No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY ALLEN HERMAN, JR.,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

Randy Herman, Jr., DC# A80442
Petitioner, *pro se*

South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

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Appendix A

United States Court of Appeals for the Eleventh Circuit Final Order Denying Petitioner's Motion for Reconsideration, filed January 24, 2025.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-12362

RANDY ALLEN HERMAN, JR.,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,
Secretary, Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:24-cv-80425-RAR

Before JILL PRYOR and KIDD, Circuit Judges.

BY THE COURT:

Pursuant to 11th Cir. R. 22-1(c) and 27-2, Randy Herman has filed a motion for reconsideration of this Court's order dated November 27, 2024, denying his motion for a certificate of appealability ("COA"), on appeal from the denial of his 28 U.S.C. § 2254 petition. Because Herman has not identified any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

Appendix B

Petitioner's Motion for Reconsideration, filed December 05, 2024.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RANDY ALLEN HERMAN, JR.,
Petitioner/Appellant,

v.

Appeal No. 24-12362-F
USDC No. 9:24-CV-80425-RAR

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent/Appellee.
_____/

MOTION FOR RECONSIDERATION

COMES NOW, Petitioner/Appellant, Randy Allen Herman, Jr., in *pro se* fashion, pursuant to Eleventh Circuit Rule 27-2, and respectfully requests this Honorable Court to reconsider the denial of Herman's Certificate of Appealability rendered on November 27, 2024 [11th Cir. Doc 11-2]. In support of this motion, Herman states the following:

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Herman certifies that the following is a complete list of interested persons required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3:

Aronberg, David – State Attorney, 15th Judicial Circuit

Coates Jr., Howard – 15th Circuit Court Judge

Damoorgian, Dorian – Fourth District Court Judge

Dixon, Ricky – Secretary, Florida Department of Corrections

Haughwout, Carey – Public Defender, 15th Judicial Circuit

Herbert, Mara – Assistant Public Defender

Herman Jr., Randy – Appellant

Kastrenakes, John – 15th Circuit Court Judge

Kuntz, Jeffrey – Fourth District Court Judge

Levine, Spencer – Fourth District Court Judge

May, Melanie – Fourth District Court Judge

McRoberts, Aleathea – Assistant State Attorney

Miller, Leigh Lassiter – Assistant State Attorney

Moody, Ashley – Attorney General

Preston, Brooke – Victim

Ruiz II, Rodolfo – United States District Judge

Scott, Reid – [Former] Assistant State Attorney

Walsh, Joseph – Assistant Public Defender

Warner, Martha – Fourth District Court Judge

Wilson, Courtney – Assistant Public Defender

Worthy, Anesha – Assistant Attorney General

ARGUMENT

In the order denying a Certificate of Appealability, this Honorable Court held that the District Court properly deferred to the state postconviction court's interpretation of state law in its conclusion that counsel could only present sleepwalking as an insanity defense. However, by this Court's own admission in its order, automatism, or unconsciousness, is recognized and defined in this Circuit as "a person's functioning automatically without knowing what he is doing," citing *Strickland v. Linahan*, 72 F.3d 1531, 1534 (11th Cir. 1996), essentially an involuntary act performed without conscious control.

Although there may be no clearly defined parameters on how to properly raise a sleepwalking defense under Florida law, there is clearly established Florida and Federal law that the prosecution must prove every element of a criminal charge beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). Therefore, an automatism defense that negates the essential elements of a crime, intent (*mens rea*) and voluntariness (*actus reus*), can be raised distinct from an insanity defense, analogous to a lack-of-intent defense widely recognized and accepted under Florida law. Had Trial Counsel performed a reasonable investigation and a thorough understanding of the law and facts relevant to Herman's case, Counsel would not have advised Herman to pursue an affirmative

insanity defense where he lacked the necessary criminal intent and voluntariness to commit the crime charged, thus warranting relief under *Strickland.*

The precedent established by the state court in Herman's case is that a sleepwalking defense, where a Defendant is unconscious and asleep at the time of the crime, ***must*** be raised as an affirmative insanity defense. The precedent set by the Fourth District Court of Appeal in Herman's case is inconsistent and contradictory to Florida Supreme Court precedent and clearly established Federal law where the Supreme Court of the United States held in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977) that an affirmative defense is one that does not serve to negative any facts of the crime which the state is to prove in order to convict of the crime charged. Accordingly, a claim of sleepwalking cannot logically be raised as an affirmative defense. As a result, under AEDPA's standard of review, the state court's adjudication of the claim resulted in a decision that was contrary to clearly established Federal law, and therefore, Herman is entitled to relief pursuant to 28 U.S.C. § 2254.

Counsel's decision to pursue an affirmative defense for a claim of sleepwalking is *deficient* where his decision contradicted clearly established United States Supreme Court precedent. Therefore, Herman's Petition for Writ of Habeas Corpus raised a substantial showing of a denial of his constitutional right to effective assistance of counsel and this Honorable Court should reconsider the

denial of his Certificate of Appealability where "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).

This Court should also grant a COA on this issue because it is novel and "deserve[s] encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This issue is arguably a matter of first impression in Florida and the Eleventh Circuit where this Court has not yet addressed such a claim involving the unique defense presented in this case.

CONCLUSION

WHEREFORE, based upon the foregoing facts, argument, and citations of authority, Herman prays this Honorable Court will reconsider the denial rendered on November 27, 2024 and issue a Certificate of Appealability as to the grounds of his 28 U.S.C. § 2254 Petition.

Respectfully Submitted,

/s/ _____

Randy Herman, Jr., DC# A80442
Petitioner/Appellant, *pro se*

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because this brief contains **1,110** words.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. *See* FRAP 27(d)(1)(E).

/s/ _____
Randy Herman, Jr., DC# A80442
Appellant, *pro se*

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

I HEREBY CERTIFY under penalty of perjury that the foregoing is true and correct, in accordance with 28 U.S.C. § 1746. Executed on this **5th day of December, 2024.**

/s/ _____
Randy Herman, Jr., DC# A80442
Appellant, *pro se*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that a true and correct copy of the forgoing *Motion for Reconsideration* has been deposited in the prison's internal mailing system with first-class postage prepaid on this **5th day of December, 2024** for mailing to: Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, Georgia 30303; *and* Regional Office of the Attorney General, 1515 N. Flagler Dr. Suite 900, West Palm Beach, Florida 33401.[1]

/s/ _____

Randy Herman, Jr., DC# A80442
South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

[1] "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 (11th Cir. 2009).

Appendix C

United States Court of Appeals for the Eleventh Circuit Order Denying Petitioner's Certificate of Appealability, filed November 27, 2024.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-12362

RANDY ALLEN HERMAN, JR.,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,
Secretary, Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:24-cv-80425-RAR

ORDER:

Randy Herman, a Florida prisoner serving life in prison for first-degree murder, filed a *pro se* 28 U.S.C. § 2254 petition, asserting that his trial counsel misadvised him that he should present his sleepwalking defense as an insanity defense, as opposed to an automatism[1] defense, under Florida law. As background, Mr. Herman was indicted with first-degree murder in the stabbing death of Brooke Preston in 2017. Prior to trial, counsel filed a notice of intent to rely on an insanity defense, explaining that he had retained an expert psychologist, who had evaluated Mr. Herman and determined that he was suffering from non-rapid eye movement sleep arousal disorder (i.e., sleepwalking), at the time of the murder, and was therefore not capable of knowing what he was doing. Following a jury trial, he was found guilty as charged.

Mr. Herman filed a Fla. R. Crim. P. 3.850 motion, raising seven grounds of ineffective assistance of counsel. Relevantly, he asserted that counsel was ineffective for advising him to raise sleepwalking as an insanity defense, instead of a defense of automatism. The State responded, noting that there were no published Florida opinions in which sleepwalking was presented, either as an insanity defense or otherwise, and thus, no clear legal guidance in Florida on how to properly present a sleepwalking defense. The State argued that "the only mechanism for presenting a sleepwalking defense" is through an insanity defense, based on *Cook v. State*, 271

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[1] Automatism, or unconsciousness, is defined in this Circuit as "a person's functioning automatically without knowing what he is doing." *Strickland v. Linahan*, 72 F.3d 1531, 1534 (11th Cir. 1996).

So.2d 232 (Fla. 2d DCA 1973). The state post-conviction court adopted the reasoning of the State's response and denied Mr. Herman's motion. The state appellate court affirmed.

Mr. Herman then filed the instant petition. After the State responded, the district court denied the petition. He then filed a Fed. R. Civ. P. 59(e) motion, which the court also denied. The court also denied a certificate of appealability ("COA"). Mr. Herman appealed and now moves this Court for a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denied a habeas petition on substantive grounds, the petitioner 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).

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1), (2). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") thus imposes a "highly deferential standard for evaluating state-court rulings . . . and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S.

766, 773 (2010) (quotation marks omitted).

To prove ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Although an ineffective-assistance-of-counsel claim is a federal constitutional claim, when the validity of the claim that counsel failed to raise turns on state law, this Court will defer to the state's construction of its own law. *See Pinkney v. Sec'y, Dep't of Corr.*, 876 F.3d 1290, 1295 (11th Cir. 2017).

Here, the district court properly deferred to the state post-conviction court's interpretation of state law with respect to how to properly present a sleepwalking defense, and its conclusion that counsel was not ineffective for presenting sleepwalking as an insanity defense under Florida law. *See id.* Because, as the state post-conviction court concluded, counsel could only present sleepwalking as an insanity defense, Mr. Herman cannot show that counsel performed deficiently. *See Strickland*, 466 U.S. at 690. As such, his COA motion is DENIED.

UNITED STATES CIRCUIT JUDGE

Appendix D

Petitioner's Certificate of Appealability, filed August 08, 2024.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RANDY ALLEN HERMAN, JR.,
Petitioner/Appellant,

v.

Appeal No. 24-12362-F
USDC No. 9:24-CV-80425-RAR

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent/Appellee.
_____/

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

COMES NOW, Petitioner/Appellant, Randy Allen Herman, Jr., in *pro se* fashion, pursuant to 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b), and respectfully requests this Honorable Court to issue a Certificate of Appealability (COA) to appeal to the United States Court of Appeals for the Eleventh Circuit from the final order denying his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254. In support of this application, Herman states the following:

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Herman certifies that the following is a complete list of interested persons required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3:

Aronberg, David – State Attorney *(15th Judicial Circuit, Palm Beach County)*

Coates, Howard Jr. – Circuit Court Judge *(3.850)*

Damoorgian – District Court Judge *(4th DCA - Direct Appeal, 3.850 Appeal)*

Haughwout, Carey – Public Defender *(15th Judicial Circuit, Palm Beach County)*

Herbert, Mara – Assistant Public Defender *(Direct Appeal)*

Kastrenakes, John – Circuit Court Judge *(Trial)*

Kuntz – District Court Judge *(4th DCA - 3.850 Appeal)*

Levine – District Court Judge *(4th DCA - 3.850 Appeal)*

May – District Court Judge *(4th DCA - Direct Appeal)*

McRoberts, Aleathea – Assistant State Attorney *(Trial)*

Miller, Leigh Lassiter – Assistant State Attorney *(3.850)*

Moody, Ashley – Attorney General *(State of Florida)*

Preston, Brooke – Victim

Ruiz, II, Rodolfo – United States District Judge *(§2254)*

Scott, Reid – Assistant State Attorney *(Trial)*

Walsh, Joseph Patrick – Assistant Public Defender *(Trial)*

Warner – District Court Judge *(4th DCA - Direct Appeal)*

Wilson, Courtney – Assistant Public Defender *(Trial)*

Worthy, Anesha – Assistant Attorney General *(Direct Appeal, 3.850 Appeal)*

STATEMENT OF THE CASE AND FACTS

The state charged Herman by Indictment with: Count 1 – First Degree Murder, 782.04(1)(a)1 and 782.04(1)(a)2, for the stabbing death of Brooke Preston that occurred on March 25, 2017 [Doc 10-1 – Exh 3].

Prior to Herman's trial, defense Counsel retained Dr. Charles Patrick Ewing, a forensic psychologist, for the purposes of conducting a mitigation evaluation [Doc 11-3 – TT Pg 929]. Dr. Ewing opined to a reasonable degree of professional certainty that Herman was suffering from the non-rapid eye movement sleep arousal disorder of sleepwalking, and therefore, he was unconscious and asleep at the time of the homicide [Doc 11-3 – TT Pg 966-967, 975]. As a result of Dr. Ewing's clinical diagnosis, Trial Counsel filed a Notice of Intent to Rely on the Defense of Insanity [Doc 10-1 – Exh 4].

Herman's case proceeded to a jury trial before the Honorable John Kastrenakes and on May 8, 2019, the jury returned a verdict of "Guilty of First Degree Murder, as charged in the Indictment" [Doc 10-1 – Exh 11]. The Court adjudicated Herman guilty in accordance with the verdict and sentenced him to life in the Florida Department of Corrections without the possibility of parole [Doc 10-1 – Exh 13].

Herman appealed his conviction and sentence and on April 14, 2021, the Fourth District Court of Appeal affirmed with a written opinion and mandate

issued on May 14, 2021 [Doc 10-1 – Exhs 14-19]. *See Herman v. State*, 315 So. 3d 743 (Fla. 4th DCA 2021).

On November 16, 2021, Herman filed a Motion for Postconviction Relief, pursuant to Fla. R. Crim. P. 3.850, raising seven claims of ineffective assistance of trial counsel [Doc 10-1 – Exh 20]. By Order of the Court, the state filed a Response to Herman's motion on February 10, 2023 [Doc 10-1 – Exh 21]. Herman filed a subsequent Reply to the state's Response on February 27, 2023 [Doc 10-1 – Exh 22].

Herman's motion came before the Honorable Judge Howard K. Coates, Jr. of the Fifteenth Judicial Circuit Court and was summarily denied on May 18, 2023. In the Order denying relief, the Court adopted the facts, legal analyses, and conclusions of law contained in the state's Response as its own [Doc 10-1 – Exh 23].

Herman timely filed a Notice of Appeal on June 06, 2023 [Doc 10-1 – Exh 24] and served his Initial Brief to the Fourth District Court of Appeal on July 13, 2023 [Doc 10-2 – Exh 26]. The Fourth District Court of Appeal issued an order on October 05, 2023 *per curiam* affirming the lower court's decision without a written opinion. On October 18, 2023 Herman timely filed a Motion for Rehearing and Request for Written Opinion that was subsequently denied on November 08, 2023

and mandate issued on December 07, 2023 [Doc 10-2 – Exhs 27-30]. *See Herman v. State,* 373 So. 3d 315 (Fla. 4th DCA 2023).

On April 08, 2024 Herman filed a Petition for Writ of Habeas Corpus and supporting Memorandum of Law in the United States District Court for the Southern District of Florida challenging the constitutional validity of his state conviction, pursuant to 28 U.S.C. § 2254(a) [Docs 1, 1-1].

The District Court issued an Order to Show Cause on April 9, 2024 [Doc 4] and counsel for the Respondent subsequently filed their Response and Appendix on May 10, 2024 [Docs 9-11].

On May 20, 2024, prior to receiving and without considering Herman's timely filed Reply to the Respondent's Response [Doc 13], the District Court entered a final judgment denying Herman's Petition [Doc 12].

On June 13, 2024 Herman timely filed a Motion to Alter or Amend Judgment, pursuant to Federal Rule of Civil Procedure 59(e) [Doc 14]. The District Court entered a final judgment denying Herman's motion on June 21, 2024 and declined to issue a Certificate of Appealability [Doc 15].

