APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 19-12468-D

[Filed September 26, 2019]

KEITH INCHIERCHIERE,
Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF THE STATE OF FLORIDA,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

ORDER:

Keith Inchierchiere is a Florida prisoner serving an 840-month total sentence for burglary of a dwelling with an assault or armed battery and second-degree murder with a deadly weapon. Mr. Inchierchiere seeks a certificate of appealability ("COA"), in order to appeal the District Court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Mr. Inchierchiere argues (1) his chosen counsel was ineffective for not appearing on the day of trial to request a continuance, and (2) his public

defender was ineffective for misadvising him about his sentencing exposure and the trial judge's reputation.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); see 28 U.S.C. § 2253(c)(2). An applicant for a habeas petition meets this standard by showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000).

I.

A.

Reasonable jurists would not debate the District Court's denial of Mr. Inchierchiere's claim for ineffective assistance of counsel. Under Strickland v. Washington, 466 U.S. 668, 694, 131 S. Ct. 733, 739 (1984), a defendant can establish an ineffective assistance claim by showing his "counsel's performance fell below an objective standard of reasonableness," Padilla v. Kentucky, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) (quotation marks omitted), and "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, 104 S. Ct. at 2068. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Id.

Reasonable jurists could not disagree as to whether Mr. Inchierchiere's retained counsel was ineffective

under the Strickland test. We assume that failing to show up for the first day of trial falls below an objective standard of reasonableness. But under Strickland's second prong, Mr. Inchierchiere cannot establish that he was prejudiced by his private attorney's failure to appear and ask for a continuance. That is because Mr. Inchierchiere received the competent assistance of his public defender on the first day of his trial, who asked the court for a continuance on Inchierchiere's behalf. Mr. Inchierchiere has not alleged his public defender ineffectively represented him in making this request.

Mr. Inchierchiere argues he suffered Strickland prejudice when his retained counsel failed to appear, because Inchierchiere was wrongfully denied his "counsel of choice." See United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 2562 (2006). However, the record makes clear the trial court did not wrongfully deny Mr. Inchierchiere the benefit of retaining counsel. The trial court instructed Mr. Inchierchiere to retain counsel—if he wished—by July 24, 2009, but Inchierchiere did not attempt to retain counsel until October 1, 2009, four days before the start of trial. On the day of trial, the government opposed continuing the trial because of the needs of witnesses and the victim in the case. Gonzalez-Lopez itself recognized that a trial court has "wide latitude in balancing the right to counsel . . . against the demands of its calendar," and must sometimes "make scheduling ... decisions that effectively exclude a defendant's first choice of counsel." Id. at 152, 126 S. Ct. at 2565–66. Under these circumstances, the trial court did not abuse its discretion by denying Mr. Inchierchiere a continuance and depriving him of his choice of counsel.

See Morris v. Slappy, 461 U.S. 1, 11–12, 103 S. Ct. 1610, 1616 (1983) (holding "broad discretion must be granted to trial courts on matters of continuances"). On this record, reasonable jurists would not debate that Mr. Inchierchiere was not prejudiced because he could not have his counsel of choice.

B.

Alternatively, a defendant can demonstrate his counsel was ineffective if he was "complete[ly] . . . denied counsel at a critical stage of his trial" or if "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984). A Cronic ineffective assistance claim does not require any showing of prejudice, see id., but "the burden of proof under Cronic is a very heavy one," Stano v. Dugger, 921 F.2d 1125, 1153 (11th Cir. 1991).

Reasonable jurists would also not debate whether Mr. Inchierchiere suffered ineffective assistance of counsel under Cronic. Even accepting that the first day of his trial was a critical stage, Mr. Inchierchiere was not actually denied counsel at this stage, as his public defender of three months was present and ready to try his case. See Frazier v. Sec'y for Dep't of Corr., 197 F. App'x 868, 871–72 (11th Cir. 2006) (unpublished) (per curiam) (concluding "there [wa]s no merit to [defendant's] claim that he suffered a 'complete denial of counsel' or that counsel was not present at a critical stage of the proceedings, as the court appointed [counsel] to represent [the defendant] at the hearing"). Reasonable jurists would not debate this conclusion.

II.

Mr. Inchierchiere next argues his public defender provided ineffective assistance of counsel, by telling him he would get a 15-year sentence in exchange for his plea and failing to mention the trial judge's reputation for harsh sentencing.

Here, reasonable jurists would not debate that Mr. Inchierchiere's public defender provided effective assistance of counsel. Even if the public defender misjudged Mr. Inchierchiere's sentencing exposure or did not mention the trial judge's reputation for harsh sentencing, Mr. Inchierchiere cannot show Strickland prejudice. The record shows Mr. Inchierchiere knew his full sentencing exposure when he entered his guilty plea. Mr. Inchierchiere's plea form and plea colloquy informed him he could receive any sentence up to the statutory maximum sentence of life. Mr. Inchierchiere also testified at the plea hearing that he received no promises of a particular sentence or range of sentences. Mr. Inchierchiere's testimony on these matters is presumed to be true. See United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994). Because Mr. Inchierchiere was clearly advised by the plea agreement and colloquy of his sentencing exposure, he cannot show he suffered prejudice from his counsel's poor predictions of the sentence the trial judge would impose. Beyond that, the public defender could have reasonably recommended that Mr. Inchierchiere plead guilty precisely because he knew the trial judge sentenced harshly. See Martin v. Sec'y, Fl. Dep't of Corr., 699 F. App'x 866, 871–72 (11th Cir. 2017) (unpublished) (per curiam) (recognizing admitting guilt

as "a strategy designed to improve [the defendant's] chances of getting a lesser sentence before a judge known for harsh sentencing").

Because reasonable jurists would agree that Mr. Inchierchiere received effective assistance of counsel, Mr. Inchierchiere's motion for a COA is **DENIED.**

/s/ Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:17-CV-14260-ROSENBERG/MAYNARD

[Filed May 31, 2019]

KEITH INCHIERCHIERE,
Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

This matter is before the Court upon Petitioner's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, DE 1, which was previously referred to the Honorable Shaniek M. Maynard for a Report and Recommendation on any dispositive matters, DE 3. On April 2, 2019, Judge Maynard issued a Report and Recommendation (the "Report") recommending that the Petition for Writ of Habeas Corpus be denied as to both claims for relief. DE 19. Petitioner filed objections through counsel on April 16, 2019. DE 20.

The Court has conducted a *de novo* review of Magistrate Judge Maynard's Report and the record and is otherwise fully advised in the premises. Upon review, the Court finds Judge Maynard's recommendations to be well reasoned and correct.

The Court briefly addresses the Petitioner's objections here: First, Petitioner contests Judge Maynard's finding that there was no prejudice in Petitioner's privately-retained counsel's failure to appear at the trial docket call. Petitioner argues that "he would have proceeded to trial had he not been forced to proceed with the public defender and not counsel of choice." Obj., DE 20, 2. In addition, Petitioner argues that he was "forced to make an important decision without retained counsel of choice" and that prejudice is "inherent and must be presumed" in this circumstance. *Id.* In support of this proposition, Petitioner cites to *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). However, that case is distinguishable and inapplicable here. There, the Government had *conceded* that the trial court had *erroneously* denied the petitioner his choice of counsel. *Id.* at 148. As a result, the Court held that "[w]here the right to be assisted by counsel of one's choice is *wrongly* denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *Id.* at 148 (emphasis added). Nonetheless, the *Gonzalez-Lopez* Court highlighted in conclusion that:

> We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the

> demands of its calendar. The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." None of these limitations on the right to choose one's counsel is relevant here. *This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.* However broad a court's discretion may be, the Government has conceded that the District Court here erred when it denied respondent his choice of counsel.

Id. at 152 (emphasis added). This case falls squarely into the category of cases that the *Gonzalez-Lopez* Court distinguished from Mr. Gonzalez-Lopez's situation. Here, Petitioner's case was called up for the docket call on October 5, 2009. *See* DE 6-1, 82. At that time, Petitioner moved to continue his trial so that he could obtain new counsel. *See id.* Petitioner's public defender was not aware until the morning of the docket call that his client did not wish to proceed with him as counsel. *See id.* at 84. Indeed, counsel stated on the record that "it [the case] is ready [to go to trial]." The State opposed the continuance – expressing that the state's attorney and the public defender had been working closely to prepare for the trial, and that the victim of the crime was present in court and wished to proceed as well. *See id.* at 83–85. The trial court, Judge Bauer, also pointed out at the docket call in October,

2009 that the Petitioner had been cautioned in June, when a different lawyer for Petitioner had withdrawn, that Petitioner would need to identify a new lawyer promptly. *Id.* at 84 ("THE COURT: Well, my question would be back on June 23rd I think it was when Mr. Kibbey withdrew, at that point, you were advised if you're going to hire a… new attorney, you must file the notice of appearance by July 24, 2009. And then when that didn't occur, is when the Public Defenders…were appointed. So it's been three months since that order – more than three months, but more than two months since the – I don't want to call it a cutoff date, because it's not a legal cutoff date, it was just my telling you to hire somebody or to have them file a notice of appearance by July 24th and that didn't occur.").

