UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DESMOND JUSTIN MURRAY,

Petitioner,

v. **Case No. 8:15-cv-1245-T-35JSS**

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

Respondents.
_____/

ORDER

This cause comes before the Court on Petitioner Desmond Justin Murray's petition under 28 U.S.C. § 2254 for writ of habeas corpus (Doc. 1), the response thereto (Doc. 6), and Petitioner's reply (Doc. 13). Upon review, and in accordance with the *Rules Governing Section 2254 Cases in the United States District Courts*, the petition is **DENIED**.

BACKGROUND

Petitioner was charged by information with manslaughter (Count One), aggravated child abuse (Count Two), and aggravated manslaughter of a child (Count Three). (Doc. 15 Ex. 1) The charges stemmed from the March 1, 2007 suffocation death of infant D.M. (*See* Doc. 15 Ex. 1; Ex. 4 at 259)

Before trial, the defense filed a motion to dismiss the charges or require the State to elect between them (*Id.* Ex. 2), which was denied. (*Id.* Ex. 3). The case proceeded to trial on the alternative theories of prosecution — that Petitioner either directly harmed his

child, resulting in the child's death (Counts One and Two), or that Petitioner failed to prevent another from killing his child (Count Three). The jurors were instructed that if they found Petitioner guilty on Counts One or Two, they must acquit him of Count Three, and if they found him guilty on Count Three, they must find him not guilty on Counts One and Two. (*Id.* Ex. 4 at 693–95) Petitioner was found not guilty on Counts One and Two and guilty as charged on Count Three. (*Id.* Ex. 5) Petitioner was sentenced to thirty years' imprisonment. (*Id.* Ex. 6 at 1036–37) He appealed, and his conviction and sentence were affirmed without a written opinion. (*Id.* Exs. 8, 11); *Murray v. State*, 84 So. 3d 1038 (Fla. 2d DCA 2011) (per curiam) (table).

Petitioner then filed a motion for post-conviction relief, pursuant to Rule 3.850, Florida Rules of Criminal Procedure. (Doc. 15 Ex. 13) Through a series of orders, the state post-conviction court held an evidentiary hearing on one issue and ultimately denied each claim. (*Id.* Exs. 14, 16, 17, 18) Petitioner appealed, and the state appellate court affirmed the denial of his motion for post-conviction relief without a written opinion. (*Id.* Exs. 19, 22); *Murray v. State*, 160 So. 3d 428 (Fla. 2d DCA 2015) (per curiam) (table).

Petitioner then filed the instant petition for writ of habeas corpus, raising three grounds for relief. (Doc. 1) Because the Court is able to resolve the entire petition on the basis of the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this proceeding. *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209, 1210 (11th Cir. 1998),

cert. denied, 531 U.S. 840 (2000). Section 2254(d), which creates a highly deferential standard for federal court review of a state court adjudication, states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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.

The Supreme Court interpreted this deferential standard as "plac[ing] a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Specifically, the Supreme Court explained that, *id.*,

> [u]nder [Section] 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

"The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable[.] . . . [A]n unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002). "[A]n 'unreasonable application of' those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting

White v. Woodall, 134 S. Ct. 1697, 1702 (2014)). *Accord Brown v. Head*, 272 F.3d 1308, 1313 (11th Cir. 2001). The phrase "clearly established Federal law" encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. Ultimately, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). That burden is very difficult to meet. *See Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (quoting *Richter*, 562 U.S. at 102, 103) (" 'If this standard is difficult to meet' — and it is — 'that is because it was meant to be.' We will not lightly conclude that a State's criminal justice system has experienced the 'extreme malfunctio[n]' for which federal habeas relief is the remedy.").

The purpose of federal review is not to re-try the state case. "The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell*, 535 U.S. at 693. Federal courts must afford due deference to a state court's decision. "AEDPA prevents [the use of] federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). *See also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Moreover, a state appellate decision is entitled to deference under Section 2254(d), regardless of whether the decision includes an opinion explaining its rationale.