On July 18, 2024 Herman timely filed a Notice of Appeal and Motion for Permission to Appeal In Forma Pauperis and Affidavit [Docs 16, 17]. The District

Court subsequently granted Herman's motion to proceed *in forma pauperis* on appeal [Doc 19].

Herman desires to appeal to the United States Court of Appeals for the Eleventh Circuit from the final order denying his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. Herman cannot appeal the District Court's final judgment unless a Certificate of Appealability issues from this Court. This application for a Certificate of Appealability follows.

STANDARD OF REVIEW

This Court may issue a Certificate of Appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, 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, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

ARGUMENT

WHETHER THE DISTRICT COURT PROPERLY DENIED PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN LIGHT OF SUFFICIENT SHOWING OF VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

I. Ineffective Assistance of Counsel

In the sole ground raised for relief, Herman contends that he was deprived of his constitutional right to effective assistance of counsel when Trial Counsel misadvised him to assert insanity as a theory of defense for a claim of sleepwalking over the proper defense of automatism, where Herman was asleep at the time of the homicide and committed the act involuntarily while in an unconscious state [Doc 1, 1-1]. An adequate investigation of Herman's theory of defense and sufficient knowledge of the law would have revealed that sleepwalking is properly raised through a defense of automatism, often referred to as unconsciousness, and that such a defense was available in Florida and further supported by Federal law.

Black's Law Dictionary defines automatism as an "action or conduct occurring without will, purpose, or reasoned intention, such as ***sleepwalking***; behavior carried out in a state of unconsciousness; Automatism may be asserted as a defense to negate the requisite mental state of voluntariness for commission of a

crime. (2) The state of a person who, though capable of action, is not conscious of his or her actions." *Black's Law Dictionary, 154 (9th ed. 2009).*

Criminal liability usually requires that two elements must be present: *actus reus* (literally "guilty act"), and *mens rea* (literally "guilty mind"). The *actus reus* is the prohibited conduct, performed voluntarily. Someone in a state of legal automatism is not acting voluntarily and so cannot have carried out the *actus reus* (nor could they have the required *mens rea*). If the accused lacks the requisite *actus reus* or *mens rea*, then the criminal offense is not made out. Sleepwalking has long been held to fulfill the requirements of legal automatism, and therefore, an act performed while sleepwalking does not meet the definition of a criminal act [Doc 10-1 – Exh 9 – R Pg 818, 821].

The United States Supreme Court has long admonished that the prosecution must prove every element of a criminal charge beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). Therefore, an automatism defense, in which Herman was sleepwalking and thus unconscious of his involuntary acts, negates both of the basic elements of a crime – the mental state (*mens rea*) and the voluntary nature of the act (*actus reus*). As such, once the issue of automatism, or unconsciousness, is raised by the defense, the State must disprove it beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime.

According to § 775.027, *Florida Statutes*, insanity is an affirmative defense in which Herman carried the burden to prove by clear and convincing evidence that he (1) had a mental infirmity, disease, or defect; and (2) because of this condition, he did not know what he was doing or its consequences. On the other hand, an automatism defense, where Herman was asleep and sleepwalking at the time of the homicide, negates the basic elements of the crime and therefore the burden remains on the State to prove that Herman acted consciously and voluntarily beyond any reasonable doubt to support a finding of guilt. Trial Counsel's misadvice to pursue an affirmative insanity defense over the proper defense of automatism prejudiced Herman by proceeding to trial with the sleepwalking defense that unnecessarily shifted the heavier burden of proof to the Defense, thereby rendering the result of the proceeding unfair and unreliable.

Herman was further prejudiced by Counsel's misadvice where under the present statutory scheme, a successful plea of insanity avoids a conviction, but confronts the accused with the very real possibility of prolonged therapeutic confinement. However, a verdict of 'not guilty' under an automatism defense would result in an outright acquittal, where Herman was not legally insane at the time of the homicide, but rather committed the act involuntarily while in the natural state of sleep. No reasonably competent attorney would have advised Herman to assert a defense of insanity where he was unconscious and asleep at the

time of the homicide. Trial Counsel's misadvice to pursue an insanity defense detracted from Herman's chosen defense that he committed the act while sleepwalking, in a state of unconsciousness, and that he did not commit the act voluntarily or with criminal intent.

II. Unreasonable Application of *Strickland*

Under AEDPA's standard of review, a habeas petitioner is not entitled to relief unless he shows that, in an earlier "state court proceeding," the state court unreasonably applied clearly established federal law or made an unreasonable factual determination in denying the petitioner's claim. *See* 28 U.S.C. § 2254(d)(1)-(2). In seeking relief, Herman contends that the state court's adjudication of the claim resulted in a decision that involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) [Doc 1-1 – Pg 6-11].

The state court's determination that "Florida law provides ample support for the reasonableness of defense counsel's conclusion that the ***only*** mechanism for presenting a sleepwalking defense is through an insanity defense" is objectively unreasonable where a defense of automatism for a claim of sleepwalking, where Herman was ***asleep*** at the time of the homicide and his acts were involuntary, is separate and distinct from an insanity defense and was cognizable under Florida

law [Doc 10-1 – Exh 21 – R Pg 57-58]. In denying relief and relying on the state court's decision, the District Court further held that federal courts "cannot second-guess a state court's application of state law, so its finding that sleepwalking must be presented as an insanity defense under Florida law is fatal to Petitioner's claim." [Doc 12 – Pg 10].

A federal court is bound to follow a state supreme court's interpretation of its own laws. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881 (1975); *see also Johnson v. Fankell*, 520 U.S. 911, 916, 117 S. Cit. 1800 (1997) (Federal courts are bound to follow the decisions of the state's highest court on state law matters). However, where the Florida Supreme Court has not addressed Herman's claim, there is a well-settled principle in the Eleventh Circuit that "a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983); *see also West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179 (1940) (intermediate state appellate court decisions are not binding upon federal court if the federal court is "convinced by other persuasive data" the state's highest court would decide the issue otherwise).

In the instant case, the Florida Supreme Court lacked jurisdiction to review Herman's claim since the Fourth District Court of Appeal did not render a written

opinion. However, the Fourth DCA's affirmance of the lower tribunal's decision involved an erroneous application of Florida law and was objectively unreasonable where the Florida Supreme Court clearly established that a defense that present's a question of the defendant's ***consciousness of his acts*** is separate and distinct from a defense of insanity, and therefore, Herman was not required to present his claim of sleepwalking under the guise of an insanity defense. The Fourth DCA's denial of Herman's claim and conclusion that Counsel's decision was reasonable was based on inapplicable and outdated case law and convincing evidence exists that the Florida Supreme Court would decide the issue otherwise.

In denying relief, the state court held that Counsel's decision was reasonable based entirely on *Cook v. State*, 271 So. 2d 232 (Fla. 2d DCA 1973) where "a defense utilizing a state of unconsciousness or automatism, such as a defendant claiming no recollection of committing a crime due to allegedly suffering an epileptic seizure at the time of the crime, falls within the insanity defense." [Doc 10-1 – Exh 21 – R Pg 57]. Relying on the state court's reasoning, the District Court further held that "although the state postconviction court conceded that *Cook* concerned epileptic seizure (and not sleepwalking), it applied *Cook's* reasoning to find that a condition causing a defendant to have 'no recollection of committing a crime' was properly categorized as an insanity defense." [Doc 12 – Pg 10].

However, the state court's denial of Herman's claim and Trial Counsel's misadvise to pursue an insanity defense, where Herman was unconscious and asleep at the time of the crime, was objectively unreasonable based on long-standing precedent by the Florida Supreme Court holding that a defense that presents a question of the defendant's consciousness of his acts is wholly distinguishable from a diminished capacity defense and may be presented absent a plea of insanity. *See Wise v. State*, 580 So. 2d 329 (Fla. 1st DCA 1991); *see also Bunney v. State*, 603 So. 2d 1270 (Fla. 1992).

The Florida Supreme Court's ruling in *Bunney* and approval of the decision held in *Wise* receded from the Second DCA's holding in *Cook* and clarified the distinction between unconsciousness and insanity, distinguishing between a defendant's consciousness of his acts from his understanding of their wrongful nature. Insanity is incapacity from disease of the mind, to know the nature and quality of one's act or to distinguish between right and wrong in relation thereto. In contrast, a person who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong. Insanity relates to cognitive understanding, while automatism focuses on involuntary actions without conscious control.

Using the rationale established by the Florida Supreme Court in *Bunney* and *Wise*, an automatism defense, where Herman was unconscious and asleep at the

time of the homicide, is a defense that specifically presents a question of Herman's consciousness of his acts and may be raised distinct from an insanity defense. Therefore, had Trial Counsel performed a reasonable investigation and a thorough understanding of the law and facts relevant to Herman's case, Counsel would not have advised Herman to pursue an affirmative insanity defense where he lacked the criminal intent and voluntariness to commit the crime charged, thus warranting relief under *Strickland v. Washington*, 466 U.S. 668 (1984).

III. Contrary to Clearly Established Federal Law

Herman further asserted that the state court's adjudication of the claim resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450 (1979); and *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977) [Doc 1-1 – Pg 9-10].

a. Automatism Defense

In denying Herman's federal claim and relying on the state court's decision, the District Court held that "Counsel was not ineffective for presenting sleepwalking as an insanity defense because, under state law, that was the ***only*** way he could," further stating that "Petitioner is right that some jurisdictions

categorize sleepwalking as an 'automatism' defense rather than an insanity defense. The problem is that many other states – **including Florida** – categorize sleepwalking, unconsciousness, and other forms of automatism as insanity defenses" [Doc 12 – Pg 10-11]. In support of that conclusion, the District Court cited a string of cases from Texas, Kentucky, and a Military Justice case, but failed to cite any relevant or applicable cases in Florida or Federal law to reject Herman's claim. Although those specific cases may be considered controlling law in their respective states, such case law is not legally binding on Florida or Federal courts.

An automatism defense, where Herman lacked the criminal intent and voluntariness to commit the crime based on expert testimony that he was asleep and unconscious at the time of the homicide, is separate and distinct from an insanity defense and is cognizable under Florida and Federal law. Due to the rarity of the sleepwalking defense, statutory authority or case law is limited in Florida. However, there is precedent to raise an automatism, or unconsciousness defense, to negate the required intent (*mens rea*) and voluntariness (*actus reus*) that the state must prove in order to meet its burden with respect to the elements of the crime. An automatism defense is used to argue that no criminal act occurred in the first place due to the lack of voluntary action or intent. As such, an automatism defense is analogous to a state-of-mind or lack-of-intent defense that is widely recognized and used in Florida law to negate the essential elements of a crime.

When a person is sleepwalking, they lack the conscious intent or awareness to commit a crime, meaning the *mens rea* is absent. The law further requires that a criminal act be voluntary and since actions taken while sleepwalking are involuntary, the *actus reus* is absent. Accordingly, an automatism defense for a claim of sleepwalking negates both of the basic elements of a crime, the *mens rea* and the *actus reus*, which the state must prove beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime. Therefore, the denial of Herman's claim in which the state court and the District Court rejected the legality of an automatism defense in Florida and held that sleepwalking ***must*** be presented under an insanity defense according to Florida law is objectively unreasonable and contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970) (the due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charge); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975) (a state cannot require a defendant to prove the absence of a fact necessary to constitute a crime); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450 (1979) (the burden of proving the elements of a crime cannot be shifted to the defendant).

b. Affirmative Defense

The District Court also held that "the distinction between insanity and automatism defenses would have had no bearing on the outcome of Petitioner's case," further stating that "both automatism and insanity are affirmative defenses which place the burden of proof on the defendant." [Doc 12 – Pg 11]. The District Court again cited a string of state law cases from North Carolina, Montana, Ohio, and Wyoming, but failed to cite any relevant or applicable cases to reject Herman's claim in the context of Florida or Federal law.

Under clearly established Florida and Federal precedent, an affirmative defense is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. "An affirmative defense does not concern itself with the elements of the offense at all; it ***concedes*** them." *Smiley v. State,* 966 So. 2d 330 (Fla. 2007) (quoting *Florida v. Cohen*, 568 So. 2d 49 (Fla. 1990)).

There is a distinction between evidence of psychological impairment that supports an affirmative defense and psychological evidence that negates an element of the offense charged. If a state of mind is an element of a crime, evidence regarding the existence or absence of that state of mind is evidence relevant to whether a crime was, in fact, committed. A defense that negates *mens*

rea and *actus reus* thus negates the essential elements of the offense rather than constituting a justification or excuse. *See United States v. Westcott*, 83 F.3d 1354 (11th Cir. 1996); *see also United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990). Evidence that aids the trier in determining the defendant's specific state of mind with regard to the actions he took at the time the charged offense was committed, by contrast, is not an affirmative defense but is evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime.

"Evidence that a defendant lacks the capacity to form *mens rea* is to be distinguished from evidence that the defendant actually lacked *mens rea*. While the two may be logically related, only the latter is admissible to negate the *mens rea* element of an offense." *Donald F. Samuel, Eleventh Circuit Criminal Handbook, Vol 1: Chapter 4 § 86(b) (Matthew Bender, 2023 Ed.).* This issue was further explored in *United States v. Bates*, 960 F.3d 1278 (11th Cir. 2020). In *Bates*, the Eleventh Circuit held - consistent with *Cameron* - that while psychiatric evidence that negates the *mens rea* element would be admissible, psychiatric evidence that negates the ability to form the *mens rea* to commit the offense was not admissible. *See also United States v. Litzky*, 18 F. 4th 1296 (11th Cir. 2021) (distinguishing psychiatric evidence that negates *mens rea* from psychiatric evidence that focuses on excuse or justification). Accordingly, an automatism defense for a claim of

sleepwalking, where Herman was unconscious and lacked *mens rea* and *actus reus* to commit the offense, challenges the fundamental elements of the crime itself rather than providing a justification or excuse for the behavior.

In *Patterson v. New York*, 432 U.S. 197, 207, 97 S. Ct. 2319 (1977), the United States Supreme Court concluded that the New York legislature's decision to define extreme emotional disturbance as an affirmative defense to the crime of murder was permissible because the defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder" but instead "constituted a separate issue on which the defendant is required to carry the burden of persuasion." The Supreme Court explained that because the fact constituting the affirmative defense was not logically intertwined with a fact necessary to prove guilt, the affirmative defense did not "unhinge the procedural presumption of innocence." *Id.* at 211.

The Florida Supreme Court applied similar reasoning in *State v. Cohen*, 568 So. 2d 49 (Fla. 1990). In *Cohen*, the Florida Supreme Court reviewed a statutory affirmative defense to Florida's witness-tampering statute. The affirmative defense required Cohen to prove that he engaged in lawful conduct and that his sole intention was to encourage, induce, or cause the witness to testify truthfully. *Id.* at 51. The Florida Supreme Court concluded that the supposed affirmative defense was merely an illusory affirmative defense because Cohen could not

logically both raise the affirmative defense and concede the elements of the crime. By attempting to prove the affirmative defense that he had acted lawfully with the intent to encourage the witness to testify truthfully, Cohen would necessarily negate the state's theory that he illegally contacted a witness, as opposed to conceding the state's charges. Thus, the purported affirmative defense unconstitutionally placed a burden on Cohen as a defendant to refute the State's case. *Id.* at 52.