Under these circumstances, *Gonzalez-Lopez* does not apply. Accordingly, Judge Maynard appropriately considered Petitioner's privately-retained counsel's failure to appear at the docket call under the *Strickland* standard and concluded that there was no prejudice to Petitioner – Petitioner's appointed counsel had been assigned to the case for months, had met with his client multiple times, and was prepared to go to trial if his client so chose.

Second, Petitioner argues that Judge Maynard was incorrect in finding that there was no prejudice to Petitioner or deficiency by counsel, when Petitioner's public defender advised Petitioner to enter into an open guilty plea rather than proceed to trial. Petitioner argues this was unreasonable advice, because the trial court, Judge Bauer, has a "reputation as a harsh sentencer," which would have impacted the Petitioner's

willingness to plead guilty versus go to trial. The Court agrees with Judge Maynard that even if Petitioner were able to establish deficient performance by the public defender, there was no prejudice to the Petitioner in the alleged failure to warn him of the trial court's sentencing reputation.

As a final matter, the Court notes that Judge Maynard conducted what could be considered a de novo review of this case – although that is not the standard required for Section 2254 petitions. Instead, as Judge Maynard aptly notes, the purpose of Section 2254(d) is to "guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Downs v. Sec'y, Fla. Dep't of Corrs.*, 738 F.3d 240, 256 (11th Cir. 2013) (quoting *Greene v. Fisher*, 565 U.S. 34, 43 (2011)). Here, the Court is not presented with such an "extreme malfunction" in the state court system.

Thus, the Court agrees with Judge Maynard's analysis, and concludes that the Petition should be denied for the reasons set forth above and in Judge Maynard's Report.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge Maynard's Report and Recommendation [DE 19] is hereby **ADOPTED**;

2. The Petition for Writ of Habeas Corpus [DE 1] is **DENIED**;

3. A certificate of appealability is **DENIED**;

4. The Clerk of Court shall **CLOSE THIS CASE**.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 31st day of May, 2019.

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-14260-CIV-ROSENBERG/MAYNARD

[Filed April 2, 2019]

KEITH INCHIERCHIERE,
Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

REPORT AND RECOMMENDATION ON AMENDED PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS (DE 5)

THIS CAUSE comes before this Court upon an Order of Reference and the above Petition. The record before this Court consists of the Petitioner's Appendix (DE 6 & 16), the Respondent's Response (DE 13) and Appendix (DE 14), and the Reply (DE 17). This Court recommends as follows:

BACKGROUND

1. On the night of December 5, 2008 the Petitioner went over to the home of the victim where, according to

the State, he pushed his way into the house and pinned the victim against a closet door. The victim fought the Petitioner back outside the house where the two continued to struggle. Law enforcement responded to the altercation. The victim's father had called for help when the Petitioner first pushed into the home. The Petitioner was arrested at the scene. The Arrest Affidavit starts at page 22 of DE 6–1.

2. This Court draws the events of that night from the Sentencing Hearing transcript (which begins at page 24 of DE 14–2), but for purposes of this background section this Court does not limit itself solely to the State's proffer. This Court incorporates both the Petitioner's and the State's versions of events. This Court does so to give context to the Petitioner's claims for relief. As for whose version of events is correct, this Court does not say. Other than what facts the Petitioner's conviction can be deemed to establish[1], the competing version of events was not presented to the fact-finder---the jury---to resolve.

3. The Petitioner, himself, did not know the victim personally, but his girlfriend did. His girlfriend and the victim were co-workers at a car dealership. Both were paid on commission and in a way that placed them in competition with each other for income. According to their immediate supervisor, the victim not only excelled at booking customers for the dealership's service department, but he did so in a way that ensured

---

[1] A no-contest plea "admits nothing" for purposes of subsequent proceedings. See United States v. Flowers, 664 Fed. Appx. 887, 888–89 (11th Cir. 2016).

credit for the business. When the victim left to work elsewhere, the girlfriend's commission income rose. The victim later returned to the dealership to resume his job, and the relationship between he and the Petitioner's girlfriend soured as her income dropped back down. She complained to her supervisor about the way the victim was claiming commission credit, but the supervisor saw no reason to intervene in her favor. In response to her complaints, the girlfriend alleges, the victim began to retaliate against her through acts of vandalism and sexual harassment.

4. At work she obtained the victim's residential address. She wrote it down on a piece of paper, brought it home, and stuck it to the refrigerator door. When the Petitioner left home on the night of the attack, he took that note with him.

5. The Petitioner left his house that evening and went to his place of work to make repairs on his truck after business hours. The Petitioner worked as an auto mechanic. Shortly before midnight he left his workplace and drove to a bar. There he drank a lot and in a relatively short period of time. He left the bar by 1:00 or 1:30 in the morning and drove to the victim's home. The Petitioner said that earlier on his way to his workplace he had driven past the victim's house but he did not stop at that time.

6. There is no dispute about the Petitioner's underlying motivation for going over to the victim's home. The Petitioner wanted to confront the victim about the workplace problems between his girlfriend and the victim. He had the intention of talking to the victim about finding a way for them to get along better

at work, he explains. The record is not clear whether the girlfriend knew about the Petitioner's plan to confront the victim or whether the confrontation and/or attack was pre-planned.

7. At the Sentencing Hearing the Petitioner denied pushing into the victim's home. The State proffered evidence that suggested otherwise. The victim's father told police that he had awaken to the sound of the commotion and saw the Petitioner pin his son against a wall inside of the house. The father retreated to call 9-1-1.

8. The Petitioner and the victim ended up outside. The victim said he had fought the Petitioner back outside. The Petitioner conceded that they were wrestling and struggling outside of the home (but that is where the physical fight began, he clarified). Also found outside the house was a tire iron that law enforcement linked to the Petitioner. The Petitioner denied---or could not remember---using the tire iron, however. Nor could the Petitioner explain its presence at the scene. The victim said that the Petitioner hit him with the tire iron after he had secured the Petitioner in a choke hold. The victim says that he next wrestled the tire iron away from the Petitioner.

9. The Petitioner asserted that while the victim had him in a choke hold, the victim called out to his father to get a gun. That is when the Petitioner pulled his pocketknife out and began stabbing the victim. The implication seems to be that after the victim had taken the advantage in the fight, the Petitioner reacted in self-defense mode.

10. Whatever motivated the Petitioner to use his pocketknife, the record is clear that the victim suffered severe wounds from those stabbings. He was stabbed eleven times, and part of his ear lobe was cut off. He lost a lot of blood at the scene. The victim claims lingering physical impairment and inability to work. The victim reported substantial income loss and medical debt.

11. Law enforcement responded quickly to the father's 9-1-1 call for help. The Petitioner attempted to flee the scene when he heard sirens. Police stopped him before he could leave and arrested him. Law enforcement interviewed him post-Miranda. Law enforcement also interviewed his girlfriend.

12. On January 7, 2009 the Petitioner was charged by way of an Information (DE 14–1) with the offenses of attempted felony murder, burglary of a dwelling with an assault or battery while armed, attempted first degree murder with a weapon, and aggravated battery. Circuit Judge Sherwood Bauer presided over the criminal case. On July 27, 2009 Assistant Public Defender John Lithgow filed a Notice of Appearance. APD Lithgow took over after the Petitioner's initially retained private defense attorney, Mr. Kibbey, had withdrawn his representation and after no other privately retained defense attorney appeared in Mr. Kibbey's place.

13. Judge Bauer called the criminal case for trial on October 5, 2009. The transcript of that proceeding begins at page 82 of DE 6–1. At the docket call APD Lithgow asked Judge Bauer to continue the trial. APD Lithgow reported that the Petitioner was in contact

with a private defense attorney, Michael Ohle, Esq., and that the Petitioner was "on the verge of retaining him." While APD Lithgow said that he, himself, was ready for trial, he indicated that the Petitioner was less than comfortable going to trial with him as his counsel. APD Lithgow noted "the seriousness of the charges" and opined that continuing the case to the next trial docket would not be "inherently unreasonable."

14. Judge Bauer denied the Petitioner's motion to continue the trial. Jury selection would begin later that same day. While the judge did not bar the Petitioner from substituting new counsel, he declined to continue the trial to let that new counsel familiarize himself with the case. Trial would continue as currently set regardless of who represented the Petitioner.

15. At some point soon after the conclusion of the docket call, APD Lithgow informed the judge that the Petitioner would be changing his plea. The prosecutor could not proceed directly to the Change of Plea Hearing that morning because he first needed to confer with his supervisor given the nature of the charges. The judge therefore scheduled the Change of Plea Hearing for 1:15 PM that afternoon. Should the change of plea not go through, then jury selection would begin.