See Harrington v. Richter, 562 U.S. 86, 99 (2011); *see also Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1353 (11th Cir. 2012); *Wright v. Moore*, 278 F.3d 1245, 1254 (11th Cir. 2002). When presented with a per curiam affirmance, "the federal court should '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." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). "[T]he State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.*

Review of a state court decision is limited to the record that was before the state court at the time the decision was made. *Pinholster*, 563 U.S. 170 at 181–82. The petitioner bears the burden of overcoming a state court factual determination by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to findings of fact, but not to mixed determinations of law and fact. *Parker v. Head*, 244 F.3d 831, 836 (11th Cir. 2001), *cert. denied*, 534 U.S. 1046 (2001).

ANALYSIS

Each of Petitioner's three grounds raises a claim of ineffective assistance of trial counsel. A claim of ineffective assistance is one that is difficult to sustain. *See Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc) (quoting *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)) ("[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between."). In *Strickland v. Washington*, 466 U.S. 668 (1984),

> the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland*, first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Sims v. Singletary, 155 F.3d 1297, 1305 (11th Cir. 1998) (citing *Strickland*, 466 U.S. at 687).

Strickland requires proof of both deficient performance and consequent prejudice. *Strickland*, 466 U.S. at 697; *Sims*, 155 F.3d at 1305. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "[A] court deciding an actual ineffectiveness claim 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." *Id.* To establish deficient performance, *Strickland* requires a petitioner to demonstrate that, "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." *Id.* To establish prejudice, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In the AEDPA context, sustaining a claim of ineffective assistance of counsel is even more difficult than in other types of cases because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. 86, 105. *See also Pinholster*,

563 U.S. 170 at 190 ("Our review of the [state court's] decision is thus 'doubly deferential.' "); *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 911 (11th Cir. 2011) ("Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.").

A. Ground One

In Ground One, Petitioner contends that his trial counsel erroneously omitted the essential element of "culpable negligence" from the jury instructions. He claims he was prejudiced because the jury, as a result, could have convicted him for mere negligence, rather than the culpable negligence required by Florida law. (Doc. 1 at 5)

Petitioner raised this argument in his Rule 3.850 motion. (Doc. 15 Ex. 49–53) The state post-conviction court denied relief, explaining that, although Petitioner argued the "culpable negligence" language was omitted from the aggravated manslaughter instruction, the record refuted his claim. (Doc. 15 Ex. 14 at 67)

Upon review, the state court's decision was not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. The record reflects that the trial court instructed the jury as follows (Doc. 15 Ex. 4 at 684–86):

> And the third charge Count Three, aggravated manslaughter, this is the definition of that. To prove the crime of aggravated manslaughter as charged in Count Three the State would have to prove the following four elements beyond a reasonable doubt, and when I say four . . . , I mean, they've got to prove all of them, not just some of them. . . . [E]lement number one is that [D.M.] is dead; element . . . number two is that the death of [D.M.] was caused because Desmond Murray failed to make a reasonable effort to protect [D.M.] from abuse, neglect or exploitation by another person; the third element is that Desmond Murray was a caregiver for [D.M.]; and fourth that [D.M.] was under the age of 18 years.

> Now neglect of a child may be based on repeated conduct or on a single incident or omission that resulted in or reasonably could have been expected to result in serious physical or mental injury or substantial risk of death to a child.
>
> Now element three we used the term caregiver. Caregiver means a parent, adult household member, or other person responsible for a child's welfare.
>
> The term culpable negligence is used in this instruction as well. It's the same definition, but out of an abundance of caution[,] if you don't mind[,] I would like to read it again.
>
> Each of us has a duty to act reasonably toward others. If there's a violation of that duty without any conscious intention to harm then that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be culpable negligence it must be gross and flagrant. The negligence must be committed with utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily harm.

Culpable negligence was, in fact, left out of the criminal elements portion of the instruction. However, Petitioner's argument that defining culpable negligence did not make up for its exclusion from the elements portion of the instruction is not persuasive.

