insufficient to alert the state court to the federal nature of the claim. *Kelley*, 377 F.3d at 1345. Therefore, Wagner did not exhaust this issue by fairly presenting a federal claim to the state courts.

Moreover, because any attempt by Wagner to go back to the state courts and raise this claim would be

time-barred, the claim is also procedurally defaulted.[1] *See Zeigler v. Crosby*, 345 F.3d 1300, 1304 (11th Cir. 2003) ("A claim is also procedurally defaulted if the petitioner fails to raise the claim in state court and 'it is clear from state law that any future attempts at exhaustion would be futile.'") (quoting *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999)). And while a petitioner can overcome a procedural default by showing either cause and prejudice or a fundamental miscarriage of justice, *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1353 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 875 (2013), Wagner does not argue either exception applies.

B. Ground Two: Ineffective Assistance of Trial Counsel for Failing to Request a Stand-Your-Ground Defense Jury Instruction

In Ground Two, Wagner argues her trial counsel was ineffective for not objecting when the jury was not instructed on the "Stand Your Ground" defense. Doc. 1 at 7. The Secretary argues Wagner is not entitled to relief in Ground Two because the First DCA's decision denying relief was neither ". . . contrary to, or involved an unreasonable application of, clearly established Federal law. . . ." nor "based on an unreasonable determination of the facts in light of

[1] *See* rule 9.140(b)(3), Florida Rules of Appellate Procedure ("The defendant must file the notice prescribed by rule 9.110(d) with the clerk of the lower tribunal at any time between rendition of a final judgment and 30 days following rendition of a written order imposing sentence."); *see also* rule 3.850(b) ("A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final.").

the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The undersigned agrees.

The First DCA denied relief on this claim under *Strickland*, because the evidence did not support the defense. *Wagner*, 353 So. 3d at 101-02. As the First DCA explained, the Stand Your Ground law suspends the common-law duty to retreat only in limited, defined circumstances. The threat must be "imminent" in time; and in nature it must be deadly, or sufficient to cause "great bodily harm," or constitute a "forcible" felony. *Id.* Here, as the First DCA correctly concluded, the evidence in the record shows that Wagner "was under no 'imminent' threat of death, great bodily harm, or the commission of any forcible felony against herself or anyone else." *Id.*

The evidence included the following: (1) Wagner and her husband had quit fighting when she shot him; (2) she was armed and he was not; (3) her claim that she was nonetheless afraid of her husband who was not armed and standing "30 feet away up a landscaped hill, falls far, far short of the 'imminent'–threat circumstances in which the Stand Your Ground law applies." *Id.* As the First DCA discussed, "at any instant during that part of the episode, if the need arose to protect herself, Appellee had the ability and the means to do exactly what she ultimately did: pull the trigger. The deadly force in her hands would, by its very nature, provide her instantaneous protection. There was always absolutely zero chance that her husband could outrun a bullet if he chose to advance on her." *Id.* Based on this record, the First DCA's determination that "[t]here was no threat" and, thus, "the retreat instruction could not have applied," is neither contrary to law nor a misapplication of the facts. *Id.*

And because the evidence did not support a stand your ground defense instruction, counsel could not have been deficient (nor Wagner prejudiced) by counsel's failure to seek such an instruction or to object to the lack of such an instruction. *See Williams v. Sec'y, Fla. Dep't of Corr.*, 2023 WL 7017206, at *10 (M.D. Fla. Oct. 25, 2023) ("Just as Defense Counsel is not ineffective for failing to file a motion sure to be denied, so too is Defense counsel not ineffective for failing to ask for a jury instruction that is surely unwarranted.") (internal quotation marks and citations omitted). Therefore, Wagner is not entitled to relief on Ground Two.

IV. CONCLUSION

A. Evidentiary Hearing

The undersigned finds that an evidentiary hearing is not warranted. In deciding whether to grant an evidentiary hearing, this Court must consider "whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan,* 550 U.S. 465, 474 (2007). Additionally, this Court must consider the deferential standards prescribed by § 2254. *See id.* Upon consideration, the undersigned finds that the claims in this case can be resolved without an evidentiary hearing. *See id*.

B. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Court provides: "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." If a certificate is issued, "the court must state the specific issue or issues that satisfy the

showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2254 Rule 11(a). A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. 28 U.S.C. § 2254 Rule 11(b).

After review of the record, the Court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended that the district court deny a certificate of appealability in its final order.

Accordingly, it is RECOMMENDED:

1. That the petition under 28 U.S.C. § 2254, challenging the conviction in *State v. Wagner*, Okaloosa County, Florida, Case Number 2014 CF 1697, Doc. 1, be DENIED without an evidentiary hearing.

2. That a certificate of appealability be DENIED.

3. That the clerk be directed to close the file.

At Pensacola, Florida, this 14th day of August, 2024.

/s/ Hope Thai Cannon
HOPE THAI CANNON
UNITED STATES MAGISTRATE JUDGE