16. The Petitioner filled out the Felony Plea Form to memorialize his change of plea. That document starts at page 1 of DE 14–2. The Petitioner agreed to plead "no contest" to Count Two (burglary of a dwelling with an assault or battery while armed) and Count Three (attempted second degree murder with a weapon). The Petitioner affirmed his belief that the plea "is in my best interest even though I am innocent of the charge,

charges, or violations, or may have defenses to them". The Petitioner expressed understanding that the length of sentence resulting from his conviction on Counts Two and Three remained an open question and could be as long as the maximum sentence allowed by law. That maximum possible sentence, the Petitioner acknowledged, was life. In return for his plea the prosecutor agreed to dismiss Counts One (attempted felony murder) and Four (aggravated battery).

17. The transcript of the Change of Plea Hearing begins at page 8 of DE 14–2. The judge engaged in the standard change of plea colloquy. This included asking the Petitioner to confirm his understanding that the sentence outcome remains an open question. The Petitioner also affirmed that he is pleading no contest in the belief that doing so is in his best interest and uninfluenced by any promise or expectation about the sentencing outcome.

18. Following the change of plea colloquy, the prosecutor proffered the factual basis for the plea. The prosecutor said that the State could prove beyond a reasonable doubt that at 2:20 AM on December 6, 2008, the Petitioner pushed his way into the victim's home soon after the victim had opened the door. The Petitioner went inside the victim's home armed "where he committed the assault and battery on the victim." The prosecutor continued:

> The fight escalated somewhat, ended up back outside. Once outside the patio area the [Petitioner] then took a tire iron and used it to beat the victim about the head, neck and shoulders. The victim was able to wrestle it

> away, at which point, the [Petitioner] then stabbed the victim a total of at least . . . eight times.

The prosecutor asserted that the Petitioner had "acted with a depraved mind and in an attempt to kill the victim, and the victim suffered significant injuries."

19. Based on that proffer, the judge found a sufficient factual basis for the plea. The judge also found the Petitioner's change of plea to have been made freely, voluntarily, and knowingly. The trial court convicted the Petitioner of the offenses of Count Two and Three. The Petitioner had been out on bond, but after the Change of Plea Hearing the judge remanded him into custody. The severe sentence that the Petitioner now was facing increased the flight risk, the judge explained.

20. Four days after the Change of Plea Hearing, Michael Ohle, Esq., appeared on the Petitioner's behalf and replaced APD Lithgow. Mr. Ohle appeared for the purpose of sentencing. His Limited Notice of Appearance is found at pages 35–36 of DE 6–1.

21. The Sentencing Hearing took place on January 15, 2010. The Petitioner expressed remorse and accepted responsibility for what he had done. Despite his plea, the State requested life imprisonment and argued that the circumstances of the crime and the harm to the victim and his family warranted the maximum possible sentence. The Petitioner highlighted mitigating evidence---no criminal history, no violent reputation, the influence of alcohol---and he disputed certain facts of the State's version of what happened.

He denied having any intent to kill. He characterized the events of that night as an altercation that went out of control. The relevant witnesses took the stand (except for the victim's father who had passed away soon after the attack).

22. Judge Bauer rendered his findings. He found the evidence to suggest pre-meditation and a sophisticated criminal conduct. He noted how but for law enforcement's very quick response, the victim easily could have died. He considered the sentence in the context of the burglary count (which offered the lengthier maximum sentence: life). If Florida law permits a life sentence for burglary without assault or battery, then what, Judge Bauer asked, is the appropriate length of sentence for the degree of physical harm suffered in this case? Next he found the need for imprisonment to outweigh the benefits of restitution to the victim. Judge Bauer sentenced the Petitioner to 840 months (70 years) for Count Two for burglary of a dwelling with an assault or battery while armed in violation of § 810.02(2)(a), Fla. Stat. He then sentenced the Petitioner to 30 years for Count Three for attempted second degree murder with a weapon in violation of § 782.04, Fla.Stat., which is the maximum permitted term of imprisonment for that offense. He made the two terms of imprisonment run concurrently.

23. The Public Defender represented the Petitioner on direct appeal. On appeal the Petitioner complained about the prosecutor's use of emotional and inflammatory arguments to influence the judge and complained about the prosecutor's use of facts not in evidence. They constituted fundamental error that

deprived him due process and resulted in an unfair sentence, the Petitioner argued. The appellate court affirmed the Petitioner's sentence in an unwritten opinion. See Inchierchiere v. State, 63 So.3d 776 (Fla. 4th DCA 2011).

24. The Petitioner retained new counsel, Ashley Minton, Esq., to file on his behalf a Rule 3.800(c) Motion to Reduce or Modify Sentence. Because it was a post-conviction motion, it was assigned to the trial judge, Judge Bauer, for consideration.

25. The Petitioner moved to disqualify Judge Bauer. In his Motion to Disqualify, the Petitioner referenced comments that Judge Bauer had made in another case that suggested his personal preference for sentencing defendants to life where ever Florida law permits life sentences, with the implication being that Judge Bauer applies the maximum sentence regardless of whether the conviction results from a jury verdict or a change of plea. The comments came from a sentencing hearing on March 12, 2008 (and thus before the Petitioner's Change of Plea Hearing on October 5, 2009 and before his Sentencing Hearing on January 15, 2010). It was on August 16, 2011 when his attorney, Ms. Minton, listened to the recording of that sentencing hearing. The Initial Motion for Disqualification of Judge starts at page 55 of DE 6–1. The State opposed the motion, arguing in part that the comments were made in reference to a case involving firearm use and that since then the trial judge has "on a number of occasions used his discretion and chosen to not sentence a defendant to life in prison when the crime involved a firearm." The State's Response begins at page 58 of DE 6–1.

26. Judge Bauer held a hearing on the Initial Motion for Disqualification of Judge, the transcript of which is found at DE 16–1. Afterwards he denied the Motion on both procedural and substantive grounds. That Order is found at pages 60–61 of DE 6–1. The Petitioner then filed an Amended Motion to Disqualify, which begins at page 62 of DE 6–1, that corrected for certain procedural defects. Judge Bauer denied it on its merits finding it to be legally insufficient. That Order is found at page 66 of DE 6–1. That prompted the Petitioner to petition Florida's Fourth District Court of Appeal for an emergency writ of prohibition. The Petitioner's Emergency Petition for Writ of Prohibition is found at DE 14–8, and the appellate court denied it on its merits without an opinion (DE 14–9).

27. Focus then returned to the Petitioner's Rule 3.800(c) Motion. After holding a hearing on it, the transcript of which begins at page 69 of DE 6–1, Judge Bauer denied it on its merits. The victim remained satisfied with the length of the Petitioner's sentence and doubted the Petitioner's ability to pay restitution. Judge Bauer found no grounds to support a sentence reduction. The Petitioner appealed, but the Public Defender withdrew its representation. The appellate court affirmed the Motion's denial. The appellate court's rulings on this case are found at DE 14–12 and at page 81 of DE 6–1.

28. Now represented by Alvin Entin, Esq., the Petitioner moved for Rule 3.850 post-conviction relief. The operative pleading here is the Verified Memorandum in Support of Sworn Motion for Post-Conviction Relief, the fourth iteration of the

Petitioner's Rule 3.850 Motion, filed on March 10, 2016 and found at DE 6–4. The record that the state post-conviction court considered consisted of the Felony Plea Form, the transcripts of the hearings to-date, and the sworn and verified averments found in the Petitioner's fourth Rule 3.850 Motion. In that fourth iteration of his Rule 3.850 Motion, the Petitioner averred the following: That he had retained Michael Ohle, Esq., before the trial's start date but Mr. Ohle still did not show up for the docket call nor moved for a continuance. That he lacked faith in APD Lithgow to represent him at trial. That he changed his plea to no-contest because he was not allowed to proceed to trial with Mr. Ohle as his attorney. Lastly that APD Lithgow did not inform him of the trial judge's reputation for imposing harsh sentences such as giving life sentences where ever Florida law permits them.

29. Circuit Court Judge Mirman---and thus not the trial judge who convicted and sentenced the Petitioner ---denied the Petitioner's Rule 3.850 Motion on its merits. Judge Mirman ruled without an evidentiary hearing but instead adopted the State's Response (which starts at page 7 of DE 6–1) and the State's citations to the existing record. Judge Mirman thereby found the existing record conclusively to show the Petitioner not entitled to relief. Judge Mirman's Order Denying Sworn Motion for Post-Conviction Relief begins at page 1 of DE 6–1.

30. The Petitioner appealed the denial of his Rule 3.850 Motion and all three claims for relief he raised in it. He also sought remand for an evidentiary hearing so that he could testify about retaining Mr.