As the Supreme Court has explained, "the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991). The only question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)) (citing also *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (" '[I]t must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some [constitutional right]' ")). *See also Neder v. United States*, 527 U.S. 1, 15 (1999); *Agan v. Vaughn*, 119 F.3d 1538, 1545 (11th Cir. 1997) (citing *Carrizales v. Wainwright*, 699 F.2d 1053,

1055 (11th Cir. 1983) ("Our limited role on habeas review, when faced with a challenge to a state law jury charge, is to determine whether any error or omission in the jury charge was so prejudicial as to amount to a violation of due process.") Further, "the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (quoting *Cupp*, 414 U.S. at 147).

In this case, immediately following a general listing of the elements to be proven with regard to Count Three, aggravated manslaughter of a child, the judge defined culpable negligence and expressly stated: "The term culpable negligence is used in this instruction as well." (Doc. 15 Ex. 4 at 684–86) The judge made clear that the culpable negligence instruction was "the same" as that given with regard to the Count One manslaughter charge. Moreover, the judge emphasized that "culpable negligence is more than a failure to use ordinary care for others. For negligence to be culpable negligence it must be gross and flagrant." (*Id.* at 682) As such, the instruction was complete if the Court does not judge the instruction in "artificial isolation" but considers it "in the context of the instructions as a whole and the trial record" as taught by *Estelle*, 502 U.S. at 72 (quoting *Cupp*, 414 U.S. at 147). That is to say, under these circumstances, the state post-conviction court could reasonably conclude that the jury was sufficiently instructed on the culpable negligence requirement for a guilty verdict on Count Three.

Moreover, Petitioner has failed to demonstrate a reasonable probability of a different outcome had culpable negligence, rather than mere negligence, been included in the elements portion of the jury instructions on Count Three. At trial, the parties stipulated that D.M. was killed by the intentional act of another person. (Doc. 15 Ex. 4 at

247) There was more than ample evidence that if Petitioner was not the direct culprit, at the very least, he was culpably complicit in failing to prevent another from killing the child. Kyristyne Hoffman,[1] former girlfriend of Petitioner and mother to the victim, testified against Petitioner. (*Id.* at 276, 279–91) She testified that she suffered physical abuse at the hands of Petitioner, both before and after the birth of their son. (*Id.* at 293–300, 302–08) She further testified that, when their infant was crying, Petitioner would put a rag in the baby's mouth and put him in the closet. When the infant started spitting the rag out, Petitioner would tape his mouth closed with the rag inside. (*Id.* at 302–06) She explained that Petitioner would beat her if she tried to help the baby, but she would sometimes try to at least move the object away from the baby's nose. (*Id.* at 305–06)

During the early afternoon of March 1, 2007, Ms. Hoffman attempted to keep the baby from crying by feeding him, burping him, and changing his diaper, but after a few minutes laying on his stomach on a blanket, he started to get fussy. (Doc. 15 Ex. 4 at 308–09) Petitioner demanded she give the baby to him. Although she continued to try to quiet him, she ultimately handed their son to Petitioner. (*Id.* at 310) Petitioner squeezed the infant hard enough to prevent him from crying by preventing his ability to breathe. (*Id.* at 311) Petitioner then punched him in the stomach, kneeled on him, and tossed him across the room, causing his head to hit the edge of the bed and a table. (*Id.* at 312–13) She was able to pick up the infant from the floor, but Petitioner again demanded she give him the infant; when she did so, out of fear, Petitioner placed him in the car seat, taped a rag into his mouth, and put him in the closet. (*Id.* at 315–17) The

[1] At the time of D.M.'s death on March 1, 2007, Kyristyne's last name was Barkley. Between the time of his death and the trial held in September 2010, she married and changed her last name to Hoffman. (Doc. 15 Ex. 4 at 276)

infant continued to make noises, and Ms. Hoffman was able to move the rag, but did not remove it out of fear the Petitioner would beat her again. (*Id.* at 318) Petitioner required her to sit on the couch and watch television with him and would not let her touch their son. (*Id.* at 319)

