[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 23-13455

Non-Argument Calendar

DUANE E. ADAMS,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:20-cv-00330-JLB-PRL

Before ROSENBAUM, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

Duane Adams, a Florida prisoner serving a 960-month sentence followed by 10 years of sexual offender probation for multiple sexual offenses involving a minor, appeals the district court's order denying his *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. A judge of this Court granted Adams a certificate of appealability ("COA") on two issues. First, "Whether the district court erred in denying Adams' claim that his trial counsel was ineffective for failing to request that the jury receive an instruction on the definition of familial authority." Second, "Whether the district court erred in denying Adams' claim that the trial court erred in denying his motion for a judgment of acquittal."[1]

I.

[1] Adams also argues that the district court erred in denying a claim for which he has not been issued a COA—namely, that the state trial court lacked jurisdiction to proceed with his criminal proceedings without a valid charging document. We will not consider Adams's challenge that the district court erred in denying his claim that the state trial court lacked jurisdiction to proceed with his criminal proceedings because this issue is not specified in the COA. 28 U.S.C. § 2253(c)(1)(A) ("Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.").

In reviewing a district court's denial of a § 2254 petition, "[w]e review the district court's conclusions on legal questions and mixed questions of law and fact *de novo* and its factual findings for clear error." *Mason v. Allen*, 605 F.3d 1114, 1118 (11th Cir. 2010). "An ineffective assistance of counsel claim is a mixed question of law and fact that [we] review[] *de novo*." *Jones v. Campbell*, 436 F.3d 1285, 1292 (11th Cir. 2006). Our review of questions decided on the merits in state court is limited by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Mason*, 605 F.3d at 1118. Under AEDPA, we cannot grant habeas relief to a petitioner challenging a state court's findings "unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Mason*, 605 F.3d at 1119.

When a state court does not explain the reasons for its decision, we must "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning" unless the State rebuts this presumption. *Wilson v. Sellers*, 584 U.S. 122, 125 (2018).

The Sixth Amendment's guarantee that a criminal defendant "shall . . . have the Assistance of Counsel for his defen[s]e"

guarantees a right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *see* U.S. Const. amend. VI. Ineffective assistance of counsel claims are governed by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), under which a petitioner "must show 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, 954 (11th Cir. 2016) (quotation marks omitted).

For the deficient performance prong, we ask what a reasonably competent attorney would have done in the circumstances facing the attorney whose performance the petitioner is challenging. *Newland v. Hall*, 527 F.3d 1162, 1184, 1187 (11th Cir. 2008). There is a presumption in favor of counsel's reasonableness which a petitioner can overcome by showing "that no competent counsel would have taken the action that [the] counsel [took]." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*). Counsel is afforded "wide latitude . . . in making tactical decisions," and "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 (quotation marks omitted). We will deny an ineffective assistance claim if "we can conceive of a reasonable motivation for counsel's actions." *Gordon v. United States*, 518 F.3d 1291, 1302 (11th Cir. 2008).

For the prejudice prong, the petitioner must show that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In 2014, Florida's sexual battery statute provided that, "[w]ithout regard to the willingness or consent of the victim, . . . a person who is in a position of familial or custodial authority to a person less than 18 years of age and who . . . [e]ngages in any act with that person while the person is 12 years of age or older but younger than 18 years of age which constitutes sexual battery . . . commits a felony of the first degree." Fla. Stat. § 794.011(8)(b) (2014). The statute defined "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." *Id.* § 794.011(1)(h).

In interpreting "familial relationship" in the sexual battery context, the Florida Supreme Court has stated the following:

> [T]he determination of whether a familial relationship exists must be done on a case-by-case basis. Consanguinity and affinity are strong indicia of a familial relationship but are not necessary. Also, the defendant and victim need not reside in the same home. The relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and her grandfather, uncle, or guardian. Where an individual legitimately exercises parental-type authority over a child

> or maintains custody of a child on a regular basis, a familial relationship may exist for purposes of the admissibility of collateral crimes evidence . . . .

State v. Rawls, 649 So. 2d 1350, 1353 (Fla. 1994) (footnote omitted), *superseded on other grounds by statute*, Fla. Stat. § 90.404(2)(b), *as recognized in McLean v. State*, 934 So. 2d 1248, 1259 (Fla. 2006); *see also Oliver v. State*, 977 So. 2d 673, 676 (Fla. Dist. Ct. App. 2008).

In *Rawls*, the Florida Supreme Court ruled that, at the time the defendant's illicit conduct was discovered, his relationship with the victim was not familial because he was not related to the victim, he did not exercise any custodial authority or supervisory authority over the victim, there was no evidence that the victim looked upon the defendant as a member of the family, and, while the defendant lived in the victim's house, "he was essentially a boarder." 649 So. 2d at 1353. In *Oliver*, by contrast, the Florida Fifth District Court of Appeal held that a rational jury could conclude that the defendant was in a position of familial authority over two sexual battery victims where the defendant became close with the victims' family, the defendant worked as a soccer coach of one of the victims, the victims often stayed overnight at the defendant's house, the victims trusted and confided in the defendant, and the victims saw the defendant as a father figure. 977 So. 2d at 676–77.

Here, as the district court found, the state postconviction court's decision—which this Court reviews as the last explained decision after "look[ing] through" the Fifth District Court of Appeal's unexplained affirmance—that Adams's trial counsel was not

deficient in failing to request that the trial court give the definition of "familial relationship" from *Rawls* and *Oliver* was neither "contrary to, [n]or involved an unreasonable application of, clearly established Federal law." *See* 28 U.S.C. § 2254(d); *Wilson*, 584 U.S. at 125. At trial, there was substantial evidence indicating that Adams had a "recognizable bond of trust" with B.G. analogous to that between a child and an uncle or guardian: B.G. met Adams after she had moved away from her stepfather, with whom she was close; B.G. saw Adams as a "figure that [she] could look up to" and "wanted to be like"; B.G. trusted and loved Adams "[m]ore than anything"; Adams bought B.G. gifts, including a cell phone, a piano, and a guitar; Adams drove B.G. to school once or twice per week; Adams taught B.G. how to drive; and Adams ironed B.G.'s school uniforms that she kept at his apartment. *See Rawls*, 649 So. 2d at 1353; Oliver, 977 So. 2d at 676.