Ohle for trial and about his lack of faith in APD Lithgow. He also wanted to testify that despite knowing the potential sentencing range---from a statutory minimum of 7.7 years to a statutory maximum of life---he based his decision to plead no contest on AFP Lithgow's advice about what sentence to expect. AFP Lithgow had told him to expect a sentence no longer than 15 years in return for the no-contest plea but a life sentence if he went to trial and lost. That advice was incorrect given Judge Bauer's reputation for harsh sentences, the Petitioner complained.

31. The appeals court affirmed the denial of the Rule 3.850 Motion. Regarding the Petitioner's third claim of ineffective assistance of counsel---about the procedural defects in the Rule 3.800(c) Motion to Reduce or Modify Sentence that Ashley Minton, Esq., had filed on his behalf---the appellate court found no constitutional right to effective collateral counsel. (The Petitioner does not raise this particular claim for relief in his present § 2254 Petition.) The appeals court next found the record to refute conclusively the Plaintiff's first two claims of relief. See Inchierchiere v. Florida, 214 So.3d 690 (Fla. 4th DCA March 29, 2017). It is those two claims of ineffective assistance of counsel that the Petitioner repeats in his present § 2254 Petition. They concern (1) APD Lithgow's misadvice about sentencing when he was deciding whether to change his plea and (2) the failure of his privately retained counsel, Mr. Ohle, to appear on the day when the trial judge started the trial.

32. The Petitioner now seeks relief in federal court. The Petitioner argues that the state post-conviction court wrongly denied those claims of ineffective assistance of counsel. They are meritorious, he argues, and he asks this Court to grant his § 2254 Petition. The Petitioner asks to have his plea, conviction, and sentence vacated.

TIMELINESS

33. Before considering the Petition's merits, this Court considers whether the Petition was timely filed. Pursuant to 28 U.S.C. § 2244(d), the "AEDPA", the Petitioner must have filed his § 2254 Petition within one year of the underlying state court judgment. The Respondent asserts that the Petitioner's underlying conviction became final on August 23, 2011. That was 90 days after the state appellate court's PCA opinion. See Phillips v. Warden, 908 F.3d 667, 671–73 (11th Cir. 2018) and Bismark v. Sec'y, Fla. Dep't of Corr., 171 Fed.Appx. 278, 279–80 (11th Cir. 2006). That started the one-year AEDPA clock to run, giving him until roughly August 23, 2012 to file his § 2254 Petition. See Green v. Sec'y, Fla. Dep't of Corrs., 877 F.3d 1244, n.3 (11th Cir. 2017) (applying the "anniversary method").

34. The AEDPA clock does not run uninterrupted, however. "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section." 28 U.S.C. § 2244(d)(2). In other words intervening state post-conviction court proceedings generally stop---or "toll"---the one-year AEDPA clock count-down. See generally, Jones v. Fla.

Dep't of Corrs., 906 F.3d 1339 (11th Cir. 2018) and Dolphy v. Warden, 2016 WL 2996615 (11th Cir. 2016). Such was the effect of the Rule 3.800(c) Motion to Reduce or Modify Sentence that the Petitioner filed on July 25, 2011. That motion remained pending until April 2, 2013 when Florida's appellate court issued its mandate. The Rule 3.800(c) Motion tolled the AEDPDA clock.

35. In practical effect that proceeding delayed the start of the AEDPA clock. It was not until April 3, 2013 when the one-year count-down began. Thereafter 79 days of untolled time ran until June 21, 2013 when the Petitioner filed his Rule 3.850 Motion.

36. The parties dispute how much tolling occurred between the filing of that initial Rule 3.850 Motion on June 21, 2013 and Florida's appellate court's mandate on April 28, 2017. About three months after the Petitioner had filed the initial Rule 3.850 Motion, the state post-conviction court dismissed it for lacking an oath. That dismissal did not bring the proceeding to conclusion, however. The state post-conviction court specified that the dismissal was "without prejudice to refile" and gave the Petitioner until November 13, 2013 to comply. The state post-conviction court further specified that its dismissal order was non-final and non-appealable. The Petitioner re-filed his corrected Rule 3.850 Motion (to include the omitted oath) timely on November 7, 2013.

37. Three months later the state post-conviction court dismissed his Rule 3.860 Motion again. This time the dismissal was for being insufficiently pleaded. The dismissal again was without prejudice: "Pursuant to

Spera v. State, 971 So.2d 754, 761 (Fla. 2007), the Defendant is allowed an opportunity to refile his motion in good faith with legally and facially sufficient claims." The state post-conviction court gave the Petitioner leave to re-file his motion (with an April 23, 2014 deadline). Like the one before, the dismissal order was non-final and non-appealable.

38. The Petitioner re-filed his Rule 3.850 Motion on April 14, 2014. About 21 months went by before the state post-conviction court took action on it. The state post-conviction court, now through a new presiding judge, issued an order on January 29, 2016. In that order the state post-conviction court accepted the motion as filed. Nor did the court mention any non-compliance with the previous dismissal order. Instead the court expressed new reasons for a Spera-based dismissal. Citing Spera the court gave the Defendant the "opportunity to refile a legally and facially sufficient motion and memorandum." It therefore dismissed the motion without prejudice to file an amended one within 60 days. The dismissal order was non-final and non-appealable.

39. The Petitioner re-filed his Rule 3.850 Motion on March 10, 2016---in what is the motion's fourth iteration. It was on the merits of this motion that the state post-conviction court ruled. In its order dated November 10, 2016 the state post-conviction court found the Defendant not entitled to relief and denied the motion. The order gave the Petitioner 30 days to appeal, which he did. The state's appeals court affirmed the ruling per curiam. Its mandate issued on April 28, 2017. Consequently "the limitation period

remained tolled until the state appellate court issued its mandate affirming the denial of the Rule 3.850 motion". Bismark v. Sec'y, Fla. Dep't of Corr., 171 Fed.Appx. 278, 280 (11th Cir. 2006).

40. Of note, the Petitioner pursued additional forms of collateral relief in state court that this Court excludes from the above procedural history. There is no need to include them because they do not toll the AEDPA clock any more than what the above-discussed motions already do.

41. The one question that controls the AEDPA timeliness question is the extent to which the Rule 3.850 Motion can be considered to have a tolling effect. The answer to this question depends on how the law regards the Spera-based dismissals. To summarize the Respondent's argument: there was not a "properly filed" Rule 3.850 motion that was "pending" to toll the AEDPA clock for a long enough time to make the § 2254 Petition timely. The Respondent counts in the above procedural history a total of 765 days (or alternatively 411 days) of untolled time, both of which exceeds the 365 days allotted.

42. The answer to this question depends on the legal significance of the several intervening dismissals. The Respondent's argument fails because those Spera-based dismissals were not final rulings. They did not bring the Rule 3.850 proceeding to conclusion. Nor did they give the Petitioner an appealable ruling. Brown v. Fla. Attorney General, 2016 WL 5415092, *2 (M.D.Fla. 2016) confirms that Florida's appeals courts regard a Spera-based dismissal as unripe for appeal. To the contrary, those "dismissals" gave the Petitioner leave

to amend his Rule 3.850 Motion and leave to continue pressing his claims for relief towards obtaining a later ruling on the merits. The state post-conviction court made clear that the dismissal was not a final decision on the Petitioner's claims for relief but rather a procedural device for instructing the Petitioner to amend his claims for relief. The way the Florida Supreme Court describes this procedural device in Bryant v. State, 901 So.2d 810 (Fla. 2005) mirrors how a Rule 12(b)(6), Fed.R.Civ.P., dismissal of a civil complaint carries with it leave to amend. See Silva v. Bieluch, 351 F.3d 1045, 1048–49 (11th Cir. 2003) (requiring courts to give a plaintiff leave to amend---unless it would be futile to do so). This Court sees other instructive analogies. Cf. Mederos v. U.S., 218 F.3d 1252 (11th Cir. 2000) (finding that an amended § 2255 motion relates back to the timely-filed but procedurally non-compliant first § 2255 motion). Cf. Johnson v. Sec'y, Fla. Dep't of Corrs., 2017 WL 2672551 (M.D.Fla. 2017) (finding a belated appeal to have a tolling effect where the state court excuses the untimeliness and rules on the merits).

43. With the exception of the first one, the state post-conviction court based its dismissal orders on Spera v. State, 971 So.2d 754 (Fla. 2007). The Spera Court held that a Rule 3.850 movant is entitled to at least one opportunity to amend a deficiently pled post-conviction claim for relief (unless amendment would be futile). The Spera Court continued that the opportunity to amend could be given either within the case or by way of leave to bring a successive proceeding. It thus appears that regardless of which of the two procedures is used to amend a Rule 3.850 motion, the goal is the

same: to afford the movant his or her due process right to amend a defectively pleaded claim. An amended Rule 3.850 motion, moreover, relates back to the initial motion. See Lukehart v. Buss, 70 So.3d 503, 517 (Fla. 2011). Spera and Lukehart suggest that the Petitioner had a Rule 3.850 motion pending the whole time under state law. Had the Petitioner not successfully amended his Rule 3.850 Motion by the given deadline, then the Respondent would have to ask the state post-conviction court to enter a final order of disposition and deny his claims for relief with prejudice. See Nelson v. State, 977 So.2d 710, 711-12 (Fla. 1st DCA 2008). This Court notes that the state court accepted the Petitioner's fourth amended motion as is and ruled on its merits. The state post-conviction court did not reject the fourth amended Rule 3.850 motion as late---even though it was filed well after the criminal conviction had become final. See Rule 3.850(b), Fla.R.Crim.P. (giving a criminal defendant two years after the conviction becomes final to file the motion).

