

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA DUKES,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

APPENDIX TO APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

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In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10402

JOSHUA LEE DUKES,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:21-cv-00128-HES-LLL

ORDER:

Joshua Dukes, a Florida prisoner serving a life sentence for second-degree murder and aggravated assault, appeals the district court's denial of his counseled 28 U.S.C. § 2254 habeas corpus petition, and now seeks a certificate of appealability ("COA") from this Court. To obtain a COA, Dukes must make "a substantial showing of the denial of a constitutional right," and must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Reasonable jurists would not find debatable the district court's determination that Claims 1, 7, and 8 were unexhausted and procedurally defaulted. Dukes did not fairly present Claim 1 in the state court, and *Martinez v. Ryan*, 566 U.S. 1 (2012), is inapplicable to excuse his procedural default of that claim. As to Claims 7 and 8, Dukes did not show that these claims were "substantial" enough to excuse his procedural default under *Martinez*. *See id.* Dukes pointed to no evidence showing the date of a photograph that was admitted into evidence and only speculated as to when it was taken, which is insufficient. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). He also failed to show how the alleged date would have affected the outcome at trial. Moreover, the verdict form contradicts Dukes's claim concerning the court's imposition of a 25-year mandatory minimum, as it showed that the jury did not find Dukes guilty under a principal theory of liability.

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Order of the Court

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Reasonable jurists would also not find debatable whether trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). In Claim 2, Dukes argued that counsel failed to adequately object to the court's instruction that the principal theory of liability applied to second-degree murder. However, as noted above, the jury did not convict him under that theory of liability, and, thus, he cannot show prejudice under *Strickland*. In Claim 3, he argued that counsel should have requested an independent-act jury instruction, but Dukes has not pointed to any evidence in the record of a drug deal, or otherwise rebutted the evidence presented at trial of the attempted armed robbery. Thus, an independent-act jury instruction would have been improper and counsel was not ineffective for failing to request it. See *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001). Finally, in Claim 4, although Dukes argued that counsel should not have requested a jury instruction on the lesser included offense of aggravated assault, the facts alleged in the indictment include the elements of aggravated assault, and the evidence at trial was sufficient to support the giving of such an instruction.

Accordingly, Dukes's motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

/s/ Kevin C. Newsom

UNITED STATES CIRCUIT JUDGE