About thirty minutes later, Ms. Hoffman was able to check on the baby and found him cold to the touch. (*Id.* at 322-23) After Petitioner removed the tape and rag, Ms. Hoffman started CPR. When Petitioner took over with CPR, Ms. Hoffman called 911, even though Petitioner did not want her to do so. (*Id.* at 324–25) When the paramedics arrived they took the baby to the ambulance and told Hoffman to follow the ambulance to the hospital. (*Id.* at 326–27) She testified that she was scared and, therefore, told the paramedics that a blanket had been wrapped around the baby and suffocated him. (*Id.* at 328) She and Petitioner gave a similar story to the physician at the emergency room, and she did not tell police that day or the next about what had happened at the apartment. (*Id.* at 329)

Ms. Hoffman testified that she did not tell police about Petitioner's actions that led to their son's death until after he beat her again a few days later before she went in to work. That day, he got mad at her while they were at the movies, and when they got back to the motel, he beat her with hangars and the mouthpiece to the motel room phone. (*Id.* at 336–40) An employee at the Days Inn at which Ms. Hoffman and Petitioner were staying testified that she inspected the room and found the phone had been broken and the mouthpiece fell apart in her hand. (Doc. 15 Ex. 4 at 435)

Ms. Hoffman testified that when she arrived at work that day, after some prodding, she eventually told her co-workers the truth about being beaten by Petitioner. (*Id.* at 335-

42) They arranged for her to stay with someone. (*Id.* at 343) One of the employees similarly testified that, when Ms. Hoffman arrived, she had a huge bruise on her face and the back of her hair was wet with blood. (*Id.* at 441–42) The employee found her a place to stay so she did not have to go back to Petitioner, and she encouraged Hoffman to get medical attention, which she refused to do. (*Id.* at 442-43)

Ms. Hoffman then reached out to her brother via social media for a place to live, and Brittany Moore, his significant other, responded. A day later, she gave another statement to police, during which they took pictures of her injuries. Those photos were admitted at trial. (*Id.* at 344–350)

The physician who tried to save the infant at the hospital testified that Petitioner told her a blanket was wrapped around the infant's neck and had to be cut with scissors to be removed. (*Id.* at 218) She also testified that, while Ms. Hoffman was crying and upset, Petitioner did not appear upset at all, did not seem emotional, did not try to comfort Ms. Hoffman, did not speak much, and only answered direct questions with simple answers. (*Id.* at 218–19) The physician noticed a bruise on the infant's head, which was also noted by the crime scene investigator who took photographs of the infant at the hospital. (*Id.* at 220–21, 266) The physician who performed the autopsy further noted the bruise and concluded that it did not cause the infant's death. (*Id.* at 254–55)

Eric Outlaw, a detective with the Winter Haven Police Department, testified to recording an interview with Petitioner the day after D.M.'s death. The recording was played for the jury. (*Id.* at 471–522) In it, Petitioner, who had been placed under oath, stated that the baby had been more cranky than usual the few weeks before his death, and that he'd had a stuffy nose. (*Id.* 509–11) He stated that Ms. Hoffman had put the

baby down for a nap and when she went to check on him, he was not breathing. A sheet or blanket was over his head. Petitioner tried to do CPR, and told Ms. Hoffman to call 911. She did, and took over CPR when the 911 operator told her how to do CPR properly, so Petitioner went out to meet the ambulance. (*Id.* at 472, 494–98) They were told to follow the ambulance to the hospital. In contrast to the physician's testimony at trial, in his recorded statement to Detective Outlaw, Petitioner explained that, once at the hospital, he got emotional and started yelling at the nurse. (*Id.* at 498–501) He also stated that he saw the bruise on the baby's head, but did not know what it was or what caused it, and that he asked everyone at the hospital what it was. (*Id.* at 505–08)

Crime Scene Investigator Steven Mannix testified that a roll of masking tape was found on the coffee table in the apartment Ms. Hoffman shared with Petitioner and their son. (*Id.* at 264) Additionally, investigators also found linear marks in the carpet leading from the back of the car seat into the closet. (*Id.* at 265)