44. Some District Courts in Florida have used the above line of reasoning to deem the time between a Spera-based dismissal and the amended Rule 3.850 motion to be tolled for AEDPA purposes. See Peterson v. Jones, 2015 WL 1061677 (N.D.Fla. 2015), Martinez v. Crews, 2014 WL 12693744 (S.D.Fla. 2014), Barry v. Crews, 2014 WL 6909410, *5 (N.D.Fla. 2014). Their line of reasoning is that the state's post-conviction review process that the petitioner's first Rule 3.850 motion initiated remains open until such time as the state post-conviction court does render the final, case-dispositive, and appealable order (and remains active until the petitioner exhausts appellate-level review).

This Court agrees. This Court does not find a Spera-based dismissal to pass the "test of finality". A Spera-based dismissal does not constitute the end of judicial labor in the case but rather leaves work for the court still to do "to fully effectuate a termination of the cause as between the parties directly affected." See Brown, supra (citing Green v. Tucker, 2013 WL 351870 (11th Cir. 2013)). See also, Pratt v. Jones, 2017 WL 3405322, *3 (N.D.Fla. 2017) (noting how a Spera dismissal is the kind of dismissal that a petitioner "can cure" and how it leaves "work for the state court to do").

45. This Court notes two District Court decisions that have answered this question in the Respondent's favor. See Overton v. Jones, 155 F.Supp.3d 1253, 1269 (S.D.Fla. 2016)[2] and Green v. Tucker, 2013 WL 351870, *3 (M.D.Fla. 2013). Having considered the issue de novo, this Court finds Peterson, Martinez, and Barry more persuasive. This Court finds this approach more consistent with how Florida law treats the matter. See Lowe v. Fla. Dep't of Corr., 679 Fed.Appx. 756, 758 (11th Cir. 2017) (noting the deference that federal court

[2] This Court takes judicial notice that the Overton decision that this Court discusses above is currently pending before the Eleventh Circuit on appeal, Eleventh Circuit Case No. 16-10654. The District Court denied Mr. Overton a Certificate of Appealability ("COA"). Therefore he asks the Eleventh Circuit for one. As far as this Court knows, the Eleventh Circuit has not yet decided whether to grant him a COA. It also is unknown whether the Eleventh Circuit's opinion in the Overton case will be an on-point ruling that answers the dispositive question that this case presents. Therefore this Court sees no reason to stay this case to await the conclusion of the Overton appeal.

gives in this context to the state court's procedural law).

46. This Court likewise finds that the first dismissal---that gave the Petitioner leave to re-file his Rule 3.850 Motion with an oath---also has a tolling effect. While the Petitioner's failure to comply with the oath procedural requirement means that his initial Rule 3.850 Motion was not "properly filed", he did bring it into compliance thereafter. Those amended motions therefore relate back to the time of the initial motion in a way that tolls the AEDPA clock. See Green v. Sec'y, Fla. Dep't of Corrs., 877 F.3d 1244 (11th Cir. 2017) (applying Spera). Because the Petitioner began seeking post-conviction relief before the AEDPA clock had run out, he gets the benefit of having the tolling effect relate back. Cf. Moore v. Crosby, 321 F.3d 1377 (11th Cir. 2003). But see, Lowe, supra, (finding no relation back effect).

47. Tolling the AEDPA clock for the full length of time when the Rule 3.850 Motion was pending, including the time of the non-final dismissals and resulting amendments, better reflects both the practical nature of those non-final dismissals and the relation-back effect. Doing so also frees petitioners to exhaust their claims for relief in state court fully before going to federal court and without fear of the AEDPA clock. This Court therefore finds that the AEDPA clock was tolled the entire time between the initial filing of the Rule 3.850 Motion (on June 21, 2013) to the mandate's issuance (on April 28, 2017).

48. Having settled that matter, this Court turns to the greater question of whether the Petitioner filed his

§ 2254 Petition within the one year period of time that the AEDPA gives him. Seventy-nine days of untolled time ran between the mandate that was issued on April 2, 2013 and the initial filing of the Rule 3.850 Motion (on June 21, 2013). Eighty-one days of untolled ran from the mandate of April 28, 2017 when the state post-conviction court proceeding concluded and the filing of the instant § 2254 Petition (on July 19, 2017). Added together[3], that means that a total of 160 days of untolled time ran. That means the Petitioner filed his Petition well within the 365 days allotted. This Court therefore accepts his § 2254 Petition as timely filed.

STANDARD OF REVIEW

49. Title 28 U.S.C. § 2254(a) permits a federal court to issue "a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" if that custody is "in violation of the Constitution or laws or treaties of the United States." However 28 U.S.C. § 2254(d) limits a federal court's ability to issue a writ of habeas corpus for a state inmate. It does so by raising the standard the petitioning state inmate must meet to obtain federal habeas corpus relief. This Court reviews below the elements of a successful § 2254(d) claim for relief and the governing standard of review.

50. Section 2254 applies at the end of a greater course of judicial review. Section 2254(d) assumes that the Petitioner already exhausted his claims using the

---

[3] This Court applies Rule 6(a), Fed.R.Civ.P., to count how much time elapses between tolling triggering events during the span of the post-conviction proceedings in state court. See Green v. Sec'y, Fla. Dep't of Corrs., 877 F.3d 1244, n.3 (11th Cir. 2017).

state's post-conviction avenues of relief to obtain an adjudication on their merits. The Eleventh Circuit directs the focus of inquiry to the last merits adjudication by the state court. As applied to this case, that is the unwritten PCA opinion that Florida's Fourth District Court of Appeal rendered to affirm the denial of his Rule 3.850 post-conviction motion. Even though the PCA adjudication is unwritten and thus gives no explanatory basis, it still counts as a merits determination, and it still is entitled to deference. See Reed v. Sec'y, Fla. Dep't of Corrs., 767 F.3d 1252, 1261 (11th Cir. 2014).

51. While the deference remains, the fact that the Fourth District Court of Appeal offered no reasons for the affirmance does affect the scope of review. In this situation the reviewing federal court must "look through" to the last adjudication that does provide a relevant rationale. See Wilson v. Sellers, 138 S.Ct. 1188 (2018). As applied here, that means this Court looks through to Circuit Court Judge Mirman's Order Denying Sworn Motion for Post-Conviction Relief dated November 10, 2016 and which starts at page 1 of DE 6–1. Wilson instructs this Court to assume that the appellate court adopted Judge Mirman's reasoning and rationale.

52. The next step in the analysis is to identify the legal basis that entitles the Petitioner to habeas corpus relief. That is, to identify the constitutional or federal law that was violated. Section 2254(d)(1) narrows that inquiry down to "clearly established Federal law, as determined by the Supreme Court of the United States." The phrase "clearly established Federal law"

refers to the holdings, as opposed to the dicta, of the Supreme Court's opinions in existence when the state court decided the post-conviction claims. See Downs v. Sec'y, Fla. Dep't of Corrs., 738 F.3d 240, 256–57 (2013) (adding that it includes a binding circuit court decision that says whether the particular point in issue is clearly established Supreme Court precedent). For a claim based on the ineffective assistance of counsel, for example, the governing standard comes from the Supreme Court's seminal Strickland v. Washington, 466 U.S. 668 (1984), opinion.

53. Section 2254(d)(1) asks whether the state court's denial was "contrary to" that clearly established Federal law. The phrase "contrary to" means that the state court decision contradicts the Supreme Court on a settled question of law or holds differently than the Supreme Court on a set of materially indistinguishable facts. See Downs, 738 F.3d at 257. A state court's decision can be contrary to the governing federal legal standard either in its result (the denial of relief) or in its reasoning.

54. Section 2254(d)(1) also asks the reviewing federal court to determine whether the state court's denial "involved an unreasonable application of" that clearly established federal standard. An unreasonable application of federal law is not the same as a merely incorrect application of federal law. See Downs, 738 F.3d at 257. It tests whether the state court's application of the legal principle was objectively unreasonable in light of the record before the state court at the time. An objectively unreasonable application of federal law occurs when the state court

identifies the correct legal rule but unreasonably applies, extends, or declines to extend it to the facts of the case. See Putnam v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001).