Similarly, in Herman's case Trial Counsel's misadvise to pursue an affirmative defense for a claim of sleepwalking, where Herman was unconscious and his acts were involuntary, relieved the state of its burden of proof beyond a reasonable doubt of the necessary elements of the offense and unconstitutionally shifted the heavier burden of proof to Herman to prove the absence of those elements. By attempting to prove the affirmative defense that he was sleepwalking and lacked *mens rea* and *actus reus* to commit the offense, Herman would necessarily negate the state's theory that he intentionally and voluntarily committed first degree premeditated murder. **As a result, a claim of sleepwalking cannot logically be raised as an affirmative defense and simultaneously concede the elements of the crime.** Therefore, Trial Counsel's misadvice to pursue an affirmative defense for a claim of sleepwalking and the state court's denial of Herman's claim is contrary to clearly established Federal law, as determined by the

Supreme Court of the United States in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977) (an affirmative defense is one that does not serve to negative any facts of the crime which the state is to prove in order to convict of the crime charged) and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975) (a state cannot require a defendant to prove the absence of a fact necessary to constitute a crime).

IV. Issuance of a COA

Herman's Petition for Writ of Habeas Corpus filed in the United States District Court raised a substantial showing of a denial of his federal constitutional right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Under AEDPA's standard of review, Herman contends that the state court's adjudication of the claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established Federal law and further involved an unreasonable determination to deny Herman's claim, and therefore, he is entitled to relief pursuant to 28 U.S.C. § 2254.

Where Herman asserted that the state court's denial was contrary to clearly established Federal law as determined by the United States Supreme Court in *Winship, Mullaney, Sandstrom,* and *Patterson*, the District Court wholly failed to refute or even reference the United States Supreme Court cases cited in Herman's

Petition. Rather, the District Court's denial of Herman's claim was largely based on out-of-state case law and failed to address the constitutional claims in the context of Florida or Federal law. Additionally, the District Court's denial of Herman's claim relied substantially on the state court's unreasonable determination and remained silent on the constitutional issue of Counsel's ineffective assistance.

Where Herman cited several cases in which sleepwalking, unconsciousness, and automatism defenses had been presented in Florida courts, the District Court refused to accept those cases or acknowledge that such defenses are cognizable under Florida law, even where the case dicta expressly indicates that such defenses have been utilized and accepted in Florida courts and further support Herman's claim for relief. Where Herman also cited a Florida case in which the defendant was acquitted after presenting a sleepwalking defense distinct from an insanity defense, the District Court stated that "Petitioner has not provided any evidence of how this defense was presented at trial, other than his own summary of what he thinks happened, so the Court cannot assign any persuasive value to this case" [Doc 15 – Pg 5], applying an unreasonable burden on Herman to present additional evidence to support a case citation.

The District Court further erred by denying Herman's Petition prior to, and without considering, his timely filed Reply to the State's Response, denying Herman a fair opportunity to refute the Respondent's factual and legal allegations

prior to the Court rendering its decision. Therefore, reasonable jurists would find the District Court's assessment of the constitutional claims and denial in this regard debatable or wrong, thus warranting a Certificate of Appealability. *See Slack v. McDaniel*, 529 US 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Furthermore, this Court should grant a COA on this issue because it is novel and "deserve[s] encouragement to proceed further." *Miller-El*, 537 U.S. at 336. This issue is arguably a matter of first impression in Florida and the Eleventh Circuit. While this Court has addressed similar issues relating to psychiatric evidence that negates the essential elements of a crime versus psychiatric evidence in support of an affirmative defense, this Court has not yet addressed such a claim involving the unique defense presented in this case or the issues raised herein.

This Honorable Court should issue a COA pursuant to 28 U.S.C. § 2253(c)(2) because Herman has shown: (1) that reasonable jurists would find the District Court's "assessment of the constitutional claims debatable or wrong," or (2) that "the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 US 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

In addition, the Supreme Court in *Miller-El v. Cockrell* went on to state that "a COA does not require a showing that the appeal will succeed." Accordingly,

this Court should not decline this application for a COA merely because it believes Herman will not demonstrate an entitlement to relief. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his part. "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 336-38.

CONCLUSION

WHEREFORE, based upon the foregoing facts, argument, and citations of authority, Herman prays this Honorable Court will issue a Certificate of Appealability as to the grounds of his 28 U.S.C. § 2254 Petition, as set forth herein.

Respectfully Submitted,

/s/ _____

Randy Herman, Jr., DC# A80442
Petitioner/Appellant, *pro se*

CERTIFICATE OF COMPLIANCE

1. This COA complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 22-2 because this brief contains 5,595 words.

2. This COA complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ _____
Randy Herman, Jr., DC# A80442
Petitioner/Appellant, *pro se*

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

I HEREBY CERTIFY under penalty of perjury that the foregoing is true and correct, in accordance with 28 U.S.C. §1746. Executed on this 8th day of August, 2024.

/s/ _____
Randy Herman, Jr., DC# A80442
Petitioner/Appellant, *pro se*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that a true and correct copy of the forgoing Certificate of Appealability has been deposited in the prison's internal mailing system with first-class postage prepaid on this 8th day of August, 2024 for mailing to: Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, Georgia 30303; *and* Regional Office of the Attorney General, 1515 N. Flagler Dr. Suite 900, West Palm Beach, Florida 33401.[1]

/s/ _____

Randy Herman, Jr., DC# A80442
South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

[1] "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 (11th Cir. 2009).

Appendix E

United States District Court for the Southern District of Florida Final Order Denying Petitioner's Motion to Alter or Amend Judgment, filed June 21, 2024.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-CV-80425-RAR

RANDY ALLEN HERMAN, JR.,

Petitioner,

v.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

THIS CAUSE comes before the Court on Petitioner's Motion to Alter or Amend Judgment ("Mot.") under FED. R. CIV. P. 59(e), [ECF No. 14]. Petitioner asserts that the Court made several errors in its May 20, 2024 Order denying his petition for writ of habeas corpus under 28 U.S.C. § 2254, [ECF No. 12], and asks the Court to reconsider its ruling. After careful review, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion, [ECF No. 14], is **DENIED**.

STANDARD OF REVIEW

"The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (cleaned up). An error is sufficiently serious to warrant correction under Rule 59(e) where it is "direct, obvious and observable[,] patently unfair[,] and apparent to the point of being indisputable." *Schmidt v. Wash. Newspaper Publ'g Co. LLC*, No. 18-CV-80614, 2018 WL 6422705, at *2 (S.D. Fla. Dec. 6, 2018) (cleaned up); *see also Am. Home Assurance Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1239 (11th Cir. 1985) (affirming the denial of a Rule 59(e) motion where "any error that may have been committed is not the sort of clear and obvious error which the interests of justice

demand that we correct"). Conversely, parties "cannot use a Rule 59(e) motion to relitigate old matters, raise argument[s] or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005); *see also Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998) ("The purpose of a Rule 59(e) motion is not to raise an argument that was previously available, but not pressed.").

ANALYSIS

Petitioner alleges that the Court made several errors in denying his Petition. After considering each one of Petitioner's points, the Court finds that it committed no error—let alone a "manifest error[ ] of law or fact" warranting reconsideration. *Arthur*, 500 F.3d at 1343.

First, Petitioner argues that the Court abused its discretion "when it failed to consider the Petitioner's timely filed Reply to the Respondent's Response." Mot. at 2. Under the prison mailbox rule,[1] Petitioner's Reply was filed on May 16, 2024, *see* Reply, [ECF No. 13], at 1, but it was not docketed until May 20, 2024—the same day the Court entered its Order denying the Petition. Petitioner is correct that the Court did not have an opportunity to review his Reply before ruling upon the Petition, but the failure "to consider [a] reply before ruling" is not "a manifest error of law[.]" *Gonzalez v. Batmasian*, 319 F.R.D. 403, 406 (S.D. Fla. 2017) (citing *United States v. Anderson*, 517 F. App'x 772, 776 (11th Cir. 2013)).

Petitioner relies on Rule 5(e) of the Rules Governing Section 2254 Cases and *Rodriguez v. Florida Department of Corrections*, 748 F.3d 1073 (11th Cir. 2014) to argue that the Court must consider a petitioner's reply before ruling on a habeas petition. *See* Mot. at 2–3. But *Rodriguez* held that a habeas petitioner "was procedurally entitled to service of the exhibits included in the

[1] "Under the 'prison mailbox rule,' a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). "Absent evidence to the contrary, [courts] assume that a prisoner delivered a filing to prison authorities on the date that he signed it." *Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014).

State's Appendix and referenced in its answer"—it did not establish a *per se* rule that a district court must always wait for and consider a habeas petitioner's reply. 748 F.3d at 1075. Indeed, the concurring opinion in *Rodriguez* suggests that Rule 5(e), which "provides for a reply brief," is not "a broad rule that will apply in all cases." *Id.* at 1085 (Baylson, Dist. J., concurring). Finally, even if the Court erred when it failed to consider the Reply before ruling on the Petition, that error has been rectified because the instant Motion has repackaged the Reply's arguments for the Court to review now. *Compare* Reply at 2–9, *with* Mot. at 3–15.

Second, Petitioner rejects this Court's finding that the state court reasonably applied *Strickland* when it determined that "[c]ounsel's decision to forgo an automatism defense and pursue an insanity defense for a claim of sleepwalking" was not deficient performance. Mot. at 4–5. Petitioner argues that the state court "relied on an erroneous application of state law to find that Petitioner's counsel was not acting deficiently" and that this Court was not bound to defer to the state court's flawed reasoning. *Id.* at 6.

The Court disagrees. Both the Fourth DCA and state postconviction court adopted the State's reasoning that, under *Cook v. State*, 271 So. 2d 232 (Fla. 2d DCA 1973), "a sleepwalking defense [under Florida law] is a species of insanity—not automatism, diminished capacity, or any other type of defense." Order Dismissing Pet., [ECF No. 12], at 10. Petitioner claims that this Court "overlooked specific points of law" in making this decision, and suggests that, if the Court considered *Wise v. State*, 580 So. 2d 329 (Fla. 1st DCA 1991) and *Bunney v. State*, 603 So. 2d 1270 (Fla. 1992), it would have found that "an automatism defense, where the Petitioner was unconscious and asleep at the time of the homicide, is a defense that specifically presents a question of the Petitioner's consciousness of his actions and therefore may be raised distinct from an insanity defense." Mot. at 9. But this argument misapprehends the standard of review under

28 U.S.C. § 2254. The state court found, as a matter of state law, that (1) *Cook* (and not *Wise*, *Bunney*, or any other Florida case) governed; and (2) "sleepwalking must be presented as an insanity defense under [*Cook*]." Order Dismissing Pet. at 9. As the Court explained, it cannot "second-guess a state court's application of state law, so its finding that sleepwalking must be presented as an insanity defense under Florida law is fatal to Petitioner's claim." *Id.* at 10 (citing *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997)). Put another way, the Court cannot correct alleged errors made by state courts in interpreting and applying state laws. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law. Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions.").

Petitioner attempts to raise two counterarguments to this black-letter law, neither of which are persuasive. First, Petitioner cites a battery of Supreme Court and Eleventh Circuit cases for the proposition that federal courts can ignore decisions made by Florida's intermediate state appellate courts when there is "convincing evidence" that the Florida Supreme Court would decide the issue differently. *See* Mot. at 6–7. But those cases have nothing to do with reviewing a habeas petition under § 2254—a statute that requires extreme deference to a state court's interpretation of its own laws. *See Estelle*, 502 U.S. at 67–68; *Agan*, 119 F.3d at 1549; *McCullough v. Singletary*, 967 F.2d 530, 535–36 (11th Cir. 1992). Second, Petitioner suggests that the Court can make its own, independent review of state law because he properly raised a federal ineffective-assistance-of-counsel claim under *Strickland*. *See* Mot. at 5–6. This specific argument has been rejected in binding Eleventh Circuit precedent. *See Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1295 (11th Cir. 2017) ("[A]lthough 'the issue of ineffective assistance—even when based on the failure of counsel to raise a state law claim—is one of constitutional dimension,' we 'must defer to the state's

construction of its own law' when the validity of the claim that [counsel] failed to raise turns on state law." (quoting *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984))).

Third, Petitioner contends that the Court erred when it determined that both automatism and insanity are affirmative defenses. *See* Mot. at 10–11. He argues that "an automatism defense for a claim of sleepwalking challenges the fundamental elements of the crime itself rather than providing a justification or excuse for the behavior." *Id.* at 12.[2] Petitioner's own case law does not support this proposition. While Petitioner's state court cases involve "automatism" in some way, none of them establish that Florida recognizes a separate automatism/unconsciousness defense that is akin to "a state-of-mind or lack-of-intent defense" rather than a traditional affirmative defense. *See Rivera v. State*, 235 So. 3d 983, 985–86 (Fla. 2d DCA 2017) (reversing conviction where the jury was never instructed "that the defendant [must have] had knowledge of the victim's status as a law enforcement officer"); *Kemp v. State*, 280 So. 3d 81, 89 (Fla. 4th DCA 2019) (reversing conviction where the trial court "abused its discretion in admitting [the expert witness's] braking opinion under *Daubert*").[3] Petitioner also takes issue with the Court's reliance on out-of-state decisions holding that automatism is an affirmative defense since the Court "failed to cite any relevant or applicable cases to reject the Petitioner's claim in the context of Florida or Federal law." Mot. at 11. But, again, none of the cases Petitioner cites show that automatism is not an affirmative defense under Florida law, let alone that Florida even has a distinct automatism defense to begin with. *See id.* at 11–13.

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[2] Whether automatism is an affirmative defense is effectively an academic question in this case because (as discussed above) the state courts have already determined that sleepwalking is an affirmative insanity defense under Florida law. *See* Order Dismissing Pet. at 10–11.

[3] Petitioner alleges that the defendant in *State v. Cox*, No. 2006-CF-007577-A-O (Fla. 9th Cir. Ct. 2006) was "acquitted after presenting a sleepwalking defense to negate essential elements of [the] crime charged." Mot. at 10. Petitioner has not provided any evidence of how this defense was presented at trial, other than his own summary of what he thinks happened, so the Court cannot assign any persuasive value to this case.

Fourth, Petitioner argues that the Court erred when it failed to grant him an evidentiary hearing on his claims and/or a certificate of appealability ("COA"). *See* Mot. at 15–16. Petitioner was not entitled to either. Evidentiary hearings are only required in "extraordinary cases" where a habeas petitioner presents a new rule of constitutional law, a factual predicate that could not have been previously discovered, or "new evidence [that] will establish [the petitioner's] innocence" by clear and convincing evidence. *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022) (citing 28 U.S.C. § 2254(e)(2)). Petitioner is not entitled to a hearing merely because the state postconviction court did not provide him one. *See* Mot. at 15; *see also Forbes v. Sec'y, Dep't of Corr.*, No. 20-CV-60009, 2022 WL 17082912, at *15 n.10 (S.D. Fla. Nov. 18. 2022) (explaining that *Townsend v. Sain*, 372 U.S. 293 (1963), "is an outdated precedent, that precedes, by more than three decades, the passage of [28 U.S.C. § 2254(e)]").

Petitioner was also not entitled to a COA. Reasonable jurists would not debate the denial of Petitioner's *Strickland* claim since the state court clearly and unequivocally found that Florida does not have a distinct automatism defense that counsel could have raised during Petitioner's trial. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA is not warranted to debate "the wisdom of combining insanity and automatism defenses together" under Florida law. *See* Order Dismissing Pet. at 12.

CERTIFICATE OF APPEALABILITY

Since the denial of a Rule 59(e) motion is a "final order" in a habeas proceeding, the Court must consider whether a COA is appropriate. *See Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013) (citing 28 U.S.C. § 2253(c)(1)). A COA will not be granted from the denial of a Rule 59(e) motion unless reasonable jurists would debate the Court's decision to deny the motion. *See Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015).