Further, a witness named Brittany Hart testified that she knew Petitioner through an ex-boyfriend and knew Ms. Hoffman because she went to school with Ms. Hoffman's younger brothers. (*Id.* at 444) Ms. Hart stated that, at the end of March 2007, which was after D.M.'s death, Petitioner came to her house, where she lived with her mother and grandmother, and they provided him a place to stay. When asked about Ms. Hoffman, Petitioner explained that she had been arrested,[2] that the baby was at his father's house, and that he would bring the baby over at Easter for them to see him. (*Id.* at 444–46) Her mother, Leslie Hart, testified that Petitioner also explained to her that he and Ms. Hoffman

[2] Ms. Hoffman testified that, at some point following the death of her son, she was arrested for driving without a license; Petitioner posted her bond. (Doc. 15 Ex. 4 at 369)

had broken up, that she had gone to jail, and that the baby was fine and was at his father's house. (*Id.* at 448–49)

Finally, Kami Chaney, a former girlfriend of Petitioner and mother to Petitioner's daughter, testified that, at some point after D.M.'s death, Petitioner visited her. She did not know he had a son, but he eventually told her that he did, and later told her that the son had died. (*Id.* at 456–59) He explained that he had suffocated. He first said there were too many blankets in the crib, then described that Ms. Hoffman had taped a rag in his mouth. (*Id.* at 459–50) He was crying, and he said he should not have let that happen, and if he had done something, maybe the baby would be alive. (*Id.* at 461, 463)

Overall, given the full context of the instructions and the evidence introduced against Petitioner at trial, Petitioner has not demonstrated that the instruction so infected the trial that his conviction violates due process. Nor has he demonstrated a reasonable probability that inclusion of culpable negligence in the elements portion of the instruction on Count Three would have resulted in a different outcome.[3]

[3] There was, of course, evidence implicating Ms. Hoffman as the primary culprit. On cross-examination, Petitioner's trial counsel brought out inconsistencies in Ms. Hoffman's testimony, including the amount of prenatal care she received, her relationship with her mother (who did not like Petitioner), her income and ability to afford a place to live when she moved out of her mother's house, and her ability to ask for help from others when not in Petitioner's presence. (*Id.* at 352–75, 392–94) Trial counsel also pointed to inconsistencies between Ms. Hoffman's statements at trial and other statements she had made, previously, under oath. (*Id.* at 364–67, 384–86, 390–91, 403–04) Additionally, the defense called as a witness Joseph Emory, a firefighter EMT who responded to Ms. Hoffman's 911 call. Mr. Emory testified that Ms. Hoffman told him she put the baby down for a nap on the couch, but that he rolled and wedged himself in the couch cushions. (*Id.* at 605) The defense also called Brittany Moore, the significant other of Ms. Hoffman's brother, as a witness. Ms. Moore testified that Ms. Hoffman lived with them for six or seven months, and that Ms. Moore drove her to all of her meetings with police and prosecutors. She explained that Ms. Hoffman only acted upset about her son's death in front of the detectives, not on the way to or from those meetings. She also testified that Ms. Hoffman told her she burned the washcloth that was in the baby's mouth the day he died and put the ashes down the garbage disposal. (*Id.* at 606–11) Ultimately, the jury found Petitioner guilty as to Count Three for his role in the death of his son.

Accordingly, Petitioner has not shown that he suffered prejudice from trial counsel's alleged error. He, therefore, has not shown that the state court's adjudication was contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. Ground One is **DENIED**.