55. Section 2254(d)(1) tests the legal correctness of the state court's decision, but it does so through a highly deferential lens. The reviewing federal court does not "grade" the state court's decision. The degree of error must be substantial and beyond dispute. The state court's decision survives § 2254(d)(1) review so long as some fair-minded jurists could agree with the state court, even if others might disagree. See Downs, 738 F.3d at 257.

56. While subsection (1) of § 2254(d) tests the legal correctness of the state post-conviction court's denial of relief against controlling federal case law, subsection (2) of § 2254(d) sets forth the standard by which a federal court reviews the state post-conviction court's findings of fact. Section 2254(d)(2) asks whether the state post-conviction court based its denial "on an unreasonable determination of the facts" based on the evidence before it at the time.

57. As with the § 2254(d)(1) legal analysis, a reviewing federal court is to consider the state court's findings of fact through a deferential lens. The state court's finding of fact is not unreasonable just because the reviewing federal court would have reached a different finding of fact on its own. So long as reasonable minds might disagree about the finding of fact, the state court's finding stands. See Downs, 738 F.3d at 257. Indeed the state court's fact determinations are presumed to be correct. Section

2254(e)(1) places the burden on the Petitioner to rebut that "presumption of correctness by clear and convincing evidence." Even if the state post-conviction court did make a fact error, its decision still should be affirmed if there is some alternative basis sufficient to support it. See Pineda v. Warden, 802 F.3d 1198 (11th Cir. 2015).

58. Obviously then § 2254(d) creates a standard of review that is highly deferential to the state court's denial of the claim. The reviewing federal court must give the state post-conviction court the benefit of the doubt and construe its reasoning towards affirmance. See Lynch v. Sec'y, Fla. Dep't of Corrs., 776 F.3d 1209 (11th Cir. 2015). To warrant relief under § 2254(d), 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 fair-minded disagreement. The purpose of § 2254(d) is to "guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." See Downs, 738 F.3d at 256. This is the degree of error the Petitioner must show before this Court may override the state post-conviction court's decision and overturn the finality of the conviction and sentence.

59. In other words the reviewing federal court should not consider the claim de novo. It is only if the Petitioner can satisfy § 2254(d)---and it is his burden of persuasion to do so---may this Court decide the claim independently and without deference. To prevail on a habeas corpus claim at the de novo stage of review, the Petitioner must show this Court how his custody

violates the Constitution or federal law. To do so the Petitioner "is not necessarily required to prove that he is entitled to relief solely on the basis of the state-court record"; the District Court should consider whether an evidentiary hearing is needed. Arvelo v. Sec'y, Fla. Dep't of Corrs., 788 F.3d 1345, 1349 (11th Cir. 2015). Having undertaken that consideration, this Court finds no basis for conducting an evidentiary hearing to develop the record further at the federal level of review.

THE PETITIONER'S CLAIMS FOR HABEAS CORPUS RELIEF

60. The Petitioner challenges his conviction and sentence collaterally on the basis that his counsel was ineffective in defending him. Consequently it is the Strickland opinion (and its subsequent interpretative case law) that sets forth and defines the actionable federal right.

61. Implicit in the Sixth Amendment's guarantee of legal representation in a criminal proceeding is the guarantee of minimally competent representation. The U.S. Supreme Court has "established a two-prong test for deciding whether a defendant has received ineffective assistance of counsel. The defendant must show (1) that counsel's performance failed to meet an objective standard of reasonableness, and (2) that the defendant's rights were prejudiced as a result of the attorney's substandard performance." Gomez-Diaz v. U.S., 433 F.3d 788, 791 (11th Cir. 2005) (citing the seminal opinion of Strickland v. Washington, 466 U.S. 668 (1984)) (internal citations omitted). See also, Gordon v. U.S., 518 F.3d 1291, 1297 (11th Cir. 2008).

62. To satisfy the "deficient performance" element, the defendant---here called the Petitioner---must show that the quality of his counsel's representation was objectively unreasonable. That is, that it fell short of an objective standard of reasonableness under prevailing professional norms and in light of the full circumstances and particular facts of the case at the time of counsel's action. The mere fact that counsel made an error does not satisfy Strickland. Strickland considers counsel's performance to be deficient only if the error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Reaves v. Sec'y, Fla. Dep't of Corrs., 872 F.3d 1137, 1148 (11th Cir. 2017).

63. A deficient performance inquiry also entails consideration of the merit of the course of action that a petitioner now says that the defense attorney should have undertaken. An attorney's failure to pursue a particular strategy was not deficient if the strategy was not viable or unlikely to succeed. See Arvelo v. Sec'y, Fla. Dep't of Corrs., 788 F.3d 1345 (11th Cir. 2015) (holding that the viability of the omitted motion to suppress informs both Strickland prongs). Conversely the attorney's performance may have been deficient if the omitted motion could have been outcome-determinative or decisive, or if "no reasonable lawyer" would have foregone litigating it. See Spriggs v. U.S., 703 Fed.Appx. 888 (11th Cir. 2017). See generally, Danielsgale v. U.S., 2017 WL 5197037, *5 (S.D.Ga. 2017) (discussing governing case law and applying that standard in the foregone motion to suppress context).

64. In the context of a guilty plea, the Petitioner "can show deficient performance by demonstrating that his counsel did not provide him with an understanding of the law in relation to the facts, so that he may make an informed and conscious choice between pleading guilty and going to trial." Carver v. U.S., 722 Fed.Appx. 906, 910 (11th Cir. 2018) (internal citation omitted). The decision whether to plead guilty is an important phase in a criminal case, see Gordon v. U.S., 156 F.3d 376, 380 (2nd Cir. 1998), just as sentencing is another important phase. Counsel's role is to ensure that a guilty plea, whereby a defendant waives his right to trial and subjects himself to criminal sanction, is the product of an informed, knowing, and voluntary choice. See Ramirez v. U.S., 260 Fed.Appx. 185, 187 (11th Cir. 2007) and Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995). The decision whether to plead guilty entails a complex calculus of competing factors. That decision is made, moreover, without foreknowledge of such important factors as the strength of the prosecutor's case-in-chief, how the jury will decide the case, and the ultimate sentencing outcome.

65. A reviewing federal court should be highly deferential when it scrutinizes counsel's performance. It is strongly presumed that the attorney's representation falls within that wide range of service that is considered reasonable. For the attorney's strategic choices made after a thorough investigation of the law and facts and after weighing plausible options, that presumption is virtually unchallengeable. Even strategic choices made without a complete investigation are presumed reasonable if counsel was reasonably limited in the ability to develop the matter

further. See Downs, 738 F.3d at 257–58 and 262–63. In effect the deference given to counsel's performance when combined with § 2254(d)'s deference creates a doubly deferential standard of review. Under this doubly deferential standard of review, this Court need only look for some reasonable argument why counsel's representation was not deficient for it to deny the Petitioner's claim. See Downs, 738 F.3d at 258.

66. The Petitioner also must satisfy the prejudice element. The Petitioner must show a reasonable probability that the outcome would have been different had his attorney not made the complained-of error. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See Morris v. Sec'y, Dep't of Corrs., 677 F.3d 1117, 1127 (11th Cir. 2012). The likelihood of a different result must be substantial, not just conceivable. As applied here, the Petitioner must demonstrate a reasonable probability that had his defense counsel took different actions, the plea process would have had a different outcome. See Moss v. U.S., 2010 WL 1571199 (S.D.Fla. 2010). That is, he would have persisted in his not guilty plea and gone to trial rather than change his plea to no contest.

67. In this particular case the prejudice inquiry asks whether the outcome would have been better had the Petitioner eschewed the chosen strategy (to plead no contest in the hope for a more lenient sentence) and had gone to trial instead (at the risk of a lengthier sentence). This type of prejudice inquiry entails anticipating the likelihood of a favorable trial outcome (whether it be a full acquittal or a partial acquittal that results in a sentencing exposure less than what his no

contest plea secured). It entails considering the merits and viability of that choice. See Lynch v. Sec'y, Fla. Dep't of Corrs., 776 F.3d 1209, 1218–19 (11th Cir. 2015). It entails considering how the trial option would have affected the full calculus behind the Petitioner's decision whether to plead no contest. See Premo v. Moore, 562 U.S. 115 (2011) and Spriggs v. U.S., 703 Fed.Appx. 888 (11th Cir. 2017). See also, Lee v. U.S., 137 S.Ct. 1958 (2017). The Petitioner's post-hoc assertion that he would have preferred going to trial is insufficient, by itself, to establish prejudice under the Strickland standard. There must be something in the record contemporaneous with that decision that corroborates it. See Cedeno-Gonzalez v. U.S., 2018 WL 6444510, *1 (11th Cir. 2018). It also must have been rational for the Petitioner to eschew the potential benefits of the no contest plea and to assume the risks of going to trial. See Carroll v. Sec'y, Dep't of Corrs., 2017 WL 6536738 (M.D.Fla. 2017).

68. In other words the prejudice inquiry focuses on the Petitioner's state of mind at the time. It entails an objective consideration of the calculus that he was facing. It also entails consideration of any points of particular subjective importance to the Petitioner at the time. Other factors relevant to the decision-making calculus include the trial result that the Petitioner had anticipated, the relative strength of the prosecutor's case against the Petitioner's defenses, benefits secured by the plea and plea negotiations, and the potential sentencing outcome. See Felix v. U.S., Case No. 13-14464-CIV-ROSENBERG/WHITE (S.D.Fla. Oct. 1, 2014) (Report and Recommendation found at DE 15 and summarizing the applicable case law at pp. 10–11).

Lee, supra, clarifies that the focus is on the change of plea decision and how the attorney's error affected that decision. The inquiry does not compare the difference in sentencing outcomes between going to trial and pleading guilty. (Arvelo, supra, further clarifies that the prejudice inquiry is made without regard to the length of the post-plea sentence.) Nor is there an automatic, per se rule that a weak defense always makes the choice to go to trial irrational. The habeas corpus court must consider the possibility that some other factor---a particular consequence of conviction such as deportation, for example---may have been of particular importance to the defendant and the attorney's erroneous advice on that point may have been critical to the defendant's decision. See also, McCoy v. Louisiana, 138 S.Ct. 1500 (2018) (giving the ultimate decision whether to plead guilty or to go to trial to the defendant to make).

69. The Petitioner therefore must demonstrate both professional error and a prejudicial effect on the proceedings, and the failure to demonstrate either is fatal to the claim. The Petitioner must show that he was denied a fair proceeding, not a perfect defense. It is the degree of ineffectiveness that calls the reliability of the proceeding into doubt. The ineffectiveness must be of constitutional proportion. Strickland does not permit redress for technical errors seen with the benefit of hindsight from an after-the-fact review of the proceeding.

70. There is an additional policy that applies to the consideration. Case law expresses a strong policy towards fostering stability of convictions that result

from guilty pleas. (For purposes of this § 2254 analysis, the Petitioner's no-contest plea is the equivalent of a guilty plea. See Carrol v. Sec'y, Dep't of Corrs., 2017 WL 6536738 (M.D.Fla. 2017).) "When a defendant pleads guilty, his declarations under oath carry a strong presumption of truth." Cedeno-Gonzalez, 2018 WL 6444510 at *1). The governing differential standard of review fosters that stability.

71. Taken together, the standard that the Petitioner must meet to overcome § 2254(d) deference and to meet Strickland's definition of ineffective assistance is very high. The Eleventh Circuit stresses how difficult it is for the Petitioner to establish that the state post-conviction court was unreasonable to reject his ineffective assistance claim. See Reaves v. Sec'y, Fla. Dep't of Corrs., 872 F.3d 1137, 1157 (11th Cir. 2017).

DISCUSSION

72. The Petitioner contends that he changed his plea to no-contest (thereby deciding to avoid trial) because he did not feel comfortable going to trial with AFP Lithgow as his defense attorney. The Petitioner contends that his decision to change his plea to no-contest also was influenced by incorrect sentencing advice. His attorney told him to anticipate a sentence no longer than 15 years, and it was that faulty advice---overestimating the benefit of pleading no-contest---that influenced his decision. Had his attorney informed him that the trial judge is a harsh sentencer regardless of how defendants plead, he would have preferred to take his chances at trial.

Claim 1:

> Whether privately-retained counsel (Mr. Ohle) provided ineffective assistance by failing to appear at the trial's docket call.

73. The Sixth Amendment of the U.S. Constitution gave the Petitioner the right to hire his counsel of choice. However that right is not without limitations. A criminal defendant's right to (privately retained) counsel of choice is balanced against the needs of fairness and calendar demands, and a trial court has wide latitude is weighing those competing concerns out. See U.S. v. Gonzalez-Lopez, 548 U.S. 140 (2006). In his discussion of the Motion to Continue, Judge Bauer recalled giving the Petitioner time to find replacement counsel. After no new private counsel appeared by the deadline, Judge Bauer appointed the Federal Public Defender. Three months had passed since then, and the trial' start date now was at hand.

74. The Petitioner raised no constitutional choice-of-counsel objection before the appellate court on direct appeal. Nor is the question of whether Judge Bauer wrongly deprived the Petitioner of his constitutional right to the counsel of his choice before this Court now to resolve. The Petition raises instead a different Sixth Amendment constitutional right: the right to effective representation.

75. To answer whether the Petitioner was deprived of that right, this Court applies the Strickland standard. The first prong of the Strickland analysis asks whether Mr. Ohle acted deficiently by not appearing at docket call. This Court notes the

possibility that the Petitioner may have retained Mr. Ohle before the trial start date[4]. This Court notes that on October 1, 2009 (four days before the docket call) a $5,000 cashier's check was sent to Mr. Ohle's office. This Court gives the Petitioner the further benefit of assuming that perhaps Mr. Ohle should have attended the combined docket call and Motion to Continue hearing (assuming, of course, that Mr. Ohle actually knew of that proceeding). Even if the Petitioner could demonstrate deficient performance after construing the above two points in his favor, he still cannot establish Strickland prejudice.

76. Judge Bauer made clear that the trial would begin that day regardless of who represented the Petitioner. In other words Judge Bauer did not deny the Motion to Continue because Mr. Ohle was absent. It follows then that no direct causal relationship exists between Mr. Ohle's absence and the Petitioner's decision to change his plea. (The Petitioner's lack of confidence in AFPD Lithgow is a different matter unrelated to whether Mr. Ohle had appeared or not.)

77. Nor does this Court see prejudice from the Petitioner having to proceed to trial with AFPD Lithgow. For whatever reason the Petitioner was dissatisfied with AFPD Lithgow, there is no indication that AFPD Lithgow was unprepared. He had been working on the Petitioner's case for three months. He had fully developed the defense case, and there was

---

[4] However the state post-conviction court found that the Petitioner had not yet retained Mr. Ohle at the time of the docket call, this Court adds.

nothing left to do. Had Mr. Ohle appeared on the day of docket call, trial still would have started that day. Had the Petitioner actually gone to trial, it would not have been rational for him to replace AFPD Lithgow (who was the attorney who had developed his defense case) with Mr. Ohle (who would have been starting on the very first day of trial). As Gonzalez-Lopez explains, supra, what would have been the objectively rational choice is a relevant factor for determining Strickland prejudice.

78. Another factor that runs contrary to finding prejudice is the absence of any statement or objection by the Petitioner during his change of plea colloquy that would suggest some sort of pressure or duress. The Petitioner did not say he felt pressured either by the circumstances generally or by his personal dissatisfaction with AFPD Lithgow, specifically, to change his plea in order to avoid trial.

79. This Court also notes that the Petitioner does not accuse AFPD Lithgow of failing to advise him at all about the change of plea decision. To the contrary, the quick turn-around between the denial of the Motion to Continue and the announcement of the plea change implies that AFPD Lithgow and the Petitioner both were prepared for it. The Petitioner instead complains about one particular facet of the plea advice---about the length of sentence to expect---which he says was incorrect.

Claim 2:

> Whether AFPD Lithgow ineffectively advised the Petitioner about sentencing expectations

when the Petitioner was deciding whether to go to trial or to change his plea to no-contest?

80. The Petitioner contends that AFPD Lithgow incorrectly advised him about the sentencing outcome. The Petitioner complains that AFPD Lithgow advised him to expect a sentence of no longer than 15 years if he changed his plea to no-contest but to expect a life sentence should he go to trial and lose. This Court finds this claim contradicted by the change of plea record. Both the Change of Plea Hearing and the Felony Plea Form informed the Petitioner---and he expressly affirmed his understanding of such---that the length of his sentence remained an open question and could not be predicted with certainty. The Petitioner thereby was informed of the limit on any sentence prediction or expectation. However accurate the sentence prediction later might prove to be, the Petitioner knew that any sentence within the statutory range remained a possibility.

81. This Court therefore finds this claim to fall short of the Strickland standard. First AFPD Lithgow's sentencing advice was not necessarily unreasonable. A sentence of up to 15 years' length for the two charges may have been entirely reasonable to expect (so long as the Petitioner also kept in mind that sentencing remained an open question). Therefore it does not necessarily follow that AFPD Lithgow performed deficiently in giving that advice. Even if he underestimated the length of the anticipated sentence, "the law is clear that an inaccurate prediction about sentencing alone will generally not be sufficient to sustain a claim of ineffective assistance of counsel."

Osborne v. U.S., 2011 WL 13104105, *11 (S.D.Fla. 2011) (citing U.S. v. Pease, 240 F.3d 938, 940–41 (11th Cir. 2001)). To the extent AFPD Lithgow may have expressly or implicitly promised a guaranteed sentence or the extent the Petitioner perceived his advice about the expected sentence's length as such, the change of plea colloquy cured any such false impression. See id. Therefore this Court finds no prejudice either.