Here, Petitioner is not entitled to a COA since he has "pointed to no newly discovered evidence or manifest errors of law or justice to justify reconsideration." *Kinard v. Dep't of Corr.*, No. 20-11728, 2020 WL 6588004, at *2 (11th Cir. Sept. 3, 2020) (citing *Hamilton*, 793 F.3d at 1266).

CONCLUSION

Having carefully reviewed the record and governing law, it is hereby

ORDERED AND ADJUDGED that the Motion to Alter or Amend Judgment, [ECF No. 14], is **DENIED**. Any request for a certificate of appealability is **DENIED**. The case shall remain **CLOSED**.

DONE AND ORDERED in Miami, Florida, this 21st day of June, 2024.

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE

Appendix F

Petitioner's Motion to Alter or Amend Judgment, filed June 13, 2024.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:24-CV-80425-RAR

RANDY ALLEN HERMAN, JR.,
Petitioner,

v.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

_____/

MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, Petitioner, Randy Allen Herman, Jr. (hereinafter "Petitioner"), in *pro se* fashion and pursuant to Federal Rule of Civil Procedure 59(e), hereby respectfully moves this Honorable Court to alter or amend the judgment rendered on May 20, 2024, wherein this Court denied the Petitioner's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. In support of this motion Petitioner states the following:

GROUND ONE

Petitioner was deprived of his constitutional right to effective assistance of counsel when Trial Counsel misadvised the Petitioner to assert insanity as a theory of defense for a claim of sleepwalking over the proper defense of automatism, where the Petitioner was asleep at the time of the homicide and committed the act involuntarily while in an unconscious state.

A. Abuse of Discretion

The Petitioner requests that this Honorable Court alter or amend its judgment where the Court abused its discretion in denying the Petitioner's Petition for Writ of Habeas Corpus,

pursuant to 28 U.S.C. 2254, when it failed to consider the Petitioner's timely filed Reply to the Respondent's Response. The 14 page final order denying relief was filed on May 20, 2024, at 10:27 AM EDT [ECF No. 12]. Although the Petitioner's Reply was mailed from the institution at which he is confined on May 16, 2024 and therefore timely filed per the 'mailbox rule,' the Petitioner's Reply was not received by the Clerk and subsequently filed on the docket until May 20, 2024 at 2:10 PM EDT [ECF No. 13].[1] As a result, this Honorable Court issued a final order denying relief without considering and prior to the Clerk receiving and filing the Petitioner's Reply. The final order further makes no mention of considering the Petitioner's Reply in denying relief.

A District Court abuses its discretion when it "applies the wrong law, the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment." *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir. 2005). A District Court's misinterpretation or misapplication of a procedural rule constitutes an abuse of discretion. *Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010).

Rules Governing Habeas Corpus Cases under Section 2254 specifically contemplate that federal habeas petitioners will be provided an opportunity to "submit a reply to the respondent's answer or other pleading within a time fixed by the judge." *Rule 5(e), Rules Governing Habeas Corpus Cases Under Section 2254*. Consistent with this rule, the Eleventh Circuit has recognized the importance of providing habeas petitioners with "an opportunity to respond to the State's answer" with respect to both procedural and merits arguments raised by the State, reasoning that

[1] In the Court's Order to Show Cause [ECF No. 4], Petitioner was required to file the Reply "within ten (10) days from the date the Response or Answer is filed by Respondent." The Respondent filed the Response on May 10, 2024 [ECF No. 9], rendering the Petitioner's Reply due on or before May 20, 2024. Therefore, Petitioner's Reply was timely filed.

petitioners must have "a meaningful opportunity to . . . explain to the District Court why the State's position [in its answer] is wrong." *Rodriguez v. Fla. Dep't of Corrs.*, 748 F.3d 1073, 1080 (11th Cir. 2014).

Federal habeas corpus proceedings are the last chance a petitioner has to present arguable constitutional violations and errors to a court capable of correcting them. Therefore much rides on having an adversarial process structured in a way that best equips the District Court to get it right. *See Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 1299 (1996) ("Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.")

Therefore, this Honorable Court erred when it denied the Petitioner's Petition for Writ of Habeas Corpus prior to receiving and without considering his timely filed Reply refuting the Respondent's Response. The Petitioner hereby requests this Honorable Court to alter or amend its judgment and consider his timely filed reply in conjunction with this motion and grant relief as requested.

B. Federal Constitutional Claim

i. Unreasonable Application of *Strickland*

The Petitioner's claim turns on the constitutional question of ineffective assistance of counsel. To establish constitutionally deficient performance, the defendant must "identify the acts or omissions . . . that are alleged not to have been the result of reasonable professional judgment" to "show that counsel's representation fell below an objective standard of reasonableness" and "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052 (1984). The unreasonable performance must have been such that "no competent counsel would have taken the action that [the petitioner's]

counsel did take." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001). "The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

"One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior" to a legal proceeding. *Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987). Such preparation includes an understanding of the legal procedures and the legal significance of tactical decisions within those proceedings. *Young v. Zant*, 677 F.2d 792, 794, 799-800 (11th Cir. 1982) (an attorney's reliance on former law and unawareness of procedure deprived his client of effective assistance). Tactical or strategic decisions based on a misunderstanding of the law are unreasonable. *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003); *see also Horton v. Zant*, 941 F.2d 1449, 1462, 1463 (11th Cir. 1991) (counsel's "tactical decision" to present no mitigating evidence during the sentencing phase was "unreasonable" when it was based on a misinterpretation of the law and the failure to evaluate alternative paths).

Trial Counsel's performance was unreasonably deficient where his decision was not made after a thorough investigation of the law, but was made based on a gross misunderstanding of a clear rule of Florida law. The deficient performance is not only Counsel's decision to forgo an automatism defense and pursue an insanity defense for a claim of sleepwalking, but also his failure to conduct adequate legal research in support of that decision. Viewing the facts of the case at the time of his decision, "no competent counsel" would have made such a mistake in his legal research in deciding to pursue an affirmative insanity defense where the Petitioner was unconscious and asleep at the time of the homicide. Counsel failed to adequately investigate or research the law and was thus unable to make a strategic decision as to what defense to pursue

for a claim of sleepwalking. Trial Counsel's misadvice to pursue an affirmative insanity defense over the proper defense of automatism further prejudiced the Petitioner by proceeding to trial with the sleepwalking defense that unconstitutionally shifted the heavier burden of proof to the Petitioner to prove that he lacked the *mens rea* and *actus reus* to commit the crime charged, thereby rendering the result of the proceeding unfair and unreliable.

Under AEDPA's standard of review, a habeas petitioner is not entitled to relief unless he shows that, in an earlier "state court proceeding," the state court unreasonably applied clearly established federal law or made an unreasonable factual determination in denying the petitioner's claim. *See* 28 U.S.C. § 2254(d)(1)-(2). In seeking relief, The Petitioner contends that the State Court's adjudication of the claim resulted in a decision that involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

The State Court's decision was objectively unreasonable where they relied on an erroneous application of Florida law to conclude that "Petitioner's counsel did not perform deficiently because his decision to raise sleepwalking as an insanity defense was reasonable under the circumstances as they stood at the time of trial" [ECF No. 9] at 15. In denying relief and relying on the state court's decision, this Honorable Court held that federal courts "cannot second-guess a state court's application of state law, so its finding that sleepwalking must be presented as an insanity defense under Florida law is fatal to Petitioner's claim," further stating that "counsel was not ineffective for presenting sleepwalking as an insanity defense because, under state law, that was the only way he could." [ECF No. 12] at 10.

"A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *Carrizales v. Wainwright*,

699 F.2d 1053, 1055 (11th Cir. 1983). However, the very nature of the Petitioner's claim turns on the constitutional question of Counsel's ineffective assistance. Although the state court relied on state law to conclude that Counsel's decision was reasonable, the Petitioner's claim nevertheless remains a constitutional issue, a violation of the Petitioner's Sixth Amendment right to effective assistance of counsel.

The state court further relied on an erroneous application of state law to find that Petitioner's counsel was not acting deficiently. A federal court is bound to follow a state supreme court's interpretation of its own laws. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881 (1975); *see also Johnson v. Fankell*, 520 U.S. 911, 916, 117 S. Cit. 1800 (1997) (Federal courts are bound to follow the decisions of the state's highest court on state law matters). However, where the Florida Supreme Court has not addressed the Petitioner's claim, a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise. This is true, even if the federal court does not agree with that state court's reasoning or the outcome which the decision dictates. *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983); *see also Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983); *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 945 (11th Cir. 1982); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179 (1940) (intermediate state appellate court decisions are not binding upon federal court if the federal court is "convinced by other persuasive data" the state's highest court would decide the issue otherwise); *Owen By and Through Owen v. U.S.*, 713 F.2d 1461, 1464-65 (9th Cir. 1983) (finding case to be "one of those rare instances where convincing evidence exists that the highest court of a state will not follow the result reached by some of that state's inferior appellate courts").

In the instant case, the Florida Supreme Court lacked jurisdiction to review the Petitioner's claim since the Fourth District Court of Appeal did not render a written opinion. However, the Fourth DCA's affirmance of the lower tribunal's decision involved an erroneous application of Florida law and was objectively unreasonable where the Florida Supreme Court clearly established that a defense that present's a question of the defendant's *consciousness of his acts* is separate and distinct from a defense of insanity, and therefore, the Petitioner was **not required** to present his claim of sleepwalking under the guise of an insanity defense in accordance with Florida law. The Fourth DCA's denial of the Petitioner's claim and conclusion that Counsel's decision was reasonable was based on inapplicable and outdated case law and convincing evidence exists that the Florida Supreme Court would decide the issue otherwise.

ii. <u>Erroneous Application of State Law</u>

In denying relief this Court relied on the Respondent's Response, asserting that Counsel's decision was *reasonable* based entirely on the 1973 decision of the Second District Court of Appeal in *Cook v. State*, 271 So. 2d 232 (Fla. 2d DCA 1973) where "a defense utilizing a state of unconsciousness or automatism, such as a defendant claiming no recollection of committing a crime due to allegedly suffering an epileptic seizure at the time of the crime, falls within the insanity defense." [ECF No. 10-1], at 261. This Court further held that "although the state postconviction court conceded that *Cook* concerned epileptic seizure (and not sleepwalking), it applied *Cook's* reasoning to find that a condition causing a defendant to have 'no recollection of committing a crime' was properly categorized as an insanity defense." [ECF No. 12], at 10.

However, this Honorable Court has overlooked specific points of law and erred in denying relief where the state court's denial of the Petitioner's claim and Trial Counsel's misadvise to pursue an insanity defense, where the Petitioner was unconscious and asleep at the

time of the crime, was objectively unreasonable based on long-standing precedent by the Florida Supreme Court holding that a defense that presents a question of the defendant's *consciousness of his acts* is wholly distinguishable from a diminished capacity defense and may be presented absent a plea of insanity. *See Wise v. State*, 580 So. 2d 329 (Fla. 1st DCA 1991); *see also Bunney v. State*, 603 So. 2d 1270 (Fla. 1992).

In *Wise*, the appellant was embroiled in an altercation at a bar when he was struck on the left side of his head. As a result, he suffered from a seizure due to partial complex epilepsy and lost consciousness at the time of the crime, a situation wholly distinguishable from that involving a diminished capacity or insanity defense. This case raised a question of whether appellant had *consciousness of his acts themselves*, not of his understanding of their wrongful nature. Nearly materially indistinguishable from the facts held in *Cook*, *Wise* did not seek to prove any mental illness or psychiatric condition, but instead he contended that he had a blackout at the time of the assault in question. *Id.* The First District Court of Appeal held that a defense that presents a question of the defendant's consciousness of his acts may be raised separate and distinct from an insanity defense.

In *Bunney*, the Florida Supreme Court approved the decision held in *Wise* and further held that a defendant's epileptic defense presents a question of the defendant's *consciousness of his acts themselves*, not of his understanding of their wrongful nature, and is thus admissible absent a plea of insanity. The Florida Supreme Court further clarified that their prior decision in *Chestnut* drew a distinction between evidence of "commonly understood conditions beyond one's control," which is admissible, and evidence of "relatively esoteric conditions," which is not admissible absent an insanity defense. *Id.*

The Florida Supreme Court's ruling in *Bunney* and approval of the decision held in *Wise* receded from the Second DCA's holding in *Cook* and clarified the distinction between unconsciousness and insanity, distinguishing between a defendant's consciousness of his acts from his understanding of their wrongful nature as required by the McNaughton Rule. *See Massey v. Fla. Dep't of Corr's.*, 2018 U.S. Dist. LEXIS 59146 (S.D. Fla. April 5, 2018) ("In Florida, that standard for insanity is the M'Naghten Rule, which considers 1) the individual's ability at the time of the incident to distinguish right from wrong, and 2) his ability to understand the wrongness of the act committed"). Accordingly, the fundamental difference between insanity and automatism lies in the awareness of the condition. An insanity defense involves a mental disorder that affects the defendant's ability to understand right from wrong. Automatism, on the other hand, refers to involuntary actions without conscious control. Insanity relates to cognitive understanding, while automatism focuses on physical control.

Using the rationale established by the Florida Supreme Court in *Bunney* and *Wise*, an automatism defense, where the Petitioner was unconscious and asleep at the time of the homicide, is a defense that specifically presents a question of the Petitioner's consciousness of his acts and therefore may be raised distinct from an insanity defense. Such a defense can further be classified as a "commonly understood condition beyond one's control... susceptible to lay understanding" and is admissible absent a plea of insanity under Florida law. *Bunney v. State*, 603 So. 2d 1270 (Fla. 1992). Therefore, had Trial Counsel performed a reasonable investigation and a thorough understanding of the law and facts relevant to the Petitioner's case, Counsel would not have advised the Petitioner to pursue a defense of insanity where the Petitioner lacked the criminal intent and voluntariness to commit the crime charged.

C. **Defense Cognizable to Negate Essential Elements of a Crime**

In denying the Petitioner's claim, this Court stated that "Petitioner is right that some jurisdictions categorize sleepwalking as an 'automatism' defense rather than an insanity defense. The problem is that many other states – **including Florida** – categorize sleepwalking, unconsciousness, and other forms of automatism as insanity defenses." [ECF No. 12] at 10-11. In support of that conclusion, this Court cited a string of cases from Texas, Kentucky, and a Military Justice case, but failed to cite any relevant or applicable cases in Florida or Federal law to reject the Petitioner's claim. Although those specific cases may be considered controlling law in their respective states, such case law is not legally binding on Florida or Federal courts.

This Honorable Court has overlooked or misinterpreted that an automatism defense, where the Petitioner lacked the criminal intent and voluntariness to commit the crime based on expert testimony that he was asleep and unconscious at the time of the homicide, is separate and distinct from a diminished capacity or insanity defense and is cognizable under Florida and Federal law. Due to the rarity of the sleepwalking defense, statutory authority or case law is limited in Florida. However, there is precedent to raise an automatism, or unconsciousness defense, to negate the required intent (*mens rea*) and voluntariness (*actus reus*) that the State must prove in order to meet its burden with respect to the elements of the crime, *See, e.g., State of Florida v. Justin Glenn Cox*, No. 2006-CF-007577-A-O (Fla. 9th Cir. Ct., 2006) (Defendant acquitted after presenting a sleepwalking defense to negate essential elements of crime charged); *Rivera v. State*, 235 So. 3d 983 (Fla. 2d DCA 2017) (defense asserted the shooting was an automatism, an automatic but not conscious behavior, and that the defendant lacked the intent to shoot the officer); *Kemp v. State*, 280 So. 3d 81 (Fla. 4th DCA 2019) ("Dispute over whether defendant was braking at the time of the collision went to the heart of his defense that he had lost

consciousness immediately before the accident"). An automatism defense is used to argue that no criminal act occurred in the first place due to the lack of voluntary action and intent. As such, an automatism defense is analogous to a state-of-mind or lack-of-intent defense that is widely recognized and used in Florida law to negate the essential elements of a crime.