B. Ground Two

In Ground Two, Petitioner claims his trial counsel erred by filing a motion to elect between Counts One and Two or Count Three (which was denied), rather than a motion to sever Counts One and Two from Count Three, which he asserts would have been granted. (Doc. 1 at 7) He claims that severing Count Three from Counts One and Two would have changed his decision-making process when deciding whether to pursue an accidental-death defense or stipulate that D.M.'s death was caused by the intentional act of another. (*Id.*) He also claims that trying all three Counts together improperly presented the jury with inconsistent counts, requiring the jury to compromise on its verdicts. (*Id.*)

Petitioner raised this claim in his Rule 3.850 motion. In response, the State argued (Doc. 15 Ex. 15 at 84–85):

> In claim 1, the Defendant alleges that trial counsel was ineffective for failing to sever counts 1 and 2 from count 3. Count 1 of the Direct Information . . . charged the Defendant with manslaughter. Count 2 was aggravated child abuse. Both of these counts alleged that the Defendant directly harmed the child. Count 3 charged the Defendant with aggravated manslaughter of a child by failing to protect the child from harm caused by another. The Defendant was convicted of count 3 and acquitted of counts 1 and 2.
>
> If trial counsel had successfully moved to sever the counts and had a separate trial on the third count, there could have been an inconsistent verdict on all the counts. For instance, the Defendant could have been found guilty on counts 1 and 3. The Court allowed the State to proceed on two theories of prosecution. Although the counts were inconsistent, this was entirely permissible under Rule 3.505, Fla. R. Crim. P. The Court instructed the jury that it was not permissible to find the Defendant guilty on

> all three counts. The Court indicated that if the jury found the Defendant guilty on counts 1 and/or 2, then the jury must return a verdict of not guilty on count 3. If the jury returned a verdict of guilty on count 3, then the Court ordered that it return a verdict of not guilty on counts 1 and 2. T.T. 693–94. Therefore, it would not have been proper to sever count 3 from the other counts. This claim should be denied.

The state post-conviction court agreed, adopting the State's argument, and denied the claim. (Doc. 15 Ex. 16 at 91-92)

"[A]lthough 'the issue of ineffective assistance . . . is one of constitutional dimension,' [the Court] 'must defer to the state's construction of its own law' when the validity of the claim that . . . counsel failed to raise turns on state law." *Pinkney v. Secretary, DOC*, 876 F.3d 1290, 1295 (11th Cir. 2017) (quoting *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984) (superseded by statute on other grounds)). *See also Estelle*, 502 U.S. at 67 ("[I]t 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.")

Although Petitioner claims that the motion to sever would have been granted, because to deny it would constitute an abuse of discretion (Doc. 13 at 8), that argument is not persuasive. The state appellate court affirmed the state post-conviction court's denial of relief on this issue, presumably on the same reasoning. *See Sellers*, 138 S. Ct. at 1192. The Court is bound by the state post-conviction court's determination that, under state law, the counts were properly tried together. Therefore, because the offenses were

properly joined, Petitioner's trial counsel did not err in failing to move to sever Count Three from the other counts.[4]

Accordingly, Petitioner has not shown that the state court's adjudication was contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. Ground Two is **DENIED**.

C. Ground Three

In Ground Three, Petitioner alleges that his trial counsel's cumulative errors constitute ineffective assistance of counsel. However, because each error alleged has been found without merit, Petitioner has not demonstrated cumulative error. *See e.g.*, *Morales v. Sec'y, Fla. Dep't Corr.*, 710 F. App'x 362, 365 (11th Cir. 2017) (per curiam) ("[W]e have rejected all of the claims of error before us. There are, therefore, no errors to cumulate."). Therefore, Ground Three is **DENIED**.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, the petition for the writ of habeas corpus (Doc. 1) is **DENIED**. The clerk is directed to enter a judgment against Petitioner and to **CLOSE** this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to

[4] Because the Court concludes that, based on the state court's determination of state law, Petitioner's trial counsel did not err, the Court does not consider Petitioner's arguments regarding prejudice. *See Strickland*, 466 U.S. 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). Section 2253(c)(2) limits the issuing of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Because he fails to show that reasonable jurists would debate either the merits of the claims or the procedural issues, Petitioner is not entitled to a certificate of appealability and is not entitled to appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Petitioner must obtain permission from the circuit court to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, this 24th day of September, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE