

APPENDIX

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NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10464
Non-Argument Calendar

FRANK J. EVANS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cv-22511-KMW

Before JORDAN, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

On May 9, 2016, Frank Evans assaulted another resident of a boarding house where he had been living. *See* D.E. 28-2: 76–77;

DE 28-3: 48–49. Florida charged Mr. Evans with one count of attempted second-degree murder with a deadly weapon. *See* D.E. 27-1: 27–29. It alleged that, during the commission of that offense, he had committed an aggravated battery by stabbing the victim and intentionally caused great bodily harm or permanent disfigurement. *See id.* at 28.

I

Mr. Evans proceeded to trial. *See* D.E. 28-1. At the conclusion of the parties’ cases, as is the usual course, the trial court instructed the jurors on the law and then sent them to deliberate. *See* D.E. 28-5: 140–161. The court, however, did not provide the jurors with the verdict form or the jury instructions. *See id.* at 163. About an hour later, the court realized its mistake, but by then the jurors had already returned a verdict. *See* D.E. 27-1: 172.

Under Florida law, juries must be provided with instructions during deliberations. *See* Fla. R. Crim. P. 3.400(b); D.E. 28-5: 164–65. So, in an attempt to protect Mr. Evans’ rights, the trial court did not accept the jury’s verdict and offered Mr. Evans a choice. *See* D.E. 28-5: 166. The court would either instruct the jury to reconsider its verdict after consulting the written jury instructions or it would declare a mistrial. *See id.* at 165. Mr. Evans opted to have the jury reconsider its verdict. *See id.*

The trial court then recalled the jury and provided the following instruction:

I would like for you to take a few minutes . . . to go through [the jury instructions] just to be sure that

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your verdict complies with the instructions that I gave you orally, and if you would comply to review the written instructions to make sure you all are working off the same concept and the right concepts that I instructed you . . . I do need to know that you all have taken some time to determine whether your verdict as you are ready to return it, is compliant as what I instructed you with.

D.E. 28-5: 168.

The jurors retired for further deliberations and returned less than ten minutes later with a verdict. *See id.* at 177. The jury found Mr. Evans guilty of aggravated battery as a lesser-included offense. *See id.* The trial court sentenced Mr. Evans to 11 years' imprisonment. *See* D.E. 28-6: 153.

Mr. Evans filed a direct appeal, in which he argued that the trial court committed reversible error when it denied his motion for a new trial due to the prosecutor's allegedly improper comments during closing argument. The Third District Court of Appeals affirmed without opinion, *see Evans v. State*, 255 So.3d 308 (Fla. 3d DCA 2018) (No. 3D17-590), and the Florida Supreme Court later dismissed Mr. Evans' further appeal for lack of jurisdiction. *See Evans v. State*, 2018 WL 6273377 (Fla. 2018) (No. SC18-1882).

On June 19, 2019, Mr. Evans filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. *See* D.E. 27-1: 183–275. In his motion, Mr. Evans argued that his conviction

for aggravated battery violated the Constitution's Double Jeopardy Clause. *See* D.E. 27-1: 217. Mr. Evans wrote in his motion:

The movant also asserts that perhaps, most significantly, whether the trial judge could have evaluated more, whether his sua sponte 'Choice to Mistrial' ruling . . . violated movant's double jeopardy rights in that his ruling . . . afforded the State a repeated opportunity to convict the movant, particularly in light of the fact that a verdict had already been determined in movant's case.

Id. at 217–18. The trial court denied Mr. Evans' postconviction motion as procedurally barred. *See* D.E. 27-2: 60. The Third District affirmed. *See Evans v. State*, 320 So.3d 745 (Fla. 3d DCA 2021) (No. 3D21-441).

On July 14, 2021, Mr. Evans filed a *pro se* federal habeas corpus petition pursuant to 28 U.S.C. § 2254, which he amended a month later. *See* D.E. 1, 17. In this petition, Mr. Evans raised multiple claims. One of them was that the trial court had violated his double jeopardy rights. *See id.* at 7. Mr. Evans asserted that:

The trial court . . . refused to render to him the jury's original verdict . . . [T]he court sought (with the collaboration of petitioner's own appointed trial attorney and State prosecutors) to conceal the jury verdict . . . for the purposes of reallowing the jury to be further instructed . . . and then reallowing the jury to re-deliberate and redetermine another jury verdict . . .

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Petitioner contends that these trial proceedings violated his double jeopardy rights.

Id. at 7.

The district court denied Mr. Evans' petition. *See* D.E. 38. It concluded that Mr. Evans' double jeopardy claim had been properly raised in his motion for post-conviction relief and was therefore not procedurally barred (as some of his other claims may have been). *See id.* at 12, n.9 (citing *State v. Fla.*, 894 So.2d 941, 944–45 (Fla. 2005) (recognizing that a double jeopardy claim raises a question of fundamental error, and thus, a defendant is not procedurally barred from raising the claim for the first time in post-conviction relief proceedings)).

As to the merits, the district court analyzed Mr. Evans' double jeopardy claim under *Blockburger v. United States*, 284 U.S. 299 (1932), which sets out the “same elements” test: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* at 304.¹

The district court then applied the “same elements” test to “the lewd or lascivious molestation offense as charged in Count 1” and determined that it was not the same offense. *See* D.E. 38 at 14. As a result, there had been no double jeopardy violation.