D. Contrary to Clearly Established Federal Law

i. Affirmative Defense

In denying relief, this Honorable Court held that "the distinction between insanity and automatism defenses would have had no bearing on the outcome of Petitioner's case," further stating that "both automatism and insanity are affirmative defenses which place the burden of proof on the defendant." [ECF No. 12] at 11. This Court again cited a string of state law cases from North Carolina, Montana, Ohio, and Wyoming, but failed to cite any relevant or applicable cases to reject the Petitioner's claim in the context of Florida or Federal law.

Under clearly established Florida and Federal precedent, an affirmative defense, when specifically recognized and defined by the legislature, must be raised by the defendant and can "justify" or "excuse" conduct that is otherwise criminal. *W. LaFave & A. Scott, Criminal Law, 152 (1972).* An affirmative defense is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. "An affirmative defense does not concern itself with the elements of the offense at all; it ***concedes*** them." *Smiley v. State,* 966 So. 2d 330 (Fla. 2007) (quoting *Florida v. Cohen*, 568 So. 2d 49 (Fla. 1990)).

However, if a state of mind is an element of a crime, evidence regarding the existence or absence of that state of mind is evidence relevant to whether a crime was, in fact, committed. A defense that negates *mens rea* and *actus reus* thus negates the essential elements of the offense.

rather than constituting a justification or excuse. *See United States v. Westcott*, 83 F.3d 1354 (11th Cir. 1996); *see also United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990). Evidence that aids the trier in determining the defendant's specific state of mind with regard to the actions he took at the time the charged offense was committed, by contrast, is not an affirmative defense but is evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime. See *Donald F. Samuel, Eleventh Circuit Criminal Handbook § 4(e) (Matthew Bender, 2023 Ed.)*. Accordingly, an automatism defense for a claim of sleepwalking challenges the fundamental elements of the crime itself rather than providing a justification or excuse for the behavior.

In *Patterson v. New York*, 432 U.S. 197, 207, 97 S. Ct. 2319 (1977), the United States Supreme Court concluded that the New York legislature's decision to define extreme emotional disturbance as an affirmative defense to the crime of murder was permissible because the defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder" but instead "constituted a separate issue on which the defendant is required to carry the burden of persuasion." The Supreme Court explained that because the fact constituting the affirmative defense was not logically intertwined with a fact necessary to prove guilt, the affirmative defense did not "unhinge the procedural presumption of innocence." *Id.* at 211.

The Florida Supreme Court applied similar reasoning in *State v. Cohen*, 568 So. 2d 49 (Fla. 1990). In *Cohen*, the Florida Supreme Court reviewed a statutory affirmative defense to Florida's witness-tampering statute. The affirmative defense required Cohen to prove that he engaged in lawful conduct and that his sole intention was to encourage, induce, or cause the witness to testify truthfully. *Id.* at 51. The Florida Supreme Court concluded that the supposed affirmative defense was merely an illusory affirmative defense. The Florida Supreme Court

explained that the purported affirmative defense was illusory because Cohen could not logically both raise the affirmative defense and concede the elements of the crime. By attempting to prove the affirmative defense that he had acted lawfully with the intent to encourage the witness to testify truthfully, Cohen would necessarily negate the State's theory that he illegally contacted a witness, as opposed to conceding the State's charges. Thus, the purported affirmative defense unconstitutionally placed a burden on Cohen as a defendant to refute the State's case. *Id.* at 52.

Similarly, in the Petitioner's case Trial Counsel's misadvise to pursue an affirmative defense for a claim of sleepwalking, where the Petitioner was unconscious and his acts were involuntary, negating the *mens rea* and *actus reus* of the offense, relieved the State of its burden of proof beyond a reasonable doubt of the necessary elements of the offense and unconstitutionally shifted the heavier burden of proof to the Petitioner to prove the absence of those elements. By attempting to prove the affirmative defense that he was sleepwalking and lacked *mens rea* and *actus reus* to commit the offense, the Petitioner would necessarily negate the State's theory that he intentionally and voluntarily committed first degree premeditated murder. As a result, a claim of sleepwalking cannot logically be raised as an affirmative defense and simultaneously concede the elements of the crime. Therefore, Trial Counsel's misadvice to pursue an affirmative insanity defense for a claim of sleepwalking and the State Court's denial of the Petitioner's claim is contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977) and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975).

ii. Burden of Proof

"Hornbook law defines a crime as *actus reus* plus *mens rea*, subject of course to a long list of exceptions. The United States Supreme Court has made it clear that guilty knowledge and criminal intent are fundamental elements of any serious crime unless Congress indicates otherwise." *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240 (1952) (quoting *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982); *see also United States v. Apfelbaum*, 445 U.S. 115, 100 S. Ct. 948 (1980) (both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur). Even where the evidence is sufficient to show the necessary *mens rea*, the government still must always meet its burden of proving the *actus reus* of the offense. *United States v. Zhen Zhou Wu*, 711 F.3d 1, 18 (1st Cir. 2013) (quoting *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002)). When a person is sleepwalking, they lack the conscious intent or awareness to commit a crime, meaning the *mens rea* is absent. The law further requires that a criminal act be voluntary and since actions taken while sleepwalking are involuntary, the *actus reus* is absent. As a result, an accused cannot be held criminally liable in a case where the *actus reus* is absent because the accused did not act voluntarily, or where *mens rea* is absent because the accused did not possess the necessary state of mind when he committed the involuntary act.

Accordingly, an automatism defense for a claim of sleepwalking negates both of the basic elements of a crime, the *mens rea* and the *actus reus*, which the State must prove beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime. Therefore, the denial of the Petitioner's claim in which the state court rejected the legality of an automatism defense and held that sleepwalking must be presented under an insanity defense according to Florida law is objectively unreasonable and contrary to clearly established Federal

law, as determined by the Supreme Court of the United States in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970) (the due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charge); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975) (a state cannot require a defendant to prove the absence of a fact necessary to constitute a crime); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450 (1979) (the burden of proving the elements of a crime cannot be shifted to the defendant). Trial Counsel's misadvice to pursue a burden-shifting defense further violated the Due Process clause of the Fourteenth Amendment of the United States Constitution and prejudiced the Petitioner because it removed the presumption of innocence and relieved the state of its burden of proving, beyond a reasonable doubt, the basic elements of the crime.

E. Evidentiary Hearing

A Federal evidentiary hearing is warranted, as the Petitioner was never afforded a full and proper hearing in the State Court proceedings and the state court record does not refute the Petitioner's factual allegations or otherwise preclude habeas relief. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *see also Earp v. Oronski*, 431 F. 3d 1158 (9th Cir. 2005). When the facts are in dispute, the Federal District Court "must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745 (1963). Absent an evidentiary hearing, this Court can only assume whether Trial Counsel's strategy was reasonable or was the result of an inadequate investigation and misunderstanding of the law, using conjecture for reasoning. *See Stouffer v. Reynolds*, 168 F. 3d 1155, 1168 (10th Cir. 1999).

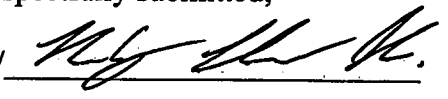
F. Certificate of Appealability

This Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029 (2003). The standard is a modest one: the court should issue the certificate unless the issue is utterly without merit. *See Silva v. Woodford*, 279 F.3d 825, 832-833 (9th Cir. 2002). Although the Petitioner must make a substantial showing of the denial of a constitutional right, this requirement is satisfied even if the claim is only *debatably* constitutional. In other words, the COA standard is met so long as the claim is "plausibly or subject to good faith debate" a decision of constitutional dimension. *U.S. v. Doe*, 810 F.3d 132 (3d Cir. 2015). In the instant case, the Petitioner's claim is adequate to deserve encouragement to proceed further where reasonable jurists would find the District Court's assessment of the constitutional claim debatable.

WHEREFORE, based on the foregoing facts, argument, and citations of authority, the Petitioner contends that Trial Counsel's ineffective representation violated the Petitioner's Sixth and Fourteenth Amendment rights as assured by the United States Constitution and that he is entitled to relief pursuant to 28 U.S.C. § 2254. Petitioner prays this Honorable Court will alter or amend the judgment rendered on May 20, 2024 and grant the following relief, including but not limited to:

1. Order an evidentiary hearing and appoint counsel to represent him at the hearing;
2. Remand the instant case back to the state court for a new trial;
3. Grant a Certificate of Appealability; or
4. Grant any other relief as may be appropriate pursuant to 28 U.S.C. § 2254.

Respectfully submitted,

/s/ 

Randy Herman, Jr., DC# A80442
South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that the foregoing is true and correct and that this motion has been placed in the hands of institutional staff on this 13th day of June, 2024, for mailing to: United States District Court, Southern District of Florida, 701 Clematis Street, Room 202, West Palm Beach, Florida 33401; *and* Regional Office of the Attorney General, 1515 N. Flagler Dr. Suite 900, West Palm Beach, Florida 33401.[2]

/s/ _____

Randy Herman, Jr., DC# A80442
South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

[2] "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 (11th Cir. 2009).

Appendix G

United States District Court for the Southern District of Florida Order Denying Petition for Writ of Habeas Corpus, filed May 20, 2024.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-CV-80425-RAR

RANDY ALLEN HERMAN, JR.,

Petitioner,

v.

RICKY D. DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER DENYING 28 U.S.C. § 2254 HABEAS PETITION

THIS CAUSE comes before the Court on a *pro se* Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, challenging Petitioner's judgment of conviction for first-degree murder imposed by the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, in Case No. 17-CF-002979. *See* Petition [ECF No. 1] ("Pet."); Memorandum of Law ("Mem.") [ECF No. 1-1]. Respondent filed a Response to the Petition. *See* Response to Order to Show Cause [ECF No. 9] ("Resp."). Having carefully reviewed the record and governing law, and for the reasons set forth below, the Court **DENIES** the Petition.

PROCEDURAL HISTORY

On April 6, 2017, a grand jury empaneled in Palm Beach County charged Petitioner with first-degree murder. *See* Indictment, [ECF No. 10-1], at 15. The State alleged that, on March 25, 2017, the Palm Beach County Sheriff's Office received a 911 call from Petitioner where he admitted to stabbing and killing the victim, his former roommate. *See* Probable Cause Affidavit, [ECF No. 10-1], at 11–12. During his interview with law enforcement, Petitioner "appeared upset and was crying" and conceded that he "must have" killed the victim even though he had no

memory of doing so. *Id.* at 12. A friend of the victim later told police that the victim had called him to complain that Petitioner "was acting weird and was drunk." *Id.*

Pursuant to FLA. R. CRIM. P. 3.216, Petitioner's defense counsel filed a notice of intent to rely on an insanity defense during trial. *See* Notice of Intent to Rely on Insanity Defense, [ECF No. 10-1], at 17–20. Counsel explained that he had retained an expert psychologist to evaluate Petitioner and that the expert had concluded that Petitioner was suffering from "Sleep Arousal Disorder – Sleepwalking" when the crime took place. *Id.* at 18. The State then retained its own expert, who opined that Petitioner "knew what he was doing, the consequences of his actions, and their wrongfulness" because Petitioner had an intact memory of other events and had been flirting with the victim via text message shortly before she was murdered. Motion in Limine, [ECF No. 10-1], at 32. Defense counsel moved to exclude the State expert's opinion under Florida law. *See id.* at 34–35. The trial court held a hearing on Petitioner's motion in limine, but reserved ruling on the issue until trial so it could "hear the training and experience of the person offering the opinion." Motion Hr'g Tr., [ECF No. 11-1], at 18:21–24. At trial, defense counsel declined to object to the State witness's expertise or the expert's ultimate conclusion that Petitioner was not sleepwalking and that the murder was sexually motivated. *See* Trial Tr., [ECF No. 11-3], at 1056–68, 1104–09.

On May 8, 2019, a jury found Petitioner guilty of first-degree murder as charged in the Indictment. *See* Verdict, [ECF No. 10-1], at 115. The trial court adjudicated Petitioner guilty and sentenced him to a mandatory term of life in prison. *See* Judgment and Sentencing Order, [ECF No. 10-1], at 121–25.

Petitioner appealed his conviction and sentence to Florida's Fourth District Court of Appeal ("Fourth DCA"). Petitioner advanced two arguments on direct appeal: (1) the trial court

erred when it admitted the testimony of the State's expert because it failed "to assess whether the reasoning or methodology underlying the expert testimony was valid"; and (2) the trial court erred when it failed to give a special jury instruction which explained "that the defense was precluded by the rules of evidence from introducing [Petitioner's] statement to the [sic] law enforcement[.]" Direct Appeal Initial Brief, [ECF No. 10-1], at 180–81. On April 14, 2021, the Fourth DCA affirmed Petitioner's conviction in a written opinion. *See Herman v. State*, 315 So. 3d 743, 745 (Fla. 4th DCA 2021). The Fourth DCA declined to consider whether the trial court "erred in admitting the State expert's testimony" because trial counsel failed to object on those grounds during the trial. *Id.* at 744–45. As for Petitioner's jury instruction argument, the Fourth DCA held that the standard jury instruction given to the jury "properly explained the burden of proof and the defendant's theory of defense" and that the trial court's decision not to give a special jury instruction did not "reasonably contribute[ ] to the verdict." *Id.* at 745.

On November 9, 2021,[1] Petitioner filed a *pro se* motion for postconviction relief under FLA. R. CRIM. P. 3.850. *See* Postconviction Motion, [ECF No. 10-1], at 234–56. Petitioner raised seven grounds for relief in his Postconviction Motion: (1) counsel was ineffective "in concluding that sleepwalking is a mental illness and further advising the Defendant to assert insanity as a theory of defense[,]" *id.* at 236; (2) counsel was ineffective for failing to discover that "sleepwalking should have been raised under the legal defense of automatism[,]" *id.* at 240; (3) counsel was ineffective for "failing to consult and present an expert witness in forensic sleep science[,]" *id.* at 241; (4) counsel was ineffective for failing to object "on the grounds that the State's rebuttal expert witness was not qualified to testify on non-rapid eye movement sleep

[1] "Under the 'prison mailbox rule,' a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). "Absent evidence to the contrary, [courts] assume that a prisoner delivered a filing to prison authorities on the date that he signed it." *Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014).

arousal disorder," *id.* at 244; (5) counsel was ineffective for failing to obtain a ruling on the motion in limine, *id.* at 247; (6) counsel was ineffective for failing to call Amanda Cona as a defense witness, *id.* at 250; and (7) cumulative error, *id.* at 252.

The State filed a Response to the Postconviction Motion contending that all seven grounds of the Postconviction Motion should be summarily denied. *See* State's Response, [ECF No. 10-1], at 269. On May 18, 2023, the state postconviction court "adopt[ed] the facts, legal analyses, and conclusions of law contained in the State's Response as its own," and denied the Postconviction Motion. Order Denying Postconviction Motion, [ECF No. 10-1], at 294. Petitioner appealed the denial of his Postconviction Motion to the Fourth DCA, but the Fourth DCA summarily affirmed the state postconviction court in an unwritten opinion on October 5, 2023. *See Herman v. State*, 373 So. 3d 315, 316 (Fla. 4th DCA 2023). After denying Petitioner's motion for rehearing, *see* Order Denying Motion for Rehearing, [ECF No. 10-2], at 65, the Fourth DCA's mandate issued on December 7, 2023, *see* Postconviction Mandate, [ECF No. 10-2], at 67.