Considering this evidence, reasonably competent defense counsel could have believed it would be more likely that the jury would find that Adams had familial authority over B.G. if it received the full "familial relationship" definition from *Rawls* and *Oliver* than if the parties simply offered competing interpretations of familial authority in their closing arguments. And this is the strategy that Adams's trial counsel chose: it allowed the State to offer an interpretation of familial authority based on a "recognizable bond of trust" in its closing argument and then defense counsel disputed this interpretation in his own closing argument: "[A]re they related? Are they a family? . . . Are they even stepfather? . . . [D]oes she live with him as father and daughter? . . . He's not [her] uncle,

he's not like [her] uncle, not a father, not like a father, has no authority . . . over her as a parent or anyone acting as a parent". Given the wide latitude afforded to defense counsel in making such tactical decisions, Adams has failed to "overcome the presumption that, under the circumstances," his counsel's choice to avoid giving the jury the definition of familial relationship from *Rawls* and *Oliver* "might be considered sound trial strategy." *See Strickland*, 466 U.S. at 689.

Thus, the state postconviction court did not reach a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law" in finding that Adams's trial counsel was not deficient in failing to request that the trial court give the full definition of familial authority from *Rawls* and *Oliver*. *See* 28 U.S.C. § 2254(d). Adams's ineffective assistance of counsel claim therefore fails.

II.

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1). To properly exhaust a claim, a petitioner "must fairly present every issue in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). To this end, he "must make the state court aware that the claims asserted present federal constitutional issues." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

While "a petitioner need not use magic words or talismanic phrases to present his federal claim to the state courts," he "must have put the state court on notice that he intended to raise a federal claim." *Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 457 (11th Cir. 2015). For example, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Snowden*, 135 F.3d at 735 (quotation marks omitted).

We have ruled that a § 2254 petitioner failed to exhaust his federal sufficiency-of-the-evidence claim merely by presenting a sufficiency claim under Florida law. *Preston*, 785 F.3d at 456–57. In *Preston*, the petitioner, who had been convicted of first-degree murder, argued on direct appeal that the evidence at his trial was insufficient to prove premeditation beyond a reasonable doubt because it was merely circumstantial. *Id.* at 453. In his initial brief before the Florida Supreme Court, the petitioner did not cite a federal case or mention the Due Process Clause, and "relied instead on a panoply of Florida cases discussing the element of premeditation, as defined by state law." *Id.* at 458–59. As such, the State "did not refer to any federal cases or federal constitutional provisions" in its response, the petitioner's reply brief did not refer to federal law, and the Florida Supreme Court relied exclusively on Florida cases and Florida law in resolving the petitioner's challenge. *Id.* at 459. For these reasons, we held that the petitioner had failed to exhaust his federal claim. *Id.* We further noted that it was "not at all clear that a petitioner can exhaust a federal claim by raising an analogous state claim," but ultimately declined to resolve this question since

the Florida standard for assessing a sufficiency of the evidence claim differed from the federal standard in cases turning on circumstantial evidence. *Id.* at 460–61.

Where a federal habeas petition presents both exhausted and unexhausted claims, a district court must ordinarily dismiss the petition without prejudice to allow the defendant to resubmit only the exhausted claims or to exhaust all claims. *Snowden*, 135 F.3d at 736. "But, when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief." *Id.* (quoting *Harris v. Reed*, 489 U.S. 255, 270 (1989) (O'Connor, J., concurring)). A habeas petitioner may overcome a procedural bar by showing "cause for the default and actual prejudice as a result of the alleged violation of federal law" or by "demonstrat[ing] that failure to consider the claims [would] result in a fundamental miscarriage of justice." *Muhammad v. Sec'y, Dep't of Corr.*, 554 F.3d 949, 957 (11th Cir. 2009) (quotation marks omitted). Under Florida law, "[m]atters which were raised on appeal and decided adversely to the movant" and matters "which could have been presented on appeal" cannot later be presented in a post-conviction motion. *McCrae v. State*, 437 So. 2d 1388, 1390 (Fla. 1983).

"After the enactment of AEDPA, whether the State's failure to raise a procedural bar defense waives it depends on the basis of the defense." *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1339 (11th

Cir. 2009). "If the procedural bar defense arises from the petitioner's failure to raise the claim at all and thereby exhaust state remedies, that defense cannot be waived implicitly by the State's failure to assert it." *Id.*; *see* 28 U.S.C. § 2254(b)(3). Additionally, "[COAs] do not limit our obligation to consider whether other parts of the governing legal analysis would necessarily cause a claim to fail on the record before us." *Bilotti v. Fla. Dep't of Corr.*, 133 F.4th 1320, 1323 (11th Cir. 2025).

The Due Process Clause protects defendants from deprivations of their liberty in the absence of sufficient proof, which is "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). The federal standard of review for sufficiency-of-the-evidence challenges is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The Florida Supreme Court has defined the standard of review for sufficiency-of-the-evidence challenges under Florida law as whether, "after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." *Reynolds v. State*, 934 So. 2d 1128, 1145 (Fla. 2006).

The Florida Supreme Court has ruled that the term "custodial authority" in the sexual battery context "must be construed in accordance with the commonly understood definition as one

having custody and control of another." *Hallberg v. State*, 649 So. 2d 1355, 1358 (Fla. 1994). The Florida Supreme Court has endorsed the notion that custodial authority of a child "usually implies that the person has some responsibilities *in loco parentis*" and "that teachers are not, by reason of their chosen profession, custodians of their students at all times, particularly when school is recessed for the summer." *Id.* at 1357 (quotation omitted). In *Hallberg*, for example, the Florida Supreme Court held that a defendant, who was the victim's teacher and had formed a close personal relationship with her during the regular school year, was not in a position of custodial authority over the victim where the defendant committed the acts of sexual battery at the victim's home in the summer, after school had recessed. *Id.* at 1355–58. There, while the victim's parents were generally aware that the defendant wanted to help the victim with a history project over the summer, the defendant's visits to the victim's home were not scheduled with the parents' knowledge or consent. *Id.* at 1356. The Florida Supreme Court ruled that the victim's parents did not place the defendant in custodial control and authority over their daughter. *Id.* at 1357–58.