¹ Florida codified the *Blockburger* “same elements” test in Fla. Stat. § 775.021(4).

Mr. Evans, however, was not charged with or convicted of lewd or lascivious molestation. He was charged with second-degree attempted murder and was convicted of aggravated battery as a lesser included offense. Mr. Evans therefore filed a *pro se* motion for reconsideration explaining that he “was never charged, tried or convicted of lewd lascivious molestation . . . only aggravated battery.” D.E. 42 at 2–3. Mr. Evans also noted that his double jeopardy claim was predicated on the “trial court refus[ing] to render to him the jury’s original verdict.” *Id.* at 3.

The district court denied Mr. Evans’ motion for reconsideration. *See* D.E. 44. Mr. Evans then filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). *See* D.E. 49. The court also denied this motion. *See* D.E. 50.

We granted Mr. Evans’ motion for a certificate of appealability in part. The single issue that we agreed to examine was:

Whether the district court erred in denying Ground One of Evans’ 28 U.S.C. § 2254 habeas corpus petition based on the *de novo* determination that Evans had not demonstrated a double jeopardy violation, where its analysis was based on purported convictions for lewd and lascivious molestation and lewd and lascivious battery, but Evans was convicted of a single count of aggravated battery.

App. D.E. 21 at 2.

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II

On appeal, Mr. Evans argues that the district court erred when it rejected his double jeopardy claim by analyzing a crime that he was not charged with or convicted of under *Blockburger*. He asserts that we should vacate and remand this case for further proceedings and instruct the court to review his double jeopardy claim *de novo*.

III

In examining a district court's denial of a habeas petition under 28 U.S.C. § 2254, we review questions of law *de novo* and findings of fact for clear error. *See Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1208 (11th Cir. 2007). “[D]e novo review requires us to look at a question as if we are the first court to consider it.” *United States v. Williams*, 340 F.3d 1231, 1237 (11th Cir. 2003). Clear error review, however, requires us to have a firm conviction that a mistake has been committed. *See Coggin v. Commissioner*, 71 F.3d 855, 860 (11th Cir. 1996) (citation omitted).

IV

The Double Jeopardy Clause provides three constitutional protections: (1) protection from a second prosecution for the same offense after acquittal; (2) protection from a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *See Monge v. California*, 524 U.S. 721, 727–28 (1998).

Mr. Evans has consistently maintained that his double jeopardy claim was predicated on the trial court’s purported refusal to “render . . . the jury’s original verdict of his trial.” D.E. 17 at 7. In his telling, this was part of a conspiracy between the court, the state, and his own trial counsel, so that the original jury verdict of not guilty would be replaced after further instructions and deliberations with a verdict of guilty. *See id.* Mr. Evans asserts that his double jeopardy claim implicates the first of the protections articulated in *Monge*—i.e., the protection from a second prosecution for the same offense after acquittal. *See Appellant’s Initial Br.* at 33.

The district court, however, understood Mr. Evans’ claim to implicate the third protection—multiple punishments for the same offense—and incorrectly analyzed the elements of a completely different offense than what he was charged with or convicted of under the *Blockburger* “same elements” test. *See* D.E. 38 at 11–15. This was error. The court misunderstood Mr. Evans’ double jeopardy claim and applied the wrong law to the wrong facts.

Normally, an error of this kind would warrant a reversal and remand for further proceedings. But we need not reverse and remand when there is no viable claim and remand would be futile. *See Santos v. United States*, 982 F.3d 1303, 1314–15 (11th Cir. 2020) (concluding that remand was futile when there was no evidence that could support a viable claim); *Ali v. Florida*, 777 F.2d 1489, 1490 (11th Cir. 1985) (denying remand, despite procedural error, because it was clear from the habeas petition that claims were not exhausted).

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Mr. Evans asserts that his double jeopardy rights were violated because the jury's original verdict was an acquittal. But he also conceded in his brief that the district court never accepted the jury's verdict. "I will not even look at the verdict,' to try to "protect[] the defendant's rights.'" Appellant's Initial Br. at 9 (quoting D.E. 28-5: 166)

It is well settled that under Florida law for a verdict to be valid, it must be announced in open court in the presence of the jurors and the accused. See *Brewer v. State*, 53 Fla. 1, 43 So. 423 (1907). So too under federal law. "A verdict is valid and final when the deliberations are over, the result is announced in open court, and no juror registers dissent." 3 Wright & Miller, Fed. Prac. & Proc. Crim. § 517 (5th ed. & Sept. 2025 update). See *United States v. Gatlin*, 90 F.4th 1050, 1069 (11th Cir. 2024) ("A final verdict is valid only if it is published in open court with no juror dissent, and the verdict is accepted by the court[.]"). And double jeopardy is only triggered upon an event that speaks to the ultimate question of guilt or innocence. See *United States v. Scott*, 437 U.S. 82, 98, n.11 (1978). One such event is an acquittal. See *Richardson v. United States*, 468 U.S. 317, 325 (1984) ("[T]he Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy."). An acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318 (2013).

The jury returned no such verdict here. Because the original verdict was not accepted by the trial court, it was not a valid verdict. As a result, Mr. Evans' double jeopardy protections were not triggered. Moreover, the trial court's error in not providing the jury with written instructions prior to its initial determinations did not trigger double jeopardy protections. *See Burks v. United States*, 437 U.S. 1, 15 (1978) (holding that an error in the proceedings leading to conviction does not trigger double jeopardy). And neither did the court's instructions to the jury to redeliberate. *See Gatlin*, 90 F.4th at 1069 (concluding that instructing the jury to continue deliberating after it returned an inconsistent verdict did not violate the Double Jeopardy Clause).

Accordingly, Mr. Evans does not present a viable double jeopardy claim. Although the district court erred in mischaracterizing Mr. Evans' offense, remand would be futile.²

V

We affirm the district court's denial of Mr. Evans' petition.

AFFIRMED.

² As we've explained in the past, we can affirm on any ground in the record. *See, e.g., United States v. Al-Arian*, 514 F.3d 1184, 1189 (11th Cir. 2008)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 21-22511-CV-WILLIAMS

FRANK J. EVANS,

Petitioner,

vs.

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

Respondent.

ORDER

THIS MATTER is before the Court upon the *pro se* Amended Petition for Writ of Habeas Corpus (DE 17)¹ (“**Amended Petition**”) brought pursuant to 28 U.S.C. § 2254 by Petitioner Frank J. Evans (“**Petitioner**”) challenging his conviction and sentence for aggravated battery causing great bodily harm and permanent disfigurement entered following a jury verdict in Miami-Dade Circuit Court, Case No. F16-9652. (DE 17; DE 271, Exs. 5–7 at 27–39.)² In the Amended Petition, Petitioner raises three claims, as follows: (1) Petitioner’s conviction and sentence was obtained in violation of his double jeopardy rights (DE 17 at 6); (2) Petitioner’s fundamental right to a fair trial was compromised when

¹ The Court takes judicial notice of the state court records and trial transcripts filed by the State in this proceeding. See Fed. R. Evid. 201; *Nguyen v. United States*, 556 F.3d 1244, 1259 n.7 (11th Cir. 2009) (quoting *United States v. Glover*, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999) (“A court may take judicial notice of its own records and the records of inferior courts.”) (citation omitted)).

² Citations to the docket in this case are designated “(DE ____).” Also, the Court uses the pagination generated by the Case Management/Electronic Case Files Systems (“**CM/ECF**”) which appears on all court filings.

the judge failed to ensure that the court's instructions and verdict were given to the jury and then absented himself during jury deliberations (*Id.* at 10); and (3) Petitioner's sentence was illegal and the trial court erred in denying his motion to correct illegal sentence (*Id.* at 13). The Court has reviewed the Amended Petition (DE 17), the response (DE 26) ("**Response**") from Respondent Ricky D. Dixon, Secretary for the Florida Department of Corrections ("**State**" or "**Respondent**"), with supporting appendices containing relevant state court records (DE 27) and transcripts (DE 28), and Petitioner's Reply (DE 30) with supporting appendix (DE 30-1). For the reasons discussed below, the Amended Petition is **DENIED**.

I. BACKGROUND

A. State Court Proceedings.

On October 13, 2016, Petitioner was charged in a single count Information with attempted second-degree murder with a deadly weapon. (DE 27-1, Ex. 5 at 27–29.) On October 27, 2016, a jury convicted Petitioner of aggravated battery, as a lesser included offense, and made a specific finding that Petitioner did not carry, use, display, or threaten to use a weapon. (*Id.*, Ex. 6 at 31–32.) On February 28, 2017, the trial court adjudicated Petitioner guilty and sentenced him to eleven (11) years in prison. (*Id.*, Exs. 7–8 at 34–42.) On October 3, 2018, the appellate court *per curiam* affirmed Petitioner's conviction and sentence. *Evans v. State*, 255 So. 3d 308, *1 (Fla. 3rd DCA Oct. 3, 2018) (unpublished table decision); (*Id.*, Ex. 9 at 44–47.) On November 6, 2018, the appellate court struck as untimely Petitioner's belated motion for rehearing. (*Id.*, Ex. 9 at 47.) On December 3, 2018, the Florida Supreme Court dismissed for lack of jurisdiction Petitioner's request for discretionary review. *Evans v. State*, 2018 WL 6273377, *1 (Fla.

2018). (*Id.*, Ex. 10 at 47.) Therefore, on January 2, 2019, Petitioner's conviction became final for purposes of the federal one-year statute of limitations when the time for seeking certiorari review with the U.S. Supreme Court expired, ninety (90) days after the Petitioner's conviction was affirmed on appeal.³ See Sup. Ct. R. 13; *Gonzalez v. Thaler*, 565 U.S. 134, 149 (2012).⁴

On June 13, 2019, after state court proceedings not relevant to the claims raised in the Amended Petition concluded, Petitioner filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 ("**Rule 3.850 Motion**"), raising multiple claims, including claim 1 of the Amended Petition. (*Id.*, Ex. 15 at 183–245.) On August 28, 2019, the trial court entered an Order summarily denying the Rule 3.850 Motion as legally insufficient. (*Id.*, Ex. 16 at 277.) On December 3, 2019, after Petitioner moved for rehearing, the trial court entered an Order which "vacated, set aside, and held for naught" its Order denying Petitioner's Rule 3.850 Motion. (*Id.*, Ex. 16 at 278.) While the Rule 3.850 Motion was pending, Petitioner filed a motion to amend the Rule 3.850 Motion to add, in relevant part, claim 2 of the Petition. (DE 27-2, Ex. 17 at 2–13.) On August 3, 2020, the trial court

³ Because Petitioner's motion for rehearing was stricken by the appellate court and the petition for discretionary review dismissed by the Florida Supreme Court, they were not properly filed so they did not serve to toll the finality of Petitioner's conviction. See *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (finding an application is properly filed if its delivery and acceptance comply with applicable laws and rules governing such filings).

⁴ Although not relevant to the issues before the Court, on March 14, 2019, Petitioner filed a state petition for writ of habeas corpus raising multiple claims of ineffective assistance of appellate counsel. (DE 27-1, Ex. 13 at 108–144.) On April 17, 2019, the appellate court *per curiam* denied the state habeas corpus petition, finding the ineffective assistance of appellate counsel claims to be meritless. *Evans v. State*, No. 3D19-562, 273 So. 3d 1068, 1068 (Fla. 3d DCA Apr. 17, 2019). (*Id.*, Ex. 12 at 106.) On May 28, 2019, after rehearing was denied, the proceedings concluded when the Mandate issued. (*Id.*, Ex. 12 at 106.)

entered an Order denying Petitioner's motion to amend. (*Id.*, Ex. 18 at 20), and on August 7, 2020, the trial court entered an Order denying the Rule 3.850 Motion. (*Id.*, Ex. 29 at 85–92.) On December 2, 2020, the appellate court reversed the trial court's orders, finding the trial court abused its discretion in denying Petitioner's motion to amend. *Evans v.* 309 So. 3d 267, 267–68 (Fla. 3d DCA Dec. 2, 2020). (*Id.*, Ex. 23 at 40.)

On January 12, 2021, following the appellate court's remand, the trial court entered an Amended Order denying the Rule 3.850 Motion which included a ruling on the two new claims that were the subject of Petitioner's motion to amend. (*Id.*, Ex. 25 at 51, 60.) On March 24, 2021, the appellate court *per curiam* affirmed the trial court's Amended Order. *Evans v. State*, 320 So. 3d 745, *1 (Fla. 3d DCA Mar. 4, 2021). (*Id.*, Ex. 26 at 69.) On April 30, 2021, after the appellate court denied rehearing, the Court issued its Mandate. (*Id.*, Ex. 26 at 70.)

While the above Rule 3.850 proceedings were pending, Petitioner filed a petition for belated appeal with the appellate court regarding the trial court's August 7, 2020 Order summarily denying the Rule 3.850 Motion. (DE 27-2, Ex. 27 at 72.) On April 1, 2021, the appellate court granted the petition, and upon receipt of certified copy of the order being appealed, proceeded with the appeal under a new appellate case number. See *Evans v. State*, No. 3D20-1844 (Fla. 3d DCA 2021). (DE 27-2, Ex. 28 at 82.) On May 19, 2021, the appellate court *per curiam* affirmed the trial court's August 7, 2020 Order. *Evans v. State*, 321 So. 3d 209 (Fla. 3d DCA 2021). (DE 27-2, Ex. 30 at 94.) On June 23, 2021, after rehearing was denied, the appellate court issued its Mandate. (*Id.*)

On September 9, 2020, while his Rule 3.850 proceedings were still pending, Petitioner filed a Motion to Correct Illegal Sentence brought pursuant to Fla. R. Crim.

P. 3.800(a) (“**Rule 3.800 Motion**”), essentially raising claim 3 of this federal petition. (DE 27-2, Ex. 31 at 96–99.) On October 2, 2020, the trial court entered an Order denying the Rule 3.800 Motion. (DE 27-1, Ex. 2 at 8, Ex. 32 at 110–11). On April 14, 2021, the appellate court *per curiam* affirmed the trial court’s Order. *Evans v. State*, 319 So. 3d 17, *1 (Fla. 3d DCA Apr. 14, 2021). (DE 27-2, Ex. 33 at 113.)

B. Federal Court Proceedings.

On July 7, 2021, Petitioner timely filed a habeas corpus petition (DE 1) (“**Petition**”) brought pursuant to 28 U.S.C. § 2254, after he signed and handed it to prison officials for mailing pursuant to the mailbox rule.⁵ (*Id.* at 46.) On October 22, 2021, Petitioner filed an Amended Petition. (DE 10 at 24.) On July 25, 2022, the Court entered an order striking the Amended Petition and ordered Petitioner to file a Second Amended Petition. (DE 15.) On August 22, 2022, Petitioner filed the operative Second Amended Petition. (DE 17 at 20.)

C. Preliminary Defenses.

1. Statute of Limitations Defense.

Respondent concedes that the Second Amended Petition was timely filed. (DE 26 at 18.) Because Respondent has explicitly waived the statute of limitations defense, this Court need not determine whether the waiver is accurate. See 28 U.S.C. §2244(d)(1)–

⁵Absent evidence to the contrary, in accordance with the prison mailbox rule, a *pro se* prisoner’s filing is deemed filed on the date it is executed and handed to prison authorities for mailing. *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001); Fed. R. App. 4(c)(1).

(2); *Wood v. Milyard*, 566 U.S. 463, 473 (2012)⁶ (citing *Day v. McDonough*, 547 U.S. 198, 210–11 (2006)).

2. Lack of Exhaustion Defense.

The State has advanced a lack of exhaustion defense and procedural default as to claim 1 and 3 of the Amended Petition but has also addressed the merits of the claims in the alternative. (DE 26 at 21–30.)

A district court can avoid the exhaustion defense and review a claim *de novo* rather than afford deference to the state court's determination under the Antiterrorism and Effective Death Penalty Act of 1996 ("**AEDPA**"). See *Dallas v. Warden*, 964 F.3d 1285, 1298 (11th Cir. 2020) (first citing *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011) ("When relief is due to be denied even if claims are not procedurally barred, we can skip over the procedural bar issues, and we have done so in the past.") and then citing *Bell v. Cone*, 543 U.S. 447, 451 n.3 (2005) (citing § 2254(b)(2) for the proposition that even if a petitioner's claim was not exhausted in state court, a federal district court may deny the claim on the merits in a federal habeas corpus application)). Even before the AEDPA's enactment, judicial economy sometimes warranted reaching the merits of a claim if the merits were "[e]asily resolvable against the habeas petitioner" while the procedural bar issues are complicated. See *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1072–73 (11th Cir. 2013) (stating that judicial economy sometimes dictates

⁶ In *Wood*, the United States Supreme Court held that a district court abuses its discretion by considering a statute of limitation defense that has been affirmatively waived, as opposed to merely forfeited. *Wood*, 566 U.S. at 473; *Green v. United States*, 735 F. App'x 687, 688 (11th Cir. 2018) (citing *In Re Jackson*, 826 F.3d 1343, 1348 (11th Cir. 2016)).

reaching the merits if the merits are easily resolvable and the procedural bar issues are not).

Although Respondent's arguments regarding lack of exhaustion and procedural default appear meritorious as to claims 1 and 3 of the Amended Petition, the merits of the claims are addressed below as they do not warrant habeas corpus relief. *See Valle v. Sec'y, Fla. Dep't of Corr.*, 459 F.3d 1206, 1213 (11th Cir. 2006) (finding it unnecessary to address the procedural bar issue even where the claim was preserved because the petitioner was not entitled to habeas corpus relief); *see also* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust [state remedies.]").

II. APPLICABLE LEGAL PRINCIPLES

A. Standard of Review.

Because the Petition was filed after the effective date of the AEDPA, the AEDPA governs the Court's scope of federal habeas corpus review. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007). The AEDPA ensures that federal habeas corpus relief works to "[g]uard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *See Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011)). The "[A]EDPA's statutory scheme is designed to strongly discourage" petitioners from presenting new evidence and ensures that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011) (citations omitted).

The AEDPA standard is both mandatory and difficult to meet. *White v. Woodall*, 572 U.S. 415, 420 (2014). It imposes a “[h]ighly 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 and citation omitted); *Lee v. Comm’r, Ala. Dep’t of Corr.*, 726 F.3d 1172, 1192 (11th Cir. 2013) (citations omitted). The Eleventh Circuit “[h]as stressed that in applying AEDPA deference federal courts are not to take a magnifying glass to the state court opinion or grade the quality of it.” *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1350 (11th Cir. 2019). Thus, deferential review under § 2254(d) is generally limited to the record that was before the state court that adjudicated the claim on the merits. See *Cullen*, 563 U.S. at 182; *Gill v. Mecusker*, 633 F.3d 1272, 1288–91 (11th Cir. 2011).

Under the AEDPA, a federal court may not grant habeas relief on any claim adjudicated on the merits in state court unless the state court’s decision (1) “[w]as contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”⁷; or (2) “[w]as based on an

⁷ Under § 2254(d)(1)’s “unreasonable application” clause, a district court may grant a writ of habeas corpus if the state court “[i]dentifie[d] the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applie[d] that principle to the facts of the case.” *Williams*, 529 U.S. at 413. Thus, district courts must first identify the last state court decision, if any, that adjudicated the merits of the claim. See *Marshall v. Sec’y, Fla. Dep’t of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). An unreasonable application of federal law differs from an incorrect application of federal law. *Renico*, 559 U.S. at 773 (citation omitted). Courts “[a]pply this same standard when evaluating the reasonableness of a state court’s decision under § 2254(d)(2).” *Landers v. Warden, Att’y Gen. of Ala.*, 776 F.3d 1288, 1294 (11th Cir. 2015) (citations omitted). That is, “[a] state court’s . . . determination of the facts is unreasonable only if no fairminded jurist could agree with the state court’s determination or conclusion.” *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) (quotation marks and citations omitted).

unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” See 28 U.S.C. § 2254(d)(1)–(2); *Harrington*, 562 U.S. at 97–98; *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000); *Rimmer v. Sec’y, Fla. Dep’t of Corr.*, 876 F.3d 1039, 1053 (11th Cir. 2017) (quoting § 2254(d)).

Also, federal courts are authorized to deny federal relief when the claim is subject to rejection under *de novo* review, regardless of whether the AEDPA deference applies. See *Berghuis v. Thompson*, 560 U.S. 370, 390 (2010) (holding that federal courts can “[d]eny writs of habeas corpus under [§ 2254] by engaging in *de novo* review when it is unclear whether AEDPA deference applies” because a habeas petitioner will not be entitled to habeas relief if his claim is rejected on *de novo* review); *Connor v. GDCP Warden*, 784 F.3d 752, 767 (11th Cir. 2015) (citations omitted) (“[B]ecause we conclude that [petitioner] would not be entitled to habeas relief under *de novo* review, we affirm the District Court’s denial of relief under that standard without resolving whether AEDPA deference applies.”).

Petitioner bears the burden of establishing his right to federal habeas corpus relief and proving all the facts necessary to demonstrate a constitutional violation. See *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995); see also *Cullen*, 563 U.S. at 187. To warrant relief, Petitioner must show that the state court ruling was “[s]o lacking in justification that there

Further, for purposes of federal habeas review, “clearly established federal law” consists of the “[h]oldings, as opposed to the dicta, of [the Supreme Court’s] decisions at the time of the relevant state court decision.” *Williams*, 529 U.S. at 412; *Lee*, 726 F.3d at 1192 (citation omitted). “A Supreme Court decision, which is not dictated by precedent or is not made retroactive to cases on collateral review, handed down after the petitioner’s conviction becomes final does not control the disposition of the petitioner’s habeas proceeding.” *Gary v. Hall*, 558 F.3d 1229, 1254 (11th Cir. 2009) (citing *Newland v. Hall*, 527 F.3d 1162, 1196–1201 (11th Cir. 2008)).

was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Lee*, 726 F.3d at 1192 (quoting *Harrington*, 562 U.S. at 103).

B. *Ineffective Assistance of Counsel.*

Petitioner also raises a claim of ineffective assistance of counsel which is governed by the Supreme Court’s two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). The two-prong test requires Petitioner to demonstrate that: (1) counsel’s performance was deficient, and (2) a reasonable probability that the deficiency resulted in prejudice. See *id.* at 694. Deficient performance requires Petitioner to demonstrate that counsel’s actions were unreasonable or fell below prevailing professional competence demanded of defense attorneys. *Id.* at 688. The *Strickland* deficiency prong does not require a showing of what the best lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle v. Sec’y, Dep’t of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). Even with the benefit of hindsight, where counsel’s decision appears unwise, it will only be ineffective if it was so unreasonable that no attorney would have chosen it. *Dingle*, 480 F.3d at 1099. *Strickland*’s prejudice prong requires Petitioner to establish that, but for counsel’s deficiency, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. If Petitioner cannot meet one of *Strickland*’s prongs, the Court need not address the other prong. *Id.* at 697; *Brown v. United States*, 720 F.3d 1316, 1326 (11th Cir. 2013). Also, bare and conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. See *Blackledge v. Allison*, 431

U.S. 63, 74 (1977); *Boyd v. Comm’r, Ala. Dep’t of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012).

III. DISCUSSION

A. *Double Jeopardy Violation.*

In claim 1, Petitioner claims his double jeopardy rights were violated because the trial court, the State, and his defense counsel concealed the “jury’s original verdict,” and manipulated the Florida Rules of Criminal Procedure by declaring a “[s]ua *sponte* sham . . . mistrial,” which effectively rescinded the jury’s original verdict, and allowed “[t]he jury to be further reinstructed . . . and . . . [t]o redeliberate and redetermine another jury verdict”⁸ (DE 27 at 7.) In the Rule 3.850 Motion where the claim was raised, Petitioner

⁸ To the extent Petitioner means to argue that the trial court violated Fla. R. Crim. P. 3.400(c) because it failed to immediately provide the jury with the written jury instructions when they retired for deliberations, the law is well settled that such error is a matter of state law and not cognizable on federal habeas corpus review. *Jacobs v. Singletary*, 952 F.2d 1282, 1290 (11th Cir. 1992). Nonetheless, the record shows that during argument regarding the defense’s motion for mistrial and second motion for judgment of acquittal, the trial court was advised by defense counsel that the jury had “[n]ever received the verdict form and instructions.” (DE 28-5 at 162.) In response, the court advised the defense that the jury could be instructed “[t]o go back to the jury room with the written instructions, read every single word to them to make sure that every juror is in compliance with the instructions that I gave them, or you may move for mistrial right now. Think about it; you got five minutes.” (*Id.* at 164.) After a short recess, defense counsel suggested “[r]ather than just a strenuous instruction, that they must [go] through and ready every page, that it be said . . . you can review these instructions now and take the time to [do] so, but if you feel it doesn’t affect your verdict, then you can knock on the door.” (*Id.* at 165.) The court agreed, and indicated it would “[n]ot even look at the verdict . . . Because [it] want[ed] to do this in a manner that protects the defendant’s rights . . . And that you feel is the appropriate way it would remedy any potential prejudice. . . .” (*Id.* at 166–67.) Absent any objections, the court then advised the jury that it had failed to provide them with the jury instructions, commending that they had already worked hard and done their deliberations, but instructing that they “[g]o over these instructions,” including “[t]he defined offenses from page two through five” and the rest of the general instructions on how to conduct their deliberations. (*Id.* at 166–67.) The court further asked the jury to go through the instructions to ensure that their verdict complied with the instructions he had given them orally. (*Id.* at 167.) Thereafter, the parties did not request that the jury be

argued that the trial court erred in declaring a mistrial in violation of Petitioner's double jeopardy rights.⁹