Petitioner timely filed the instant Petition on April 8, 2024. *See* Pet. at 1.

STANDARD OF REVIEW

A. Review Under 28 U.S.C. § 2254

"As amended by [the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")], 28 U.S.C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Some of the more restrictive limits are found in § 2254(d). Under that provision, a federal court may grant habeas relief from a state court judgment only if the state court's decision on the merits was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Consequently, § 2254(d) constructs a "highly deferential standard for evaluating state-court rulings" because, after all, this standard "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

"A state court's decision is 'contrary to' federal law if the 'state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Consalvo v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 842, 844 (11th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000)) (brackets omitted). A state court's decision qualifies as "an unreasonable application of federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (quoting *Williams*, 529 U.S. at 413) (cleaned up). "'If this standard [seems] difficult to meet'—and it is—'that is because it was meant to be.'" *Burt v. Titlow*, 571 U.S. 12, 20 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

By its own plain terms, § 2254(d)'s deferential standard applies only when a claim "was adjudicated on the merits in State court proceedings[.]" 28 U.S.C. § 2254(d); *see also Cullen*, 563 U.S. at 181 ("If an application includes a claim that has been adjudicated on the merits in State court proceedings, § 2254(d), an additional restriction applies."); *Cone v. Bell*, 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA."). The summary denial of a claim with no articulated reasons presumptively serves as an adjudication on the merits subjecting the claim to § 2254(d)'s additional restrictions. *See Richter*, 562 U.S. at 100 ("This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons

before its decision can be deemed to have been 'adjudicated on the merits.'"). This is because federal courts ordinarily presume § 2254(d)'s deferential standard applies when a constitutional claim has been presented to a state court and denied in that forum. *See, e.g.*; *id.* at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

At the same time, "federal court[s] should 'look through' [an] unexplained decision to the last related state-court decision that *does* provide a relevant rationale" if one exists. *See Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (emphasis added). From there, federal courts "presume that the unexplained decision adopted the same reasoning." *Id.* "[T]he State may rebut [that] presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.* at 125–26.

In addition to the standard of review imposed by AEDPA, the petitioner must also show that any constitutional error had a "substantial and injurious effect or influence" on the verdict to be entitled to habeas relief. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The Supreme Court has explained that, while the passage of AEDPA "announced certain new conditions to [habeas] relief," it did not supersede or replace the harmless error standard announced in *Brecht*. *Brown v. Davenport*, 596 U.S. 118, 134 (2022). In other words, a habeas petitioner must also satisfy *Brecht*, even if AEDPA applies. *See id.* ("[A] federal court must *deny* relief to a state habeas petitioner who fails to satisfy either [*Brecht*] or AEDPA. But to *grant* relief, a court must find that the petition has cleared both tests.") (emphasis in original); *see also Mansfield v. Sec'y, Dep't of Corr.*,

679 F.3d 1301, 1307 (11th Cir. 2012) ("[A] habeas petition cannot be successful unless it satisfies both [AEDPA] and *Brecht*.").

B. Ineffective Assistance of Counsel Claims

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas litigant must demonstrate "that (1) his counsel's performance was deficient and 'fell below an objective standard of reasonableness,' and (2) the deficient performance prejudiced his defense." *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016) (quoting *Strickland*, 466 U.S. at 687–88).

Regarding the deficiency prong, "a petitioner must establish that no competent counsel would have taken the action that his counsel did take" during the proceedings. *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). If "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial[,]" counsel did not perform deficiently. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (quoting *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)).

As for the second prong, "a defendant is prejudiced by his counsel's deficient performance if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

ANALYSIS

Petitioner advances only one claim in his Petition and incorporated Memorandum of Law. He insists that counsel was ineffective for presenting Petitioner's sleepwalking disorder as an insanity defense. *See* Pet. at 3. Instead, Petitioner explains, "[a]n adequate investigation of Petitioner's theory of defense and sufficient knowledge of the law would have revealed that sleepwalking is properly raised through a defense of automatism, often referred to as unconsciousness, and that such a defense was available in Florida and further supported by Federal law." *Id.* Petitioner believes that presenting his sleepwalking defense through the lens of insanity, rather than "automatism," prejudiced him because it shifted the burden of proof from the State and onto the defense. *See* Mem. at 5. The State responds that defense counsel properly and reasonably asserted an insanity defense based on Petitioner's sleepwalking disorder and that "there is no statutory authority or case law in Florida that supports his argument that automatism instead of insanity was the proper way to raise sleepwalking as a defense in his case[.]" Resp. at 15.[2] After reviewing the record and the parties' pleadings, the Court finds that Petitioner's argument lacks merit.

Under AEDPA's stringent standard of review, a habeas petitioner is not entitled to relief unless he or she shows that, in an earlier "State court proceeding," the state court unreasonably applied clearly established federal law or made an unreasonable factual determination in denying the petitioner's claim. *See* 28 U.S.C. § 2254(d)(1)–(2). The relevant "State court proceeding" for

[2] Respondent does not contest the timeliness of the Petition and has expressly waived an exhaustion defense. *See* Resp. at 5, 12. Accordingly, the Court will analyze the merits of the Petition under AEDPA's standard of review without considering the viability of any other procedural defenses. *See Day v. McDonough*, 547 U.S. 198, 209 (2006) (holding that district courts "are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition"); *Vazquez v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 964, 966 (11th Cir. 2016) ("States can waive procedural bar defenses . . . including exhaustion" (alteration adopted; internal quotation marks omitted)).

AEDPA purposes is the "highest state court decision" that reached the merits of the habeas petitioner's claim. *See Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008). In this case, the "highest state court decision" at issue is the Fourth DCA's opinion summarily affirming the denial of Petitioner's Postconviction Motion. *See Herman*, 373 So. 3d at 316. Since the Fourth DCA did not render a "reasoned opinion," the Court must "look through" this decision to "the last related state-court decision that does provide a relevant rationale." *Wilson*, 584 U.S. at 125. The state postconviction court's order denying Petitioner's Postconviction Motion merely adopted the reasoning of the State's Response, *see* Order Denying Postconviction Motion, [ECF No. 10-1], at 294, so "the Court shall review the reasonableness of the State's Response as it is the presumptive reasoning of both the Fourth DCA and the state postconviction court." *Baker v. Dixon*, No. 21-CV-60876, 2022 WL 3867784, at *10 (S.D. Fla. Aug. 30, 2022) (cleaned up).

Petitioner claims that counsel was ineffective for framing his sleepwalking as "an affirmative insanity defense" when it should have been presented as an "automatism" defense—which would have purportedly convinced the jury that Petitioner "did not commit the act voluntarily or with criminal intent." Pet. at 5; *see also* Mem. at 5–6 (same). In denying this same claim, the state postconviction court adopted the State's arguments that: (1) sleepwalking must be presented as an insanity defense under *Cook v. State*, 271 So. 2d 232 (Fla. 2d DCA 1973); (2) the record shows that counsel's decision to package sleepwalking as an insanity defense was based on an exceedingly thorough and reasonable investigation into the science and law; and (3) Petitioner did not suffer any prejudice because the physical evidence presented at trial proved "that the defendant's actions were premediated and [that] he was awake during the victim's murder [and] not sleepwalking at all." *See* State's Response, [ECF No. 10-1], at 261–65.

The state postconviction court found, as a matter of state law, that a sleepwalking defense is a species of insanity—not automatism, diminished capacity, or any other type of defense. *See id.* at 261 ("A defense utilizing a state of unconsciousness or automatism, such as a defendant claiming no recollection of committing a crime due to allegedly suffering an epileptic seizure at the time of the crime, falls within the insanity defense, as seen in *Cook v. State*, 271 So. 2d 232 (Fla. 2d DCA 1973)."). Although the state postconviction court conceded that *Cook* concerned an epileptic seizure (and not sleepwalking), it applied *Cook*'s reasoning to find that a condition causing a defendant to have "no recollection of committing a crime" was properly categorized as an insanity defense. *Id.*; *see also Cook*, 271 So. 2d at 233 (applying insanity defense where "Cook does not deny that he committed the offense, but claims that he has no recollection of what happened that night"). This Court cannot second-guess a state court's application of state law, so its finding that sleepwalking must be presented as an insanity defense under Florida law is fatal to Petitioner's claim. *See Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997) ("[S]tate courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters."). In other words, counsel was not ineffective for presenting sleepwalking as an insanity defense because, under state law, that was the only way he could. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1354–55 (11th Cir. 2005) (holding that counsel cannot be ineffective for failing to raise a state-law objection where the state's courts "already told us how the issues would have been resolved under . . . state law").

Petitioner resists this conclusion, arguing that "an automatism defense has been recognized by courts as a complete defense bearing on the voluntariness of an otherwise criminal act" and that "automatism" is legally distinct from "insanity." Mem. at 7. Petitioner is right that some jurisdictions categorize sleepwalking as an "automatism" defense rather than an insanity defense.

See, e.g., *McClain v. State*, 678 N.E.2d 104, 109 (Ind. 1997) (describing "sleepwalking" as "automatism" and distinguishing it from an "insanity defense" under Indiana law); *Fulcher v. State*, 633 P.2d 142, 147 (Wyo. 1981) ("We now hold that, under the law of this state, unconsciousness, or automatism, is a complete defense to the criminal charge, separate and apart from the defense of insanity[.]" (quoting *State v. Caddell*, 215 S.E.2d 348, 363 (N.C. 1975)). The problem is that many other states—including Florida—categorize sleepwalking, unconsciousness, and other forms of automatism as insanity defenses. *See Loven v. State*, 831 S.W.2d 387, 391 (Tex. App. 1992) ("Texas courts have held that states of unconsciousness or automatism, including epileptic states, are includable in the defense of insanity."); *Tibbs v. Commonwealth*, 128 S.W. 871, 874 (Ky. 1910) (describing "somnambulism," or sleepwalking, as a defense "that is "embraced in a plea of insanity"); *see also United States v. Savage*, 67 M.J. 656, 661 n.6 (A. Ct. Crim. App. 2009) ("We note that courts have not come to a consensus on the legal status of parasomnia and the parasomnia defense"). Florida's refusal to recognize automatism as a distinct defense from insanity does not make Petitioner's conviction repugnant in the eyes of the Constitution. *See Kahler v. Kansas*, 589 U.S. 271, 282 (2020) ("A State's insanity rule is substantially open to state choice. . . . [N]o particular insanity test serves as a baseline for due process. Or said just a bit differently, [ ] due process imposes no single canonical formulation of legal insanity." (cleaned up)); *Haskell v. Berghuis*, 511 F. App'x 538, 545 (6th Cir. 2013) ("Supreme Court precedent does not clearly establish an automatism defense, nor does it establish that defendants may raise whatever defenses they choose.").[3]

[3] For what it's worth, the Court also finds that the distinction between insanity and automatism defenses would have had no bearing on the outcome of Petitioner's case. Petitioner appears to believe that automatism is not an affirmative defense, and that simply invoking an automatism defense would immediately negate a crime's *actus reus* and *mens rea* unless the State could disprove the automatism defense beyond a reasonable doubt. *See* Pet. at 4; Memo. at 5–6, 9–10. This is mistaken. Both automatism and insanity are affirmative defenses which place the burden of proof on the defendant. *See, e.g.*, *State v.*

At the end of the day, Petitioner's argument boils down to his frustration that Florida law cabins sleepwalking within the well-worn confines of its insanity defense. Although legal scholars can question the wisdom of combining insanity and automatism defenses together, *see Palmer v. State*, 379 P.3d 981, 990 & n.24 (Alaska Ct. App. 2016), federal courts cannot pass judgment on matters of state law, *see McCullough v. Singletary*, 967 F.2d 530, 535–36 (11th Cir. 1992) ("A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief . . . . State courts are the ultimate expositors of their own state's laws, and federal courts entertaining petitions for writs of habeas corpus are bound by the construction placed on a state's criminal statutes by the courts of the state[.]"). Since counsel was not ineffective for using Petitioner's alleged sleepwalking disorder to present an insanity defense within the parameters of Florida law, Petitioner fails to show that the state courts unreasonably applied *Strickland* (or any other federal law) in denying his application for postconviction relief. *See Herring*, 397 F.3d at 1354–55. Accordingly, the Petition is **DENIED**.

EVIDENTIARY HEARING

No evidentiary hearing is warranted in this matter. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the [state court] record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

Rogers, 725 S.E.2d 342, 349 (N.C. Ct. App. 2012) ("Automatism is an affirmative defense, and the burden is on the defendant to prove its existence to the jury."); *City of Missoula v. Paffhausen*, 289 P.3d 141, 148 (Mont. 2012) (describing automatism as "an affirmative defense"); *State v. Ireland*, 121 N.E.3d 285, 293 (Ohio 2018) ("Ireland's blackout defense . . . is an affirmative defense[.]"); *Polston v. State*, 685 P.2d 1, 6 (Wyo. 1984) ("[T]he burden is upon the defendant who raises the defense of automatism to prove the elements necessary to establish the defense[.]"). For this reason, the Court finds that, even if defense counsel tried to put on an automatism defense, the outcome of Petitioner's trial would not have changed because Petitioner retained the same burden of proof as he did when presenting an insanity defense. *See Strickland*, 466 U.S. at 694.

CERTIFICATE OF APPEALABILITY

After careful consideration of the record in this case, the Court declines to issue a certificate of appealability ("COA"). A habeas petitioner has no absolute entitlement to appeal a district court's final order denying his habeas petition. Rather, to pursue an appeal, a petitioner must obtain a COA. *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009).

Issuance of a COA is appropriate only if a litigant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, litigants must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And "[w]here a district court has disposed of claims . . . on procedural grounds, a COA will be granted only if the court concludes that 'jurists of reason' would find it debatable both 'whether the petition states a valid claim of the denial of a constitutional right' and 'whether the district court was correct in its procedural ruling.'" *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001) (quoting *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000)).

Here, reasonable jurists would not debate the Court's decision to deny the Petition on its merits. Accordingly, a COA will **NOT ISSUE**.

CONCLUSION

Having carefully reviewed the record and governing law, it is hereby

ORDERED AND ADJUDGED that the Petition, [ECF No. 1], is **DENIED**. Any request for a certificate of appealability is **DENIED**, and an evidentiary hearing is **DENIED**. All deadlines are **TERMINATED**, and any pending motions are **DENIED** as moot. The Clerk is directed to **CLOSE** the case.

DONE AND ORDERED in Miami, Florida, this 20th day of May, 2024.

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE

Appendix H

Petitioner's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus and Memorandum of Law, filed April 08, 2024.

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

UNITED SATES DISTRICT COURT	District: SOUTHERN DISTRICT OF FLORIDA
Name (under which you were convicted): RANDY ALLEN HERMAN, JR.	**Docket or Case No.:**
Place of Confinement: South Bay Correctional Facility, 600 U.S. Highway 27 South, South Bay, Florida 33493	**Prisoner No.:** A80442
Petitioner (include the name under which you were convicted): RANDY ALLEN HERMAN, JR. v.	**Respondent** (authorized person having custody of petitioner): RICKY DIXON, SEC. F.D.O.C.
The Attorney General of the State of: FLORIDA – ASHLEY MOODY	

PETITION

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

   (b) Criminal docket or case number: 50-2017-CF-002979-A

2. (a) Date of judgment of conviction: May 08, 2019

   (b) Date of sentence: May 08, 2019

3. Length of sentence: Life without the possibility of parole

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

5. Identify all crimes of which you were convicted and sentenced in this case: First Degree Murder, F.S. § 782.04(1)(a)1

6. (a) What was your plea? (Check one)

   [ ] (1) Not guilty
   [ ] (2) Guilty
   [ ] (3) Nolo contendere
   [X] (4) Insanity plea

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

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

   [X] Jury [ ] Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

   [X] Yes [ ] No

8. Did you appeal from the judgment of conviction?

   [X] Yes [ ] No

9. If you did appeal, answer the following:

(a) Name of court: In the District Court of Appeal, Fourth District of Florida

(b) Docket or case number: 4D19-1636

(c) Result: Per Curiam Affirmed with Written Opinion

(d) Date of result: Opinion filed April 14, 2021; Mandate filed May 14, 2021

(e) Citation to the case: *Herman v. State*, 315 So. 3d 743 (Fla. 4th DCA 2021)

(f) Grounds raised: (1) The Trial Court erred in admitting over defense objection the State's expert testimony on sexually motivated homicide; (2) The Trial Court erred in denying the requested special jury instruction

(g) Did you seek further review by a higher state court? [ ] Yes [X] No

(h) Did you file a petition for certiorari in the United Sates Supreme Court? [ ] Yes [X] No

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? [X] Yes [ ] No

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

(a) (1) Name of court: In the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida

(2) Docket or case number: 50-2017-CF-002979-A

(3) Date of filing: November 16, 2021

(4) Nature of the proceeding: Motion for Postconviction Relief *(pursuant to Fla.R.Crim.P. 3.850)*

(5) Grounds raised: (1) Trial Counsel was ineffective for improperly classifying sleepwalking as a mental disease, defect, or infirmity and further misadvising the Defendant to pursue a defense of insanity; (2) Trial Counsel was ineffective for his failure to investigate non-REM sleep arousal disorders and present the proper defense of automatism; (3) Trial Counsel was ineffective for his failure to consult and present a sleep specialist or forensic sleep expert with a specialty in non-REM sleep arousal disorders in support of the Defendant's sleepwalking defense; (4) Trial Counsel was ineffective for his failure to object on the grounds that the State's rebuttal expert witness was not qualified to testify on non-REM sleep arousal disorders; (5) Trial Counsel was ineffective for his failure to make a standard contemporaneous objection on the grounds initially raised in the Defendant's pretrial Motion in Limine and obtain a ruling by the Trial Court; (6) Trial Counsel was ineffective for his failure to present Amanda Cona as a witness in support of the defense; and (7) Trial Counsel's cumulative errors deprived the Defendant of the right to effective assistance of counsel and the right to a fair trial

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

(7) Result: Summarily Denied

(8) Date of result: May 18, 2023

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

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

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: [X] Yes [ ] No

(2) Second petition: [ ] Yes [ ] No N/A

(3) Third Petition: [ ] Yes [ ] No N/A

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

PETITIONER WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL MISADVISED THE PETITIONER TO PURSUE A DEFENSE OF INSANITY RATHER THAN THE PROPER DEFENSE OF AUTOMATISM FOR A CLAIM OF SLEEPWALKING, IN VIOLATION OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION; THE STATE COURT'S ADJUDICATION OF THE CLAIM 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

(a) Supporting facts:

Before trial, Counsel retained a forensic psychologist that diagnosed the Petitioner with the non-rapid eye movement sleep arousal disorder of *sleepwalking* at the time of the homicide (R 231-232, 240). The Petitioner informed Counsel that it was his desire to present evidence and expert testimony that he suffered from this sleep disorder that caused him, while in an unconscious state, to stab the victim without any criminal intent or culpability for his involuntary actions. Trial Counsel informed the Petitioner that sleepwalking is a mental disorder and must be asserted through a defense of insanity. Counsel further claimed that this was the only theory of defense aligned with the sleepwalking disorder in Florida and the only way to offer a viable defense to the jury (R 4-5).

The Petitioner contends that Trial Counsel provided constitutionally ineffective assistance by misadvising the Petitioner to assert insanity as a theory of defense over the proper defense of automatism for a claim of sleepwalking, where the Petitioner was asleep at the time of the homicide and committed the act involuntarily (R 7-9). An adequate investigation of the Petitioner's theory of defense and sufficient knowledge of the law would have revealed that sleepwalking is properly raised through a defense of automatism, often referred to as unconsciousness, and that such a defense was available in Florida and further supported by Federal law.

Automatism has been recognized by courts as a complete defense bearing on the voluntariness of an otherwise criminal act. Black's Law Dictionary defines automatism as:

> *(1) Action or conduct occurring without will, purpose, or reasoned intention, such as sleepwalking; behavior carried out in a state of unconsciousness; Automatism may be asserted as a defense to negate the requisite mental state of voluntariness for commission of a crime. (2) The state of a person who, though capable of action, is not conscious of his or her actions. Black's Law Dictionary, 154 (9th ed. 2009). (See also Sleepwalking Defense- See AUTOMATISM; Unconsciousness Defense- See AUTOMATISM. Black's Law Dictionary, 484 (9th ed. 2009)) (R 8).*

Criminal liability usually requires that two elements must be present: *actus reus* (literally "guilty act"), and *mens rea* (literally "guilty mind"). The *actus reus* is the prohibited conduct, performed voluntarily. Someone in a state of legal automatism is not acting voluntarily and so cannot have carried out the *actus reus* (nor could they have the required *mens rea*). If the accused lacks the requisite *actus reus* or *mens rea*, then the criminal offense is not made out (R 323). Sleepwalking has long been held to fulfill the requirements of legal automatism, and therefore, an act performed while sleepwalking does not meet the definition of a criminal act (R 326).

Accordingly, the most significant distinction between insanity and automatism rests on the burden of proof issue. Because insanity leading to criminal behavior usually does not eliminate the mental state necessary for a finding of criminal culpability, the burden may be placed on the defendant to prove insanity. On the other hand, an automatism defense, in which the Petitioner was sleepwalking and therefore unconscious of his involuntary acts, negates both of the basic elements of a crime – the mental state (*mens rea*) and the voluntary nature of the act (*actus reus*). As such, once the issue of automatism, or unconsciousness, is raised by the defense, the State must disprove it beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime.

There is no legal precedent to support Trial Counsel's decision to pursue an insanity defense for a claim of sleepwalking in the State of Florida and the record in this case expressly supports the Petitioner's claim that sleepwalking is properly raised under a defense of automatism. Specifically, Trial Counsel acknowledged during closing arguments that sleepwalking is an *involuntary act* and Dr. Charles Patrick Ewing, the sole expert witness for the Defense, testified numerous times during trial that the Petitioner was *unconscious* and *asleep* at the time of the homicide, directly supporting an automatism defense:

> *"The whole point of sleepwalking is that you don't know that you are doing it. That's what you heard from Dr. Ewing. I think that's what you heard from Dr. Myers. You don't know what you are doing. You are [will] acting involuntarily. That's the point of sleepwalking" (R 412-413).*
>
> *"The studies that I looked at seemed to indicate that there was, because you're asleep at the time, because you're unconscious, that you are largely, if not completely, impervious to pain" (R 231).*
>
> *"During the attack he was unconscious, asleep, and that afterwards he was awake..." (R 231).*
>
> *"They're not conscious of what's going on, but the literature is pretty clear that even though they're not conscious they're still capable of carrying out very complex acts" (R 232).*
>
> *"Yes, the fact that somebody who is unconscious, who's asleep and sleepwalking is still capable of carrying out complex tasks" (R 232).*
>
> *"...as a result he was not conscious at the time of the homicide, and because he was not conscious, he was not capable of knowing what he was doing, or knowing that what he was doing was wrong" (R 240).*
>
> *"Because he was unconscious, because he was suffering from this illness that he was not able to know what he was doing, or know the consequences of what he was doing" (R 242).*

In addition, research articles introduced by Counsel as defense exhibits at trial further conclude that *"sleepwalking is seen as a classic example of a legal automatism"*, that *"later cases clearly opposed the use of the insanity defense in sleepwalking cases"*, and that *"modern courts and scholars have abandoned the classification of sleepwalking as an insanity defense"* (R 326, 344). The record further lists several judicial decisions from superior courts holding that a sleepwalking defense is separate and distinct from a defense of insanity and that an automatism defense is more appropriate in the context of sleepwalking (R 342-344).

Trial Counsel's misadvice prejudiced the Petitioner by proceeding to trial with an affirmative insanity defense that detracted from the Petitioner's chosen defense that he committed the act while sleepwalking, in a state of unconsciousness, and that he did not commit the act voluntarily or with criminal intent. In light of all the facts, evidence, and applicable case law, a reasonably competent attorney would have presented a defense of automatism. Trial Counsel should have understood that an automatism defense for a claim of sleepwalking would negate the basic elements of the crime and did not support a standard for insanity under *Florida Statutes*. For purposes of *Strickland*, the failure to assert an obvious defense to the elements of a crime - intent and voluntariness - constitutes deficient performance. Competence requires a basic conception of the elements of a crime and how lawyers must go about casting doubt on *mens rea* and *actus reus*, which the State must prove beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime. Instead, Counsel chose to carry the heavier burden of proving the affirmative defense of insanity by clear and convincing evidence, unnecessarily shifting the burden of proof to the Petitioner. There's a reasonable probability that the evidence presented by the Defense may have been sufficient to establish that the Petitioner was not guilty beyond a reasonable doubt, but was insufficient to rise to the level of clear and convincing evidence to persuade the jury that the Petitioner was not guilty by reason of insanity, thereby prejudicing the Petitioner and rendering the result of the proceeding unreliable and fundamentally unfair.

Had Trial Counsel correctly advised the Petitioner to pursue the proper defense of automatism and had the jury been properly instructed on the applicable law, it would have reasonably changed the outcome of the Petitioner's case where the State would be required to prove the Petitioner acted consciously and voluntarily beyond any reasonable doubt to support a finding of guilt. Therefore, where the State's evidence pertaining to the requisite intent required for a finding of premeditation was wholly predicated on circumstantial evidence and the evidence presented by the Defense was sufficient to suggest the Petitioner was sleepwalking at the time of the homicide so as to give rise to a reasonable doubt as to his culpability, there is a reasonable probability that the jury would have found the Petitioner *not guilty* in accordance with the law, resulting in an outright acquittal. The Petitioner was further prejudiced by Counsel's misadvice to pursue an insanity defense where the best possible outcome at trial would have been for the jury to find him *not guilty by reason of insanity*, resulting in possible commitment to a mental institution for mental rehabilitation- an inappropriate treatment for sleepwalking where the Petitioner was not legally insane at the time of the homicide, but rather committed the act involuntarily while in the natural state of sleep.

In denying relief, the Petitioner contends that the State Court's adjudication of the claim 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 and further 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, pursuant to 28 U.S.C. 2254(d). The State Court further failed to hold a full and fair hearing where the attached records did not conclusively refute the Petitioner's legally sufficient claim and the Petitioner was denied his right to develop and adequately present his claim in the State Court. Therefore, a Federal evidentiary hearing is warranted.

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

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

(1) If you appealed from the judgment of conviction, did you raise this issue? [ ] Yes [X] No

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of trial counsel claims are appropriately raised in a Motion for Postconviction Relief pursuant to *Fla.R.Crim.P.* 3.850 and are generally not applicable on direct appeal

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

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

Type of motion or petition: Motion for Postconviction Relief *(pursuant to Fla.R.Crim.P. 3.850)*

Name and location of the court where the motion or petition was filed: In the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida

Docket or case number: 50-2017-CF-002979-A

Date of the court's decision: May 18, 2023

Result: Summarily Denied

(3) Did you receive a hearing on your motion or petition? [ ] Yes [X] No

(4) Did you appeal from the denial of your motion or petition? [X] Yes [ ] No

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

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

Name and location of the court where the appeal was filed: In the District Court of Appeal, Fourth District of Florida

Docket or case number: 4D23-1473

Date of the court's decision: Decision filed October 05, 2023; Timely filed Motion for Rehearing denied November 08, 2023; Mandate filed December 07, 2023

Result: Per Curiam Affirmed *(Decision without Published Opinion) (2023 Fla. App. LEXIS 6916)*

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

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

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

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? [X] Yes [ ] No

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: No. All grounds in this petition have been presented in state court

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

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging: [ ] Yes [X] No

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

(a) At preliminary hearing: Joseph P. Walsh, *Assistant Public Defender*, 421 3rd Street, West Palm Beach, Florida 33401

(b) At arraignment and plea: Joseph P. Walsh, *Assistant Public Defender*, 421 3rd Street, West Palm Beach, Florida 33401

(c) At trial: Joseph P. Walsh, *Assistant Public Defender*, 421 3rd Street, West Palm Beach, Florida 33401

(d) At sentencing: Joseph P. Walsh, *Assistant Public Defender*, 421 3rd Street, West Palm Beach, Florida 33401

(e) On appeal: Mara Herbert, *Assistant Public Defender*, 421 3rd Street, West Palm Beach, Florida 33401

(f) In any post-conviction proceeding: Randy Herman, Jr., *Petitioner, pro se*, South Bay Correctional Facility, 600 U.S. Highway 27 South, South Bay, Florida 33493

(g) On appeal from any ruling against you in a post-conviction proceeding: Randy Herman, Jr., *Petitioner, pro se*, South Bay Correctional Facility, 600 U.S. Highway 27 South, South Bay, Florida 33493

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

[ ] Yes [X] No

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

The instant petition is timely pursuant to 28 U.S.C. § 2244(d). On Petitioner's direct appeal, The Fourth District Court of Appeal issued a *per curiam* affirmance with a written opinion on April 14, 2021. Where Petitioner failed to invoke the discretionary jurisdiction of the Florida Supreme Court, his direct appeal became final on May 14, 2021, when the time for seeking such review expired. *See Phillips v. Warden*, 908 F.3d 667 (11th Cir. 2018) (holding that the petitioner, who had failed to seek review of his conviction in the state supreme court, was not entitled to petition the United States Supreme Court for a writ of certiorari, and his conviction became final when the time for seeking review in the relevant state court expired). Therefore, Petitioner's one-year time limit began to run on May 14, 2021.

On November 16, 2021, Petitioner properly filed a Motion for Postconviction Relief, pursuant to Fla.R.Crim.P. 3.850, in the state trial court. At the time of filing, Petitioner had exhausted **186 days** of his AEDPA one-year time limit. The trial court summarily denied Petitioner's Rule 3.850 Motion for Postconviction Relief on May 18, 2023. Petitioner timely appealed, and on October 05, 2023, the Fourth District Court of Appeal issued an order *per curiam* affirming the trial court's denial of Petitioner's motion. Petitioner timely filed a Motion for Rehearing that was subsequently denied on November 08, 2023 and Mandate issued on December 07, 2023.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

RANDY ALLEN HERMAN, JR.,
Petitioner,

v.

RICKY DIXON, SEC. F.D.O.C.,
Respondent.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

COMES NOW, Petitioner Randy Allen Herman, Jr., *pro se*, and respectfully submits the following Memorandum of Law in support of his Petition for Writ of Habeas Corpus for a person in state custody under the Antiterrorism and Effective Death Penalty Act (AEDPA), pursuant to 28 U.S.C. § 2254.

BACKGROUND

The State charged the Petitioner by Indictment with: Count 1 – First Degree Murder, *782.04(1)(a)1* and *782.04(1)(a)2*, for the stabbing death of Brooke Preston that occurred on March 25, 2017 (R 67).

Prior to the Petitioner's trial, defense Counsel retained Dr. Charles Patrick Ewing, a forensic psychologist, for the purposes of conducting a mitigation evaluation (R 194). At the conclusion of the evaluation and after further research, Dr. Ewing opined to a reasonable degree

of professional certainty that the Petitioner was suffering from the non-rapid eye movement sleep arousal disorder of sleepwalking, and was therefore unconscious and asleep at the time of the homicide (R 231-232, 240). As a result of Dr. Ewing's diagnosis, Trial Counsel filed a *Notice of Intent to Rely on the Defense of Insanity* (R 74-78).

The Petitioner's case proceeded to a jury trial before the Honorable John Kastrenakes and on May 8, 2019, the jury returned a verdict of *'Guilty of First Degree Murder, as charged in the Indictment'* (R 80). The Court adjudicated the Petitioner guilty in accordance with the verdict and sentenced him to life in the Florida Department of Corrections without the possibility of parole (R 82-84, 86-87).

The Petitioner appealed his conviction and sentence and on April 14, 2021, the Fourth District Court of Appeal affirmed with a written opinion and mandate issued on May 14, 2021 (R 97-103). *See Herman v. State*, 315 So. 3d 743 (Fla. 4th DCA 2021).

On November 16, 2021, the Petitioner filed a *Motion for Postconviction Relief*, pursuant to *Fla. R. Crim. P.* 3.850, raising seven claims of ineffective assistance of trial counsel (R 3-26). By Order of the Court, the State filed a Response to the Petitioner's motion on February 10, 2023 (R 54-691). The Petitioner filed a subsequent Reply to the State's Response on February 27, 2023 (R 3606-3629).

The Petitioner's motion came before the Honorable Judge Howard K. Coates, Jr. of the Fifteenth Judicial Circuit Court and was summarily denied on May 18, 2023. In the Order denying the Petitioner's motion, the Court adopted the facts, legal analyses, and conclusions of law contained in the State's Response as its own (R 3630-3631).

The Petitioner timely filed a *Notice of Appeal* on June 06, 2023 (R 3633-3634) and served his *Initial Brief on Merits* to the Fourth District Court of Appeal on July 13, 2023. The Fourth District Court of Appeal issued an order on October 05, 2023 *per curiam* affirming the lower court's decision without a written opinion. *See 2023 Fla. App. LEXIS 6916.* On October 18, 2023 the Petitioner timely filed a *Motion for Rehearing and Request for Written Opinion* that was subsequently denied on November 08, 2023 and mandate issued on December 07, 2023.

The Petitioner's Memorandum of Law in support of his Petition for Writ of Habeas Corpus on the ground that he is in custody in violation of the Constitution of the United States, pursuant to 28 U.S.C. § 2254(a), follows.

ARGUMENT

GROUND ONE

PETITIONER WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL MISADVISED THE PETITIONER TO PURSUE A DEFENSE OF INSANITY RATHER THAN THE PROPER DEFENSE OF AUTOMATISM FOR A CLAIM OF SLEEPWALKING, IN VIOLATION OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION; THE STATE COURT'S ADJUDICATION OF THE CLAIM 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

The Petitioner contends that Trial Counsel provided constitutionally ineffective assistance in violation of the Petitioner's Sixth and Fourteenth Amendment rights as assured by the United States Constitution. In *Strickland*, the United States Supreme Court established a two-part test to determine whether a convicted person is entitled to habeas relief on the grounds that his or her counsel rendered ineffective assistance. First, the claimant must identify particular acts

or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

The Petitioner contends that Trial Counsel provided constitutionally ineffective assistance by misadvising the Petitioner to assert insanity as a theory of defense over the proper defense of automatism for a claim of sleepwalking, where the Petitioner was asleep at the time of the homicide. Had Trial Counsel performed a reasonable investigation based on Dr. Ewing's clinical diagnosis, he would have discovered respected authority and recognized precedent in Florida law to raise an automatism defense based on a claim of sleepwalking separate and distinct from an insanity or diminished capacity defense. *See State of Florida v. Justin Glenn Cox*, No. 2006-CF-007577-A-O (Fla. 9th Cir. Ct., 2006)(defendant acquitted after presenting a sleepwalking defense, separate and distinct from an insanity defense); *Rivera v. State*, 235 So. 3d 983 (Fla. 2d DCA 2017)(defense asserted the shooting was an automatism, an automatic but not conscious behavior, and that the defendant lacked the intent to shoot the officer); *Wise v. State*, 580 So. 2d 329 (Fla. 1st DCA 1991)(a defense that presents a question of the defendant's consciousness of his acts is wholly distinguishable from a diminished capacity defense); *Bunney v. State*, 603 So. 2d 1270 (Fla. 1992)(approving the decision in *Wise* and holding that *Chestnut* drew a distinction between evidence of "commonly understood conditions beyond one's control," which is admissible, and evidence of "relatively esoteric conditions," which is not admissible absent an insanity defense).

According to §775.027, *Florida Statutes*, insanity is an affirmative defense in which the Petitioner carried the burden to prove by clear and convincing evidence that he (1) had a mental infirmity, disease, or defect; and (2) because of this condition, the Petitioner did not know what he was doing or its consequences. On the other hand, an automatism defense, where the Petitioner was asleep and sleepwalking at the time of the homicide, negates the basic elements of the crime and therefore the burden remains on the State to prove that the Petitioner acted *consciously* and *voluntarily* beyond any reasonable doubt to support a finding of guilt. Trial Counsel's misadvice to pursue an insanity defense over the proper defense of automatism prejudiced the Petitioner by proceeding to trial with the sleepwalking defense that unnecessarily shifted the heavier burden of proof to the Petitioner, thereby rendering the result of the proceeding unfair and unreliable. *See Lockhart v. Fretwell*, 506 U.S. 364 (1993) (holding that an ineffective assistance of counsel analysis "focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective").

Had Trial Counsel correctly advised the Petitioner to pursue the proper defense of automatism and had the jury been properly instructed on the applicable law, it would have reasonably changed the outcome of the Petitioner's case where the evidence presented by the Defense was sufficient to suggest the Petitioner was sleepwalking at the time of the homicide so as to give rise to a reasonable doubt as to his culpability. Therefore, there is a reasonable probability that the jury would have found the Petitioner not guilty beyond a reasonable doubt in accordance with the law.

The Petitioner was further prejudiced by Counsel's misadvice where *"under the present statutory scheme, a successful plea of insanity avoids a conviction, but confronts the accused*

with the very real possibility of prolonged therapeutic confinement." Chestnut v. State, 538 So. 2d 820 (Fla. 1989)(quoting *Bethea v. United States*, 365 A.2d 64, 88 (D.C. 1976)). However, a verdict of *not guilty* under an automatism defense would result in an outright acquittal, where the Petitioner was not legally insane at the time of the homicide, but rather committed the act involuntarily while in the natural state of sleep. No reasonably competent attorney would advise the Petitioner to assert a defense of insanity where the Petitioner was unconscious and asleep at the time of the homicide. Ultimately, Trial Counsel's misadvice to pursue an insanity defense detracted from the Petitioner's chosen defense that he committed the act while sleepwalking, in a state of unconsciousness, and that he did not commit the act voluntarily or with criminal intent.

The Petitioner contends that the State Court's adjudication of the claim resulted in a decision that involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), and further 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, pursuant to 28 U.S.C. 2254(d). In denying relief, the State Court held that *"Florida law provides ample support for the reasonableness of defense counsel's conclusion that the only mechanism for presenting a sleepwalking defense is through an insanity defense"*, and *"if, as defendant claims, sleepwalking does not constitute insanity, then it necessarily follows that it is simply an abnormal mental condition with no relevance but to impermissibly negate intent, i.e., evidence of diminished mental capacity."* (R 57-58, 3630-3631). However, the State Court's decision was objectively unreasonable where a defense of automatism for a claim of sleepwalking, where the Petitioner was *asleep* at the time of the homicide and his acts were therefore *involuntary*, is

separate and distinct from an insanity defense or an abnormal mental condition constituting a diminished capacity defense and was available in Florida and further supported by Federal law.

Under narrow circumstances, evidence that sounds like diminished capacity has been accepted as state of mind evidence. Evidence of the Petitioner's state of mind is relevant to the question of whether the requisite intent was present to commit a specific intent crime in some cases. Whether evidence is admissible to prove the Petitioner's inability to form the intent necessary to commit a specific intent crime depends upon the nature of the condition at the time of the incident. *LexisNexis: Florida Criminal Practice and Procedure, 11.18 State of Mind Evidence (3rd ed. 2021). "To apply the term diminished capacity connotes the existence of an intermediate criterion of partial culpability - a capacity somewhat impaired but not so fully impaired as to establish a nonresponsibility defense"* (quoting *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989)).

On the other hand, an automatism defense has been recognized by courts as a complete defense bearing on the voluntariness of an otherwise criminal act. While *'automatism'* does not appear in the internationally used diagnostic manuals, the term is used in practice in a variety of contexts, *e.g.* sleepwalking, hypnosis, and post-traumatic stress disorder. *John Parry & Eric Y. Drogin, Criminal Law Handbook on Psychiatric Psychological Evidence and Testimony, 155-56, 174-75 (Am. Bar Ass'n, ed. 2000)* (quoting *Haynes v. United States*, 451 F. Supp. 2d 713 (4th Cir. 2006)); *see also West v. Addison*, 127 Fed. Appx. 419 (10th Cir. 2005)(the defense of automatism or unconsciousness involves criminal conduct resulting from an involuntary act completely beyond the individual's knowledge and control and is a defense distinct from that of insanity).

> *"A defense related to but different from the defense of insanity is that of unconsciousness, often referred to as automatism: one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness. Although this is sometimes explained on the ground that such a person could not have the requisite mental state for commission of the crime, the better rationale is that the individual has not engaged in a voluntary act." Wayne R. LaFave, Substantive Criminal Law, pg. 33-34 (2nd ed. 2003).*

Accordingly, the *Model Penal Code,* a well respected authority and legislative model from the *American Law Institute,* adopted a voluntary act requirement. Under the *MPC*, a voluntary act is an essential component of any crime, and therefore, any act that is not voluntary is not a crime. In this vein, the *Model Penal Code* provides that a person who commits an act during unconsciousness or sleep has not committed a voluntary act and is not criminally responsible for the act. *See Model Penal Code § 2.01(2).* In addition, the United States Supreme Court has also stated that a general intent requirement would separate wrongful conduct from innocent conduct and would protect *"the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)." Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159 (2000).

In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur. *United States v. Apfelbaum*, 445 U.S. 115, 100 S. Ct. 948 (1980); *see also Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240 (1952) (crime generally stems *"only from concurrence of an evil-meaning mind with an evil-doing hand"*). Even where the evidence is sufficient to show the necessary *mens rea*, the government still must always meet its burden of proving the *actus reus* of the offense. *United States v. Zhen Zhou Wu*, 711 F.3d 1, 18 (1st Cir. 2013) (quoting *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002)). As a result, an accused cannot be held criminally liable in a case where the *actus reus* is absent because the accused did not act voluntarily, or where *mens rea* is absent because the accused did

not possess the necessary state of mind when he committed the involuntary act. *"With few exceptions, wrongdoing must be conscious to be criminal. Indeed, we have said that consciousness of wrongdoing is a principle as universal and persistent in mature systems of criminal law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil"* (quoting *Donald F. Samuel, Eleventh Circuit Criminal Handbook § 4(a) (Matthew Bender, 2023 Ed.)).

An automatism defense for a claim of sleepwalking, where the Petitioner was asleep at the time of the homicide, in an unconscious state and his acts were involuntary, negates both of the basic elements of a crime, the *mens rea* and the *actus reus*, which the State must prove beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime. Therefore, the denial of the Petitioner's claim in which the State Court rejected the legality of an automatism defense under Florida law is objectively unreasonable and contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970)(the due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charge); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975)(a state cannot require a defendant to prove the absence of a fact necessary to constitute a crime); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450 (1979)(the burden of proving the elements of a crime cannot be shifted to the defendant).

In *Winship, Mullaney,* and *Sandstrom* the United States Supreme Court has long admonished that the prosecution must prove every element of a criminal charge beyond a reasonable doubt. *Id.* However, the burden of persuasion on affirmative defenses may be shifted to the defendant. *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977). In *Patterson,* the

Supreme Court defined affirmative defense as one that *"does not serve to negative any facts of the crime which the State is to prove in order to convict of (the crime charged.)" Id.* at 206-07, 97 S. Ct. at 2325. Therefore, under the principles established in *Patterson*, a sleepwalking defense that negates the basic elements of the crime – *mens rea* and *actus reus* – is separate and distinct from an affirmative defense. As a result, Trial Counsel's misadvice to pursue an affirmative insanity defense for a claim of sleepwalking and the State Court's denial of the Petitioner's claim was objectively unreasonable and contrary to clearly established Federal law, as determined by the Supreme Court of the United States in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977).

Where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the Federal court to which the application is made has the power to receive evidence and try the facts anew. *See Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745 (1963). When the facts are in dispute, the Federal District Court *"must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." Id.* In this case, the State Court failed to hold a full and fair hearing, and therefore the Petitioner was denied his right to develop and adequately present his claim and has further alleged specific facts, which, if proved, would entitle him to relief.

Ineffectiveness claims are a mixed question of fact and law, and therefore, adequacy of the record is essential. Absent an evidentiary hearing, this Court can only assume Trial Counsel's strategy or what the State Court relied on to make a determination of the Petitioner's claim, using conjecture for reasoning. *See Stouffer v. Reynolds*, 168 F. 3d 1155, 1168 (10th Cir. 1999). The State Court's failure to hold an evidentiary hearing further violated the Petitioner's constitutional

right to Due Process, in that it neglected to allow the Petitioner to develop an adequate record for review. Accordingly, a Federal evidentiary hearing is warranted, as the Petitioner was never afforded a full and proper hearing in the State Court proceedings. *See Earp v. Oronski*, 431 F. 3d 1158 (9th Cir. 2005).

CONCLUSION

Given the attached Petition for Writ of Habeas Corpus and the foregoing Memorandum of Law outlining Trial Counsel's ineffective representation in violation of the Petitioner's Sixth and Fourteenth Amendment rights as assured by the United States Constitution, the Petitioner respectfully requests that this Court review and approve his writ and require relief from his state conviction pursuant to and appropriate under 28 U.S.C. § 2254.

Respectfully submitted,

/s/ _____

Randy Herman, Jr., DC# A80442
South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

CERTIFICATE OF SERVICE

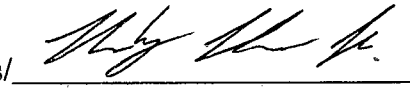
I HEREBY CERTIFY under penalty of perjury that the foregoing is true and correct and that this *Memorandum of Law* has been placed in the hands of institutional staff on this 8th day of April, 2024, for mailing to: United States District Court, Southern District of Florida, 701 Clematis Street, Room 402, West Palm Beach, Florida 33401; *and* Regional Office of the Attorney General, 1515 N. Flagler Dr. Suite 900, West Palm Beach, Florida 33401.

/s/ _____

Randy Herman, Jr., DC# A80442
South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that a true and correct copy of the forgoing **Joint Appendix** has been deposited in the prison's internal mailing system with first-class postage prepaid on this 18th day of February, 2025 for mailing to: United States Supreme Court, One First Street N.E., Washington D.C. 20543; Secretary, Department of Corrections, 501 South Calhoun Street, Tallahassee, FL 32399; and Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399.

/s/ 

Randy Herman, Jr., DC# A80442
Petitioner, *pro se*

South Bay Correctional Facility
600 U.S. Highway 27 South
South Bay, Florida 33493