Here, as an initial matter, the State is correct in arguing that Adams's challenge to the trial court's denial of his motion for a judgment of acquittal as to Count One is unexhausted. *See O'Sullivan*, 526 U.S. at 842; 28 U.S.C. § 2254(b)(1). In his direct appeal to the Fifth District Court of Appeal, Adams limited his challenge to the denial of his motion for a judgment of acquittal to Counts Two, Three, and Four. Because Adams never clearly presented a challenge to the trial court's denial of his judgment of acquittal as to

Count One in any of his postconviction proceedings, we dismiss his claim as to Count One as unexhausted and procedurally barred. *See Ward*, 592 F.3d at 1156.

The State is also very likely correct in arguing that Adams's challenge to the trial court's denial of his motion for a judgment of acquittal as to Counts Two through Four is procedurally barred. *See O'Sullivan*, 526 U.S. at 842; 28 U.S.C. § 2254(b)(1). In his direct appeal to the Fifth District Court of Appeal, Adams did not ground his challenge to the district court's denial of his judgment of acquittal in federal law or present it as a federal claim. *Snowden*, 135 F.3d at 735. Instead, similar to the petitioner in *Preston*, Adams cited exclusively to Florida cases and never cited a federal case or argued that his due process rights had been violated. *Preston*, 785 F.3d at 456–57. While Adams did cite *Reynolds*, which defined Florida's sufficiency-of-the-evidence standard nearly identically to the federal *Jackson* standard, this Court has expressed doubt that presenting a sufficiency-of-the-evidence challenge under Florida law is sufficient to present a sufficiency-of-the-evidence challenge under federal law. *See Preston*, 785 F.3d at 459–60. And while the State did not raise its AEDPA procedural defense until appeal, the State could not implicitly waive this defense merely by failing to assert it in the district court. *See Smith*, 572 F.3d at 1339. Nor does this Court's issuance of a COA on the merits of Adams's claim preclude its ability to analyze whether the claim fails under other parts of the governing legal analysis. *See Bilotti*, 133 F.4th at 1323.

Normally, this Court would dismiss Adams's petition without prejudice to allow him to exhaust his claims or resubmit only his exhausted claims. *See Snowden*, 135 F.3d at 736. In this case, however, this would be a fruitless exercise: Adams would be barred from exhausting these claims under Florida law since his challenge to the trial court's denial of his motion for a judgment of acquittal was already decided adversely to him on direct appeal and "could have been presented" as a federal claim. *See McCrae*, 437 So. 2d at 1390. And because Adams has neither shown cause and prejudice nor a fundamental miscarriage of justice concerning his procedural default, *see Muhammad*, 554 F.3d at 957, Adams's challenge to the trial court's denial of his motion for a judgment of acquittal as to Counts Two through Four (as well as Count One) is likely procedurally barred. *See O'Sullivan*, 526 U.S. at 842.

In any event, even assuming Adams's challenge is not procedurally barred, it nonetheless fails on its merits. The focus of Adams's argument in support of his motion for judgment of acquittal is that there was insufficient evidence of the familial or custodial element. As discussed in Issue I, there was substantial evidence by which a rational trier of fact could have found beyond a reasonable doubt that Adams had a "recognizable bond of trust" with B.G. analogous to that between a child and an uncle or guardian: B.G. met Adams after she had moved away from her stepfather, with whom she was close; B.G. saw Adams as a "figure that [she] could look up to" and "wanted to be like"; B.G. trusted and loved Adams "[m]ore than anything"; Adams bought B.G. gifts, including a cell phone, a piano, and a guitar; Adams drove B.G. to school once or

I don't think this step father thing was brought up at trial to avoid him-Weird relationship as her boyfriend

twice per week; Adams taught B.G. how to drive; and Adams ironed school B.G.'s school uniforms that she kept at his apartment. *See Rawls*, 649 So. 2d at 1353; *Oliver*, 977 So. 2d at 676. Based on this evidence, a rational trier of fact could have concluded beyond a reasonable doubt that Adams committed the charged acts of sexual battery against B.G. when he was in a position of familial authority over her under Florida law. *See Jackson*, 443 U.S. at 319; *Rawls*, 649 So. 2d at 1353; *Oliver*, 977 So. 2d at 676.

There was also substantial evidence by which a rational trier of fact could have concluded beyond a reasonable doubt that Adams committed the charged acts of sexual battery against B.G. while acting in loco parentis, and not solely because he was her teacher: Adams was B.G.'s orienteering coach and zero period (homeroom) teacher; Adams and B.G. would stay together in hotels for orienteering events without the rest of the team; Adams transported B.G. to his apartment and had sex with B.G. while her mother thought she was at school; and Adams altered the dates on consent forms signed by B.G.'s mother for orienteering events to give him and B.G. extra time together without the rest of the team. Given this evidence, a rational trier of fact could have found beyond a reasonable doubt that Adams committed sexual battery against B.G. when he was in a position of custodial authority over her under Florida law. *See Jackson*, 443 U.S. at 319; Hallberg, 649 So. 2d at 1357–58.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DUANE E. ADAMS,

Petitioner,

v. Case No. 5:20cv50-RV-HTC

MARK INCH,

Respondent.
_____/

REPORT AND RECOMMENDATION

Petitioner Duane Adams, proceeding *pro se*, filed a petition under 28 U.S.C. § 2254 challenging his conviction in Marion County, located in the Middle District of Florida and paid the filing fee. ECF Docs. 1 and 4. The petition was referred to the undersigned Magistrate Judge for preliminary screening and report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B), and the Court directed the State to respond. ECF Doc. 5. The Respondent timely responded with a May 13, 2020 motion to transfer venue to the Ocala Division of the Middle District of Florida (ECF Doc. 8). On May 14, 2020, the Court issued an order for Petitioner to show cause within twenty-one (21) days why the case should not be transferred (ECF Doc. 9), to which Adams timely responded on May 27, 2020. ECF Doc. 10. Upon consideration of the motion to transfer and Petitioner's response, the

undersigned finds that the motion should be granted and, thus, recommends that this case should be transferred, over the objections of the Petitioner.

Petitioner is currently confined at Jackson Correctional Institution, which is in the Northern District of Florida. As stated above, Petitioner is challenging his judgment of conviction in the Circuit Court in and for Marion County, which is in the Middle District of Florida. *Id.* at 1. Because the Middle District is the district containing the state court in which Adams was convicted, Respondent moves to transfer the case to the Middle District for the convenience of witnesses and in the interests of justice.

Under 28 U.S.C. § 1404(a), the decision to transfer an action is left to the "sound discretion of the district court." *Roofing & Sheeting Metal Servs. v. La Quinta Motor Inns*, 689 F.2d 982, 985 (11th Cir. 1982). Also, 28 U.S.C. § 2241(d) provides:

> Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

Respondent argues that while jurisdiction is proper in either the Northern or Middle Districts because they are the districts of confinement and conviction, respectively, the district of conviction is the most convenient for witnesses should an evidentiary hearing be necessary. *See Parker v. Singletary*, 974 F.2d 1562, 1582 n.118 (11th Cir. 1992) (courts should give great weight to the convenience of witnesses and ease of access to sources of proof when considering a habeas transfer under § 2241(d)); 28 U.S.C. § 1404(a) ("[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought"). The Middle District is the district where material events took place and the location where records and witnesses pertinent to the claims are likely to be found. Thus, "petitions challenging a conviction preferably are heard in the district of conviction." *See Laue v. Nelson*, 279 F.Supp. 265, 266 (N.D. Cal. 1968).

Petitioner argues, however, that the Northern District is the more appropriate venue for "purposes of neutrality and objectiveness" because he is "prejudiced by media exposure due to the high profile nature of his case and avers that proceedings in Ocala or Marion Co. in general would be inherently tainted." ECF Doc. 10. Petitioner has not made a sufficient showing of potential prejudice. A prejudice-by-media-exposure claim requires that the publicity be so pervasive, prejudicial and inflammatory that it renders a fair trial impossible. *See Coleman v. Kemp*, 778 F.2d

1487, 1490 (11th Cir. 1985) (a defendant seeking a change of venue based on pretrial publicity must make the showing that "pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held."). Adams has not provided any details about whether the publicity was "prejudicial," "inflammatory" or "pervasive."

Additionally, protections against undue pretrial publicity "derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by 'a panel of impartial, "indifferent" jurors.'" *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). Given that this matter is pending on a petition for habeas corpus relief, which will be decided by a judge and not a jury, any prejudicial risk of pretrial publicity is greatly reduced.

Finally, improper venue based on presumed prejudice from pretrial publicity is "rare[ly]" applicable . . . and is reserved for an 'extreme situation.'" *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985) (citing *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 554 (1976)). In fact, the Eleventh Circuit stated, "our research has uncovered only a very few additional cases in which relief was granted on the basis of presumed prejudice." *Id.* Petitioner has not established that this is the rare case where prejudice from pretrial publicity should be presumed.

Accordingly, it is RECCOMENDED:

1. That the Respondent's Motion to Transfer Case to the Middle District of Florida (ECF Doc. 8) be GRANTED.

2. That the clerk TRANSFER this case to the United States District Court for the Middle District of Florida.

3. That the clerk close the file.

DONE AND ORDERED this 17th day of June, 2020.

/s/ Hope Thai Cannon

HOPE THAI CANNON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations may be filed within 14 days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the Court's internal use only and does not control. A copy of objections shall be served upon the Magistrate Judge and all other parties. A party failing to object to a Magistrate Judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DUANE E. ADAMS,

Petitioner,

v. CASE NO.: 5:20-cv-330-JLB-PRL

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.
_____/

ORDER

This case is before the Court on the 28 U.S.C. § 2254 petition for writ of habeas corpus filed by Petitioner Duane E. Adams, a prisoner in the custody of the Florida Department of Corrections. (Doc. 1.) Respondents, the Florida Attorney General and the Secretary of the Florida Department of Corrections ("the State"), filed a response in opposition to the Petition (Doc. 24), and Adams filed a reply. (Doc. 29.)

After carefully reviewing the parties' briefs and the entire record before this Court, the Court finds that Adams is not entitled to federal habeas relief. Further, because the Court may resolve Petitioner's claims on the record, an evidentiary hearing is not warranted. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007).

I. Background

An amended information charged Adams with four counts of sexual battery on a child over the age of 12 and less than 18 by a person with familial or custodial authority (counts 1–4), one count of lewd or lascivious conduct (count 5), three counts of lewd or lascivious molestation (counts 6–8), and one count of interfering with child custody (count 9). (Doc. 24-2 at 52–54.) Adams proceeded to a jury trial and was found guilty of all counts except count seven. (Doc. 24-3 at 8–16.)

On December 16, 2014, Adams was adjudicated guilty and sentenced to four consecutive twenty-year terms of imprisonment for counts one through four, a concurrent five-year sentence for count nine, followed by concurrent ten-year terms of sex offender probation for counts five, six, and eight. (Doc. 24-6 at 82–100.) Adams appealed that judgment and sentence, and appointed counsel raised three issues on appeal: (1) the trial court erred in denying his motion for judgment of acquittal on counts two, three, and four; (2) the trial court erred in instructing the jury on count five that included uncharged conduct other than kissing; and (3) his dual convictions for counts four and six violated double jeopardy. (Doc. 24-7 at 761–804.) The Fifth District Court of Appeal ("Fifth DCA") affirmed Adams's judgment and sentences on February 9, 2016. See Adams v. State, 185 So. 3d 1252 (Fla. 5th DCA 2016). The mandate issued on March 4, 2016. (Doc. 24-7 at 3020.)

On July 1, 2016, Adams filed a habeas petition in the Fifth DCA, alleging that his appellate counsel was ineffective for failing to argue on direct appeal that

the trial court was without jurisdiction to try the case because no valid information existed. (Id. at 855–68.) The Fifth DCA denied the petition on October 13, 2016. (Id. at 885.) Rehearing of the denial of that state habeas petition was denied on November 16, 2016. (Id. at 896.)

On April 26, 2017, Adams filed a postconviction motion under Florida Rule of Criminal Procedure 3.850 raising twelve claims. (Id. at 921–70.) Adams argued that the trial court lacked subject matter jurisdiction, and his remaining eleven arguments were various ineffective assistance of counsel claims. Thereafter, he filed a motion seeking the appointment of counsel for the evidentiary hearing held on the Rule 3.850 Motion (id. at 986–90), which the postconviction court denied. (Id. at 997–98.) An evidentiary hearing was held on October 10, 2018.[1] (Id. at 999–1000.) On November 27, 2018, the postconviction court denied all of Adams's claims. (Id. at 1108–1132.)

Adams, through retained counsel, appealed the denial of his Rule 3.850 motion to the Fifth DCA, raising three issues: (1) the postconviction court erred in denying Adams's motion for counsel to represent him at the evidentiary hearing; (2) the postconviction court erred in not finding trial counsel ineffective for failing to request a jury instruction defining "familial authority"; and (3) the trial court lacked subject matter jurisdiction because the pending information had been vitiated.

[1] Following the hearing, Adams retained counsel, who filed a written closing statement on his behalf. (Doc. 24-7 at 1092–1107.)

(Doc. 24-7 at 2948–84.) The Fifth DCA affirmed without a written opinion on November 26, 2019. Adams v. State, 284 So. 3d 1070 (Fla. 5th DCA 2019). The mandate issued on December 20, 2019. (Doc. 24-7 at 3020.)

Adams filed this habeas petition on February 5, 2020.[2]

II. Legal Standards

A. The Antiterrorism Effective Death Penalty Act (AEDPA)

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

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

28 U.S.C. § 2254(d)(1)–(2). In this context, clearly established federal law consists of the governing legal principles, and not the dicta, set forth in the decisions of the United States Supreme Court at the time the state court issued its decision. White v. Woodall, 572 U.S. 415, 420 (2014); Carey v. Musladin, 549 U.S. 70, 74 (2006) (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)).

A decision is contrary to clearly established federal law if the state court either: (1) "appl[ied] a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reach[ed] a different result from the Supreme Court when

---

[2] The State concedes that the Petition was timely filed. (See Doc. 24 at 5–6.)

faced with materially indistinguishable facts." Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010); see also Mitchell v. Esparza, 540 U.S. 12, 16 (2003).

A state court decision involves an unreasonable application of the Supreme Court's precedents if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case "in an objectively unreasonable manner," Brown v. Payton, 544 U.S. 133, 134 (2005), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000) (quoting Williams, 529 U.S. at 406).

The standard to obtain relief under 28 U.S.C. § 2254(d) is both mandatory and difficult to meet. To demonstrate entitlement to federal habeas relief, the petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." White, 572 U.S. at 420 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Moreover, when reviewing a claim under section 2254(d), a federal court must presume that any "determination of a factual issue made by a State court" is correct, and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e).

A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits—warranting deference. Ferguson v. Culliver, 527 F.3d 1144, 1146 (11th Cir. 2008). Generally, in the case of a silent affirmance, a federal habeas court will "look through" the unreasoned opinion and presume that the affirmance rests upon the specific reasons given by the last court to provide a reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 806 (1991); Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). However, the presumption that the appellate court relied on the same reasoning as the lower court can be rebutted "by evidence of, for instance, an alternative ground that was argued [by the state] or that is clear in the record" showing an alternative likely basis for the silent affirmance. Wilson, 138 S. Ct. at 1196.

B. Ineffective Assistance of Counsel

In Strickland v. Washington, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. 466 U.S. 668, 687–88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. Id. This is a "doubly deferential standard of review that gives both the state court and the [petitioner's] attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 15 (2013).

The focus of inquiry under Strickland's performance prong is "reasonableness under prevailing professional norms." 466 U.S at 688. In reviewing counsel's performance, a court must presume that "counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689 (citation omitted). A court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a highly deferential level of judicial scrutiny. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (quoting Strickland, 466 U.S. at 690). Proving Strickland prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

C. Exhaustion and Procedural Default

The AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b)(1). Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights[.]" Duncan v. Henry, 513 U.S. 364, 365 (1995). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998). Under the similar doctrine of procedural default, "a federal court will not review the merits of claims, including

constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez v. Ryan, 566 U.S. 1, 9 (2012). A petitioner can avoid the application of the exhaustion or procedural default rules by establishing objective cause for failing to properly raise the claim in state court and actual prejudice from the alleged constitutional violation. Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179–80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate a reasonable probability the outcome of the proceeding would have differed. Crawford v. Head, 311 F.3d 1288, 1327–28 (11th Cir. 2002).

A second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" Murray v. Carrier, 477 U.S. 478, 479–80 (1986).

III. Discussion

Adams now brings thirteen claims challenging his convictions and alleging that his trial counsel, David Mengers, rendered ineffective assistance. Three of those claims—grounds eleven, twelve, and thirteen—were raised on direct appeal. Adams's direct appeal was affirmed by the Fifth DCA without a written opinion. Grounds one through ten were raised in Adams's Rule 3.850 Motion and denied by

the postconviction court. Grounds one, nine, and ten were appealed, but the claims were affirmed by the Fifth DCA without a written opinion. The Fifth DCA's summary rejection of these grounds—even without explanation—qualifies as an adjudication on the merits, which warrants deference. Therefore, this Court will "look through" the Fifth DCA's decision to the postconviction court's rationale for denying grounds one, nine, and ten. See Sellers, 138 S. Ct. at 1193. Adams did not appeal the postconviction court's denial of grounds two through eight, and, as discussed below, those grounds are subject to dismissal as procedurally defaulted.

A. Ground One

Adams asserts that the trial court was without jurisdiction when the case was tried because there was no valid information, and he further asserts that his counsel was ineffective for failing to object on this basis. (Doc. 1 at 5-7, 26–28.)

As background, an amended information was filed on February 25, 2014. (Doc. 24-2 at 52–54.) Prior to trial, the State filed a second amended information that was subsequently withdrawn. (Doc. 24-6 at 176–80.) Although the State offered to file a third amended information, the trial court ordered that the second amended information be stricken and the February 25, 2014 amended information would become the operative charging instrument. (Id. at 179–80.) Noting that Adams had waived speedy trial, defense counsel agreed to this procedure. (Id. at 179.)

Adams raised this claim in his Rule 3.850 Motion, and the postconviction court denied it. (Doc. 24-7 at 923–30, 1108–33.) In denying the claim, the postconviction court relied on State v. Anderson, 537 So. 2d 1373 (Fla. 1989). (Doc. 24-7 at 1110–12.) In Anderson, the Florida Supreme Court held that an original information is vitiated by the filing of an amended information, but the oral amendment of the amended information without filing a second information did not divest the trial court of jurisdiction. 537 So. 2d at 1376. "Essentially, [defendant's] position is that the trial court erred in not delaying the trial by requiring the state to retype and refile a 'new' information even though both parties understood the charge and urged immediate trial. We reject this position." Id.

Here, the postconviction court found the situation "factually and legally similar to Anderson." (Doc. 24-7 at 1112.)

> [T]he State and the Defendant agreed to proceed to trial on the amended information, which charged the Defendant with four counts of sexual battery on a child older than 12 years of age but less than 18 by a person in familial or custodial authority (Counts I-VI), one count of lewd or lascivious conduct by touch (Count V), three counts of lewd or lascivious molestation of a child older than 12 years of age but less than 16 (Counts VI-VIII), and one count of interfering with child custody (Count IX). Although the State did not file a third amended information, pursuant to Anderson, the Court was not divested of jurisdiction.

(Id.) It further noted that the State could have filed an amended information. Accordingly, the postconviction court found the claim to be without merit. (Id.)

To the extent Adams asserts that the trial court erred under Florida law by proceeding to trial on the amended information, "federal habeas corpus relief does

not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991). This is so because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. at 67–68.

Further, Adams has failed to show that the state court's denial of this claim was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Nor was it an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d).

Finally, to the extent Adams alleges ineffective assistance of counsel for his failure to object to the trial proceeding on the amended information (see Doc. 1 at 26–27, Doc. 29 at 4–7), this claim defaulted. Adams neglected to raise this particular ineffective assistance of claim in his Rule 3.850 Motion and in his appeal of the order denying that motion. (Doc. 24-7 at 923–30, 2979–82.)

Accordingly, Ground One does not warrant federal habeas relief.

B. Grounds Two through Eight

In grounds two through eight, Adams raises various ineffective assistance of counsel claims. (Doc. 1 at 7–16, 28–35.) Adams raised these claims in his Rule 3.850 motion, (Doc. 24-7 at 930–61), but they were denied by the postconviction court. (Id. at 1113–28.) However, he did not present any argument on these

claims in his initial brief appealing the postconviction court's denial of his Rule 3.850 motion, which was filed by retained counsel. (Id. at 2948–84.) Therefore, the State contends these claims are procedurally defaulted. (Doc. 24 at 14.) Adams does not dispute this in his reply. (Doc. 29 at 7.)

A review of Adams's appellate brief challenging the denial of his Rule 3.850 motion reveals that he did not address the substance of the federal claims that are now presented in grounds two through eight. Adams received an evidentiary hearing on his Rule 3.850 Motion. Therefore, he was required to file a brief raising his specific Rule 3.850 claims. See Fla. R. App. P. 9.141(b)(3)(C). When a petitioner receives an evidentiary hearing in a Rule 3.850 challenge, failure to address issues in an appellate brief constitutes a waiver of those issues. See Cortes v. Gladish, 216 F. App'x 897, 899–90 (11th Cir. 2007) ("In contrast, had Cortes received an evidentiary hearing, his failure to address issues in his appellate brief would constitute a waiver."); Williams v. McDonough, No. 8:02-cv-965-JSM-MAP, 2007 WL 2330794 (M.D. Fla. Aug 14, 2007) (petitioner procedurally defaulted claims by failing to address them on direct appeal of Rule 3.850 order after evidentiary hearing). Adams has not established objective cause for failing to properly raise the claim in state court and actual prejudice from the alleged constitutional violation. Spencer, 609 F.3d at 1179–80. Nor has he demonstrated the applicability of the actual innocence exception. Murray, 477 U.S. at 479–80.

Accordingly, grounds two through eight are procedurally barred, and this Court therefore denies Adams's request for habeas relief on these claims.

C. Ground Nine

Adams asserts that trial counsel was ineffective for failing to request the trial court give the definition of "familial" when the jury asked the question. (Doc. 1 at 16–17, 35–38.) The Court disagrees.

Adams was charged with four counts of sexual battery by a person in familial or custodial authority. Whether Adams was in a position of familial authority was disputed at trial. The parties disagreed as to the proper jury instruction defining familial. (Doc. 24-7 at 533–38.) At the time of trial, the Florida criminal pattern jury instruction did not include a definition of "familial" authority for the offense of sexual battery by a person in familial or custodial control. See Fla. Std. Jury Instr. 11.6 (Crim. 2010). The State proposed that the jury be charged with a definition of "familial" that a Florida appellate court announced in a case involving the standard for admission of collateral crimes evidence, namely similar fact or Williams Rule[3] evidence. (Doc. 24-7 at 534.) But the State asked that only part of that definition be charged to the jury. Defense counsel first objected to the State's proposed instruction, arguing that "it would mislead the jury because it has no application in this case." (Id.) Defense counsel also argued that if the trial court overruled his

[3] Williams v. State, 110 So. 2d 654, 663 (Fla. 1959).

objection, the defense would request that the entire definition of "familial" be charged to the jury, which included an additional sentence. (Id. at 534–35.)

Specifically, the State's proposed jury instruction took a portion of the definition of "familial" relationship announced in the Fifth DCA's Oliver v. State decision. 977 So. 2d 673 (Fla. 5th DCA 2008). (Doc. 24-7 at 534.) Ultimately, the trial court ruled that the proposed paragraph defining familial relationship would be stricken from the State's proposed jury instructions. (Doc. 24-7 at 538.)

After the jury instructions were read and the jury began deliberations, a juror asked the trial court to define familial authority and custodial authority. (Doc. 24-7 at 673–74.) After conferring with the parties, the trial court did not squarely answer the question and instead advised the jury to rely on the evidence and law previously provided. (Id. at 680–81.) Adams claims that his counsel should have recommended the trial court give the jury the requested definitions.

The postconviction court rejected this claim on both Strickland prongs, finding:

> The record is clear that the issue regarding an instruction on familial authority was an important issue during the Defendant's trial. The State and the defense disagreed about how the jury should be instructed on such issue. Given the disagreement between the parties, the Court finds Mr. Mengers' performance was not deficient in failing to object to the Court instructing the jury to base their decision on the evidence presented and the law as instructed by the Court. Moreover, the Court finds the Defendant has failed to establish how he was prejudiced by Mr. Mengers' failure to object.

(Doc. 24-7 at 1130–31.)

The record supports the postconviction court's rejection of this claim. At the charge conference, (Doc. 24-7 at 2613), the State requested additional language taken from Oliver, 977 So. 2d 673, be added to the standard instruction to define familial. Specifically, Oliver states:

> Consanguinity and affinity are strong indicia of a familial relationship but are not necessary. Also, the defendant and victim need not reside in the same home. The relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and her grandfather, uncle, or guardian.

977 So. 2d at 676 (quoting State v. Rawls, 649 So. 2d 1350, 1353 (Fla. 1994)). Defense counsel objected to the instruction as proposed because, "it can be misleading and is certainly not necessary[.]" (Doc. 24-7 at 375.) Defense counsel advised that, if the trial court allowed the proposed instruction to be given, he would request an additional sentence be added as follows: "[W]here an individual legitimately exercises parental-type authority over a child or maintains custody of a child on a regular basis, a familial relationship may exist[.]" (Id. at 377.)

After both the State and the defense rested, the trial court again addressed the instruction for the charge of sexual battery on a child older than 12 years of age but less than 18 by a person in familial or custodial authority. (Id. at 533–41.) The State objected to the additional sentence as proposed by defense counsel. (Id. at 533–36.) The trial court then overruled the State's objection and ruled that if the State's proposed instruction were to be given, the additional sentence requested by defense counsel would also be given. (Id. at 536.) The State then advised the

trial court it no longer would pursue its proposed jury instruction because of that ruling. (Id. at 538.) The trial court therefore did not include the proposed instruction. (Id.)

After the jury instructions were read and the jury began deliberations, the trial court was given a question from the jury. (Doc. 24-7 at 673.) The jury asked, "we got the definitions of lewd and lascivious, unnatural, but may we please get a law definition of familial or custodial, please[?]" (Id.) The parties then discussed how to answer the jury's question. The State suggested the Court instruct the jury on the State's proposed instruction or to instruct the jury to rely upon the instructions given. (Id. at 674.) Defense counsel noted three alternatives to the Court: (1) instruct the jurors to rely on the instructions as given; (2) instruct as to the State's proposed instruction; or (3) instruct as to the State's proposed instruction with the additional sentence counsel had requested. (Id. at 674–75.) Defense counsel asserted that, given those three options, the trial court should instruct the jurors to rely on their own interpretation of the instructions as they were previously charged. (Id.) The State indicated it preferred its proposed instruction be given; but, the alternative was to instruct the jurors to rely on their own interpretation of the instructions. (Id.) The parties then drafted the court's response to the jury's question to rely upon their own interpretation of the instructions. (Id. at 676–80.) The court then answered the jury's question in the manner agreed upon by the parties. (Id. at 680–81.)

Given the State's objection to defense counsel's proposed jury instruction and defense counsel's wish to avoid the state's jury instruction, it is clear that defense counsel strategically chose the course to have the jurors rely on their own interpretation of the instructions. Simply stated, Adams has simply failed to demonstrate that his trial counsel was deficient here. Furthermore, Adams must demonstrate that counsel's alleged error prejudiced his defense because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. He cannot meet his burden by showing that the avenue chosen by counsel proved unsuccessful, to the extent that the jury returned a guilty verdict. See id. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]").

Accordingly, Adams has failed to demonstrate that the state courts' denial of these claims was an unreasonable application of Strickland or based on an unreasonable determination of the facts.

D. Ground Ten

Adams asserts that the postconviction court erred when it denied his motion to appoint counsel prior to the evidentiary hearing on his postconviction motion. (Doc. 1 at 17–18, 38–41.)

Prior to the evidentiary hearing, Adams moved for appointment of counsel. (Doc. 24-7 at 986–90.) The postconviction court denied the request. (Id. at 997–98.) Petitioner raised the issue in his brief on appeal, but the Fifth DCA affirmed without a written opinion.

The Supreme Court has repeatedly held that prisoners do not have a constitutional right to counsel "when mounting collateral attacks upon their convictions." Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings."). Therefore, the postconviction court's decision to not appoint counsel for Adams's evidentiary hearing collaterally attacking his state judgment and sentence could not have been contrary to or based upon an unreasonable application of clearly established federal law. Adams is not entitled to federal habeas relief on this ground.

E. Ground Eleven

At the close of the State's case, defense counsel argued that the State's evidence failed to establish a familial or custodial relationship between Adams and the victim. The trial court denied the motions for judgment of acquittal as to all counts. Adams now contends he was denied due process when the trial court denied his motions for judgment of acquittal on counts two, three, and four because the State failed to prove the existence of a custodial or familial relationship. (Doc.

1 at 19–20, 41–42.) Adams raised this issue in his counseled brief on direct appeal, and the Fifth District Court of Appeal affirmed per curiam without written opinion.

Under the Supreme Court's decision in Jackson v. Virginia, 443 U.S. 307, 319 (1979), a court reviewing a challenge to the sufficiency of the evidence must evaluate whether, after viewing the evidence in the light most favorable to the jury's verdict, any rational juror could have found proof of guilt beyond a reasonable doubt. The Jackson standard must be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." Id. at 324 n.16. Under Jackson, the prosecution does not have "an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." Id. at 326. If the record contains facts supporting conflicting inferences, the jury is presumed to have resolved those conflicts in favor of the prosecution and against the defendant. Id.

Here, the evidence supports that Adams had both custodial and familial authority over the victim. As to the familial relationship, Adams was the victim's teacher and orienteering coach. (Doc. 24-6 at 625.) The victim testified that she looked up to Adams, that she loved and trusted him, and that Adams was her mentor. (Id. at 544–46.) The victim had a key to Adams's apartment and kept clothes there. (Id. at 527, 550.) This evidence satisfies a familial relationship under Florida law. See Pozek v. State, 803 So. 2d 768, 770 (Fla. 5th DCA 2001) (quoting State v. Rawls, 649 So. 2d 1350, 1353 (Fla. 1994), ("'Consanguinity and

affinity are strong indicia of a familial relationship but are not necessary. Also, the defendant and victim need not reside in the same home. The relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and her grandfather, uncle, or guardian.'").

Even if the evidence did not support a familial relationship, the evidence also supports a custodial relationship. The sexual activity occurred during the school year, while Adams was the victim's teacher and orienteering coach. (Doc. 24-6 at 632.) Consent forms listed Adams as the supervising faculty member to accompany members of the orienteering team to the competition. (Id. at 640.) Cf. Hallberg v. State, 649 So. 2d 1355, 1357 (Fla. 1994) (finding teacher did not have "custodial authority" over 14–year-old sexual battery victim as incidents did not occur during school year, nor in connection with activities of recognized teaching or extracurricular event, and victim's parents did not place teacher in custodial control and authority over victim).

Thus, the state court's denial of this claim was not contrary to or involve an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

F. Ground Twelve

Adams asserts the trial court erred in the jury instruction that it provided as to lewd and lascivious conduct through touching by kissing. (Doc. 1 at 20–21, 42–43.) In count five, Adams was charged with lewd or lascivious conduct between September 1, 2013, and January 14, 2014, by intentionally touching the victim in a

lewd or lascivious manner, to-wit: kissing, in violation of Fla. Stat. § 800.04(6)(a)1 and (b). The jury instruction did not include the specific act of kissing. (Doc. 24-7 at 2894-95.) Instead, the instruction provided that the State must have proven three elements beyond a reasonable doubt: (1) the victim was under the age of sixteen years; (2) Adams intentionally touched the victim in a lewd or lascivious manner; and (3) Adams was eighteen years of age or older at the time of the offense. (Id. at 2895.) The jury was further instructed: "The words lewd and lascivious mean the same thing and mean a wicked, lustful, unchasted [sic], licentious or sensual intent on the part of the person doing an act." (Id.) Adams argues that because the jury was not instructed that the lewd and lascivious touch was by kissing, that the instruction was incomplete, misleading, and referenced uncharged crimes and was therefore fundamental error.

Adams raised this issue in his counseled brief on direct appeal, and the Fifth District Court of Appeal affirmed per curiam without written opinion.

State court jury instructions ordinarily comprise issues of state law and are not subject to federal habeas corpus review. Jones v. Kemp, 794 F.2d 1536, 1540 (11th Cir. 1986); see also Wilson v. Sec'y, Fla. Dep't of Corr., No. 19-10320, 2020 WL 12880803, at *7 (11th Cir. Apr. 20, 2020). As such, on federal habeas review, the petitioner must demonstrate that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (quotations omitted). Adams has failed to do so. The

record shows defense counsel did not object to instruction. Adams maintained on appeal that the failed jury instruction was fundamental error. (Doc. 24-7 at 793.) See State v. Delva, 575 So. 2d 643, 644 (Fla. 1991) ("Instructions . . . are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred."). "[T]he fundamental error question is an issue of state law, and state law is what the state courts say it is." Pinkney v. Sec'y, DOC, 876 F.3d 1290, 1299 (11th Cir. 2017). Because Adams presents a state law claim, it is not cognizable on federal habeas review.

Nevertheless, even if Adams fairly presented a federally cognizable challenge to the state court's purported error, he is still not entitled to relief. Even though silent, the state court's adjudication is entitled to deference under AEDPA. See Ferguson, 527 F.3d at 1146. Adams has not directed the Court to any clearly established federal law suggesting that the jury instruction violated due process. And after a review the record and the applicable law, the Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Therefore, Adams is also not entitled to habeas relief on this claim.

G. Ground Thirteen

Adams asserts his convictions for counts four and six violate double jeopardy. (Doc. 1 at 22–23, 43–44.) Count four charged Adams with sexual battery on a child over the age of 12 and less than 18 by a person with familial or custodial authority, specifically vaginal penetration by an object between November 1, 2013, and January 14, 2014, in violation of Fla. Stat. § 794.011(8)(b),[4] and count six charged that Adams intentionally touched the genitals, genital area, or clothing covering the genitals in a lewd and lascivious manner between November 1, 2013 and January 14, 2014, in violation of Fla. Stat. § 800.04(5)(a) and (c)(2).[5] (Doc. 24-2 at 52–53.) Adams raised this issue in his counseled brief on direct appeal, and the Fifth DCA affirmed per curiam without written opinion.

The state court's ruling is consistent with federal law. The Double Jeopardy Clause protects defendants from successive prosecutions and multiple punishments.

---

[4] This section provides, in relevant part, that "[w]ithout regard to the willingness or consent of the victim, which is not a defense to prosecution under this subsection, a person who is in a position of familial or custodial authority to a person less than 18 years of age and who . . . [e]ngages in any act with that person while the person is 12 years of age or older but younger than 18 years of age which constitutes sexual battery under paragraph (1)(h) commits a felony of the first degree[.]" Fla. Stat. § 794.011(8)(b). Under subsection 1(h), sexual battery is defined in pertinent part as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object [.]" Fla. Stat. § 794.011(1)(h).

[5] Under Florida Statute § 800.04(5)(a), "a person who intentionally touches in a lewd or lascivious manner the breast, genitals, or buttocks, or the clothing covering them, of a person less than 16 years of age . . . commits lewd or lascivious molestation."

United States v. Dixon, 509 U.S. 688, 696 (1993) (citing North Carolina v. Pearce, 395 U.S. 711, 718 (1969)). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine where there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" Blockburger v. United States, 284 U.S. 299, 304 (1932) (internal citations and quotations omitted).

Here, while the offenses charged in counts four and six involved the same victim, they were committed in different locations and at different times. (Doc. 24-2 at 52–54.) The victim testified about contact in November 2013 at an Ocala hotel and again in December 2013 at Adams's apartment. (Doc. 24-6 at 518–19, 533.) Further, count six involved Fla. Stat. § 800.04, which contains an element that section 794.011 does not, i.e., lewd and lascivious touching of the breasts. See Fla. Stat. § 800.04(5)(a); see also State v. Drawdy, 136 So. 3d 1209, 1214 (Fla. 2014) (defendant's convictions for "sexual battery for penetrating the victim's vagina with his penis" and "lewd or lascivious molestation for intentionally touching the victim's breasts in a lewd or lascivious manner during the vaginal penetration" did not violate double jeopardy). Simply stated, there is no double jeopardy violation.

In sum, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts. Therefore, Adams is not entitled to relief on this claim.

IV. Conclusion

Based on the foregoing, Petitioner Duane E. Adams is not entitled to relief on the habeas claims presented here.

Accordingly, it is ordered that:

1. The 28 U.S.C. § 2254 petition filed by Duane E. Adams is **DENIED**.

2. The Clerk is **DIRECTED** to enter judgment in favor of Respondents and against Adams, deny any pending motions as moot, terminate any deadlines, and close this case.

Certificate of Appealability[6]

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court or circuit justice or judge must first issue a certificate of appealability (COA). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong,"

[6] Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

Slack v. McDaniel, 529 U.S. 473, 484 (2000), or that "the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

Upon consideration of the record, the Court declines to issue a COA. Because Adams is not entitled to a COA, he is not entitled to appeal in forma pauperis.

DONE AND ORDERED in Fort Myers, Florida this 15th day of September, 2023.

JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE

SA: OCAP-2
Copies: Petitioner (Duane E. Adams)
Counsel of Record