Both the United States Constitution and Florida Constitution contain double jeopardy clauses that forbid successive trials for the same offense, and multiple punishments for the same offense. See U.S. Const. amend. V; Art. I, § 9, Fla. Const.; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Carawan v. State*, 515 So.2d 161, 163 (Fla. 1987), *superseded by statute, as stated in State v. Maisonet-Maldonado*, 308 So. 3d 63 (Fla. 2020). Also, Florida courts apply the *Blockburger*¹⁰ “same elements” test to determine whether multiple convictions violate double jeopardy. See *Lee v. State*, 258 So.3d 1297, 1301 (Fla. 2018) (explaining that the question under Fla. Stat. § 775.021(4)(b) is whether each offense contains an element not contained in the other).

provided any further clarifying instructions on how to proceed before the court allowed them to retire so they could review the written instructions. (*Id.*) On this record, Petitioner has not demonstrated prejudice arising from a violation of state law, much less that his substantial rights were violated when the jury was asked to return to the jury room to review the jury instructions to ensure their verdict was consistent with the instructions provided orally.

⁹ Under Florida law, a defendant's double jeopardy claim is properly raised in a motion for post-conviction relief. See *State v. Fla.*, 894 So.2d 941, 944–45 (Fla. 2005) (recognizing that a double jeopardy claim raises a question of fundamental error, and thus, a defendant is not procedurally barred from raising the claim for the first time in post-conviction relief proceedings) (*citing Lippman v. State*, 633 So.2d 1061, 1064–65 (Fla. 1994) (holding that a double jeopardy claim raises a question of fundamental error which is not procedurally barred when raised initially in a Rule 3.850 proceeding)). A federal court should not defer to a state court's interpretation of a state procedural rule unless the rule and its interpretation rests on an independent and adequate state ground. *Harris v. Reed*, 489 U.S. 225 (1989).

¹⁰ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

When dealing with the issue of whether two convictions violate double jeopardy, the *Blockburger* “same elements” test requires courts to determine whether each offense contains an element not contained in the other; and, if they do not, then they are the same offense. See *Blockburger*, 284 U.S. at 304; see also Fla. Stat. § 775.021(4) (1997) (codifying the *Blockburger* test). In relevant part, § 775.021(4) provides that “[o]ffenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.” § 775.021(4), Fla. Stat. (1997). If each offense has at least one element that the other does not, then the offenses are separate crimes, and double jeopardy does not bar multiple punishment or successive prosecution. *Id.*

The Florida Legislature, however, has instructed generally that its intent “[i]s to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity ... to determine legislative intent.” Fla. Stat. § 775.021(4)(b); see Fla. Stat. § 775.021(4)(a) (“Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense....”). Exceptions to this rule are, among other things, “[o]ffenses which require identical elements of proof.” *Id.* § 775.021(4)(b)(1).

Here, if Petitioner’s convictions as to Counts 1 and 4 were based on a single criminal act and required proof of the same elements, then Counts 1 and 4 would violate the *Blockburger* “same-elements test” and Florida law. See Fla. Stat. § 775.021(4)(b)(1); *Blockburger*, 284 U.S. at 304. Florida law, however, provides that a defendant may be punished multiple times under the same statute so long as the offenses are each based

on “distinct” criminal acts. *See, e.g., State v. Drawdy*, 136 So. 3d 1209, 1213 (Fla. 2014); *Hayes v. State*, 803 So.2d 695, 700 (Fla. 2001) (“[T]he prohibition against double jeopardy does not prohibit multiple convictions and punishments where a defendant commits two or more distinct criminal acts.”).

Regarding the lewd or lascivious molestation offense as charged in Count 1, the evidence at trial established that Petitioner, well over thirty years of age, engaged in foreplay with the minor victim on August 31, 2011, and while on top of the minor victim, he held her hands behind her head as he removed her bra and panties. As to the lewd or lascivious battery offense as charged in Count 4, the evidence at trial established that Petitioner changed positions, placing the minor victim on top of him, penetrating her vaginally with his penis. Here, the first act—removing the victim’s clothing—was separate in “character and type” from the second act—vaginal penetration with his penis. *See Drawdy*, 136 So. 3d at 1213 (defendant’s conviction for sexual battery, for penetrating minor victim’s vagina with his penis, and his conviction for lewd or lascivious molestation, for intentionally touching the victim’s breasts in a lewd or lascivious manner during the vaginal penetration, were distinct criminal acts of a separate character and type, and thus did not violate double jeopardy; although the acts essentially occurred simultaneously, the touching of the victim’s breasts occurred with some part of the defendant’s body other than his penis, and the touching occurred under victim’s shirt and was not incidental or integral to the vaginal penetration); *see also State v. Meshell*, 2 So. 3d 132, 135 (2009) (holding that, even if both acts occurred during the same encounter, “[s]exual acts of a separate character and type requiring different elements of proof . . . are distinct criminal acts that the Florida Legislature has decided warrant multiple punishments”).

Because Petitioner's act of removing the minor victim's bra was not an "an integral or necessary part of" Petitioner's vaginal penetration of the victim with his penis, his convictions as to Counts 1 and 4 involve separate and distinct criminal acts, and did not violate his double jeopardy rights. See *Id.* Given the above, counsel had no duty to raise this non-meritorious claim at trial or on appeal, because the jury could well have concluded that Petitioner committed separate and distinct acts. Having failed to demonstrate *Strickland* deficiency or prejudice, Petitioner is not entitled to habeas corpus relief on this claim.

B. *Failure to Object or Move for a Mistrial.*

In claim 2, Petitioner asserts that his counsel was ineffective for failing to object or move for a mistrial after the trial judge, during jury deliberations, left to participate in an appellate panel. (DE 17 at 10–11.) Petitioner claims he was never consulted by defense counsel or the court regarding waiving the judge's presence during jury deliberations and did not consent to judge's absence or the waiver by defense counsel. (*Id.* at 11–12.) Petitioner maintains the jury never received the written jury instructions because the judge left the courtroom. (*Id.* at 12.) As a result, Petitioner claims he was convicted and sentenced to eleven years in prison. (*Id.*).

This claim was raised in claims 4 and 15 of Petitioner's Rule 3.850 Motion. (DE 27-2, Ex. 17 at 5.) The trial court denied relief, finding that once it was discovered that the written instructions had not been given to the jury, instructions were provided to them, and the jury was instructed to read them over before rendering its verdict. (*Id.*, Ex. 25 at 62–63, 67.) Thus, the trial court correctly determined that Petitioner had not demonstrated *Strickland* deficiency or prejudice arising from counsel's agreement to waive the judge's

absence during deliberations. (*Id.*). Nothing in the record suggests that had counsel not agreed to the judge's absence and had the judge remained in the courtroom that the jury would have acquitted Petitioner of the charged offenses. To the contrary, it is likely that the jury would have been provided—as they were—the instructions and rendered the same guilty verdict. Consequently, Petitioner is not entitled to relief on this claim, having failed to demonstrate *Strickland* deficiency or prejudice.

C. Trial Court Erred in Denying Motion to Correct Illegal Sentence.

In claim 3, Petitioner asserts that the trial court erred in denying his motion to correct illegal sentence. (DE 17 at 13.) Petitioner maintains “[h]is motion affirmatively alleged and addressed how and where the court records demonstrated entitlement to relief.”¹¹ (*Id.*) The claim presents a question of state law so that federal habeas corpus relief is not available even when couched in terms of violations of equal protection and due process.¹² See *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011) (quoting *Lewis v.*

¹¹ In the Amended Petition, Petitioner fails to allege any facts to support the claim, referring the Court to his state court records. “With a typically heavy caseload and always limited resources, a district court cannot be expected to do a petitioner’s work for him.” See *Chavez v. Sec’y, Fla. Dep’t of Corr.*, 647 F.3d 1057, 1064 (11th Cir. 2011) (citations omitted); see also *Fils v. City of Aventura*, 647 F.3d 1272, 1284 (11th Cir. 2011) (A court may not act as a Petitioner’s lawyer and construct the party’s theory of liability from facts never alleged, alluded to, or mentioned during the litigation.). On this basis alone, the claim is denied.

¹² On the merits, for the reasons set forth in the State’s Response, the claim warrants no habeas corpus relief because the jury was provided with the Florida standard jury instructions for aggravated battery, as a lesser included offense of attempted second-degree murder. (DE 27-3, Ex. 34 at 5.); see also Fla. Stat. §§ 784.045(1)(a), (2) (2016); Fla. Std. Jury Instr. (Crim.) 8.4 (2016). Notably, Florida courts have determined that the Florida Standard Jury Instructions are presumed to be correct. See *Thomas v. State*, 838 So. 2d 535, 541 (Fla. 2003). Consequently, the trial court’s denial of the Rule 3.800 Motion should not be disturbed here.

Jeffers, 497 U.S. 764, 780 (1990) (finding federal habeas corpus court is bound by state's interpretation of its own laws) (citations omitted)); *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) (finding claims that actually involve state-law issues are not cognizable on federal habeas corpus review, even when couched in terms of violation of equal protection and due process). "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Thus, a habeas petition premised on issues of state law provides no basis for habeas corpus relief as a violation of a state statute or rule of procedure is not, in itself, a violation of the federal constitution. *Branan*, 861 F.2d at 1508. Petitioner has not demonstrated error arising from the trial court's denial of his Rule 3.800 Motion. For all of the foregoing reasons, claim 3 is DENIED.

IV. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his § 2254 habeas corpus petition has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability ("**COA**"). See *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (quoting 28 U.S.C. § 2253(c)(1)(A)). When a district court rejects Petitioner's constitutional claims on the merits, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). However, when the district court rejects a claim on procedural grounds, a petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in

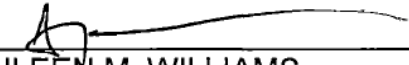
its procedural ruling.” *Id.* Upon consideration of the record, the Court finds that no certificate of appealability shall issue.

V. CONCLUSION

Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. The Petitioner’s § 2254 Petition (DE 1) is **DENIED**.
2. Judgment in favor of the Respondent will be entered separately in accordance with Fed. R. Civ. P. 58(a).
3. A Certificate of Appealability is **DENIED**.
4. All pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers in Miami, Florida, this 25th day of January, 2024.


KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

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