82. What AFPD Lithgow should have advised him instead, the Petitioner contends, is that Judge Bauer has a reputation of being a harsh sentencer who is more likely to give a life sentence than not. Had he known that, the Petitioner asserts, he would have preferred to defend himself at trial. Whether the Petitioner can establish the deficient performance prong is doubtful. It requires a showing that Judge Bauer did have such a reputation and that AFPD Lithgow did or should have known of it.

83. Regardless, even if the Petitioner can demonstrate deficient performance, he still cannot demonstrate prejudice. Based on what the Petitioner knew at the time, he does not convince this Court that that additional information would have persuaded him to go to trial. First the preclusive effect of the change of plea colloquy discussed above applies with equal force here. The Petitioner was directly instructed that no advice about sentence expectations---whether for a shorter or longer period---could be guaranteed and that the actual sentence to be imposed remained an open question. Even if AFPD Lithgow had advised the Petitioner that Judge Bauer is a harsh sentencer, the Petitioner knew that AFPD Lithgow could not

definitively promise that the actual sentence would be at the high end. Because it was not a foregone conclusion that Judge Bauer actually would sentence the Petitioner harshly (meaning at the high end of the permitted range), AFPD Lithgow could not definitively exclude the possibility of leniency or an unexpectedly shorter sentence. It would have been reasonable for the Petitioner to expect that pleading no-contest to just two of the four counts at least would make a shorter sentence more likely than if he lost at trial on all four counts. In retrospect, based on what he knows now, the Petitioner may feel that he had nothing to lose at trial. He did have something to lose, however: the better chance at a shorter sentence.

84. Nor does this Court see how eschewing the benefits of a no-contest plea and going to trial would have been the more rational choice. The Petitioner does not rate the strength of his defense or his likelihood of prevailing at trial. His defense would have to address several unfavorable points. There is the issue of how he deliberately sought out the victim with an aggressive purpose and while intoxicated. Even if the altercation spiraled beyond what he intended, he was the one who had started it. This Court discerns no exculpatory evidence or witness testimony in the Petitioner's favor. Moreover the Petitioner would be going to trial with AFPD Lithgow (in whom he had little confidence) or alternatively with Mr. Ohle (who presumably was not prepared for trial) that same day. The trial judge had refused to continue the trial.

85. Even if the Petitioner felt he had a strong defense to raise at trial, the strategy of pursuing a

reduced sentence may have been stronger. He had several mitigating factors in his favor. The no-contest plea leveraged them better. Few rational defendants facing a possible life sentence would insist on contesting guilt where there is no real chance of acquittal and where admitting guilt improves the chance of avoiding that life sentence. See McCoy v. Louisiana, 138 S.Ct. 1500, 1514–15 (2018) (adapting the observation that Justice Alito made in his dissent from that case's capital punishment context to the life context of this case).

86. That was the calculus that the Petitioner was facing at the time. As Lee and Hill instruct, this Court must consider the full decision-making calculus that the Petitioner faced at that time and all of its relevant parts. Factors relevant to the decision include the expected likelihood of success at trial, the difference between the two expected sentencing outcomes, and the objective reasonableness or wisdom of his available choices. No one factor is dispositive by itself. However when considered together and in the full context, here they fail to corroborate the Petitioner's present after-the-fact assertion---however genuinely meant---that he would have gone to trial had AFPD Lithgow advised him differently.

87. While AFPD Lithgow could advise the Petitioner about different potential sentencing outcomes, the Petitioner knew that AFPD Lithgow could not promise with certainty what the sentence actually would be. The actual sentence to be imposed was left for the sentencing judge to decide. The only known information that the Plaintiff had was the sentencing

range that Florida's criminal statutes permitted. Those factors were outside AFPD Lithgow's control.

EVIDENTIARY HEARING

88. Lastly this Court considers whether the Petitioner is entitled to an evidentiary hearing. This Court begins by considering whether 28 U.S.C. § 2254(e) bars one. First, § 2254(e)(2) bars an evidentiary hearing if the Petitioner had failed to develop the factual basis of his claims in the state court proceedings. That bar does not apply here because the Petitioner did attempt to develop the factual basis of his claims in the state post-conviction court proceeding (but the state court denied his request). Second, § 2254(e)(1) presumes the state court's fact determinations to be correct. It does not apply here either because the state post-conviction court made no findings of fact about the issues for which the Petitioner presumably seeks an evidentiary hearing now. The state post-conviction court did not develop the fact record to learn more about the circumstances of Mr. Ohle's retention nor did it hear the Petitioner's testimony about his preference between going to trial versus pleading no-contest. To that extent the state post-conviction court reached no fact-findings that estop the Petitioner from developing the record here. Consequently this Court finds those two provisions of 28 U.S.C. § 2254(e) not to bar his request for an evidentiary hearing in federal court.

89. This Court considers next the standard that governs the decision of whether to hold an evidentiary hearing when the limitations of § 2254(e) do not apply. The decision whether to grant an evidentiary hearing

is left to this Court's sound discretion. This Court must review the available record and determine whether an evidentiary hearing is warranted. To guide the determination the Eleventh Circuit directs this Court to consider several factors. First, this Court must consider whether there are disputed facts concerning the Petitioner's claims for which the Petitioner did not receive a full and fair hearing from the state post-conviction court. Second, this Court must consider whether the Petitioner's fact allegations, if he could prove them true, would entitle him to prevail on his Petition. Third, in making that determination of whether the Petitioner can prevail on the merits of his claims, this Court also must keep in mind the deference that § 2254 gives to the state post-conviction court's ruling. Fourth, this Court must consider the nature of the Petitioner's fact allegations. If they are merely conclusory and unsupported by specifics, the evidentiary hearing request may be denied. See Boyd v. Allen, 592 F.3d 1274, 1304-05 (11th Cir. 2010).

90. The present record presents no disputes of fact, per se, that require resolution. The Petitioner's criminal case unfolded in the way it did. The sole reason for the evidentiary hearing would be to learn more about Mr. Ohle's retention and to hear the Petitioner's testimony about whether he would have preferred to go to trial (1) had Mr. Ohle appeared at the docket call to take over his defense and/or (2) had Mr. Lithgow advised him differently about sentence expectations. However this Court already takes the Petitioner's allegations about those two issues into consideration in the merits analysis above. Having done so and despite construing those allegations in the

Petitioner's favor, that merits analysis still fails to show either claim to be meritorious. First, even if the Petitioner in fact had retained Mr. Ohle before the docket call, this Court does not find that fact to support a finding of ineffective assistance of counsel based on Mr. Ohle's absence at the docket call. Second, even if the Petitioner's present (and after-the-fact) contention about his trial preference is genuinely made, it still fails to establish Strickland prejudice. Even if Mr. Ohle had appeared and/or Mr. Lithgow had advised him differently about sentence expectations, the Petitioner still fails to persuade this Court that based on what was knowable at that time, that (1) he would have rationally perceived the trial option as presenting the more likely advantageous outcome and (2) he actually would have decided differently and chosen trial. Moreover, even if the Petitioner could establish Strickland prejudice, he still would have to demonstrate an error that would support a finding of "deficient performance" for Strickland purposes. Lastly, this Court reaches that conclusion even before applying § 2254's deferential lens. For all of those reasons this Court does not find an evidentiary hearing warranted. See Martinez, 684 Fed.Appx. at 926 (explaining that a court "need not conduct an evidentiary hearing if the record refutes the petitioner's factual allegations, otherwise prevents habeas relief, or conclusively demonstrates that the petitioner was not denied effective assistance of counsel").

CONCLUSION

91. After what amounts in substance to a de novo review, this Court finds no meritorious claim for

habeas corpus relief. This Court sees no violation of the Petitioner's constitutional right to effective counsel with respect to either Mr. Ohle or AFPD Lithgow. Of course de novo review is not the standard of review that governs the Petition. Section 2254 imposes deference to the state court's determinations of those same claims for relief. If the Petitioner's claims for relief fail on de novo review, it follows then that they fail under § 2254's highly deferential standard of review, too.

ACCORDINGLY, this Court recommends to the District Court that the Re-Filed Petition for Writ of Habeas Corpus (DE 5) be **DENIED** as to both claims for relief.

The parties shall have fourteen (14) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Robin L. Rosenberg, the United States District Judge assigned to this case. Failure to file timely objections shall bar the parties from a de novo determination by the District Court of the issues covered in this Report and Recommendation and bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745, 749–50 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988).

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this 2nd day of April, 2019.

/s/ Shaniek M. Maynard
SHANIEK M. MAYNARD
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12468-D

[Filed October 28, 2019]

KEITH INCHIERCHIERE, Petitioner-Appellant, versus FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF THE STATE OF FLORIDA, Respondents-Appellees.	)

Appeal from the United States District Court
for the Southern District of Florida

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Keith Inchierchiere has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 26, 2019, order denying his counseled motion for a certificate of appealability to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Mr. Inchierchiere's motion for

reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.