# APPENDIX

## APPENDIX

# A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-11534-CC

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ERIC CHRISTOPHER BARRASS,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents - Appellees.

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

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, BRANCH and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

# A-2

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-11534
Non-Argument Calendar

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D.C. Docket No. 1:14-cv-24885-JAL

ERIC CHRISTOPHER BARRASS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

---

(March 7, 2019)

Before WILLIAM PRYOR, BRANCH and JULIE CARNES, Circuit Judges.

PER CURIAM:

Eric Barrass, a Florida prisoner, appeals the denial of his petition for a writ of habeas corpus seeking relief from his conviction for the attempted second degree murder of Tim Cummings. 28 U.S.C. § 2254. We granted Barrass a certificate of appealability to address whether the Florida courts violated his right to due process by excluding from evidence Christopher Travis's hearsay that he defended Barrass by shooting Cummings. Because it was not contrary to or an unreasonable application of clearly established federal law for the state courts to exclude Travis's statements as inadmissible hearsay, we affirm.

## I. BACKGROUND

Around 6:00 a.m. on August 6, 2006, Barrass drove Travis and two other friends to a residence in Miami-Dade County where, during a brawl with Cummings and other men, Cummings was shot in the back. When Barrass revisited the residence, he was arrested and volunteered that he shot Cummings in self-defense. In a later interview by a detective, Barrass repeated his admission.

A Florida grand jury indicted Barrass for attempted first degree murder by shooting Cummings, Fla. Stat. §§ 782.04(1)(A)1, 777.04(1), and for battering Cummings, *id.* § 784.03. Barrass entered pleas of not guilty to the offenses. Barrass's defense was that he falsely confessed to protect Travis, who had admitted to shooting Cummings to defend Barrass.

On August 19, 2006, Barrass's investigator interviewed Travis, who stated that he "was dropped off at [his] house" at 6:00 a.m. by Barrass who "came back" complaining about two men "standing in the middle of the road [that] wouldn't let him pass by and were threatening him." Travis recounted that he, "Andrew and Mike" rode down the street with Barrass until they encountered men "jumping around . . . [and] threatening . . . to fight." Travis stated that "[o]ne of the guys knocked [Barrass] out, punched him . . . [i]n the head . . . two or three [times] . . . [and] knocked him to the ground," retrieved "what appeared to be a gun from underneath the passenger seat" of a truck, and "walked towards [Barrass] and . . . pointed the gun at him." Travis "thought that [Barrass] was going to get killed," so Travis "ran to [Barrass's] truck" to obtain Barrass's gun and "fired one shot." Travis stated that the bullet struck the man's right "back shoulder blade area" and caused him to fall "on the ground then he ran away" and "might have fired some shots" as he fled. When asked if "at any point and time did [Barrass] fire a gun," Travis responded "No."

The prosecutor deposed four persons who reportedly spoke with Travis after the shooting. Shaun Baker testified that, on the morning of August 6, 2006, Travis said that he, Barrass, Mike, and Andrew fought Cummings, Cummings knocked out Barrass, Andrew kicked Cummings in the head, Cummings obtained a gun and walked toward Barrass, and then Travis retrieved Barrass's gun from his vehicle

and shot Cummings in the back. Casandra Chily testified that Travis twice told her that Barrass was fighting Cummings and someone was going to shoot Barrass, so Travis shot Cummings in a nonlethal area before he could hurt Barrass. David Palacios testified that he went to Travis's home on August 6, 2006, to discuss the shooting and that Travis said Cummings was beating Barrass, he went to Barrass's car to get a gun, he heard two gunshots, and he shot Cummings with Barrass's gun. Tina Bauer testified that, after the brawl, Travis returned home and said he shot Cummings because he had knocked out Barrass and threatened to execute Barrass with a gun.

The prosecutor moved *in limine* to exclude Travis's statements from trial. The prosecutor argued that Travis's statements were hearsay that failed to qualify for the exception for declarations against penal interest, *see* Fla. Stat. § 90.804(2)(c), because his statements were exculpatory, *see id.* § 776.012 (justifying the use of force to defend another person), and inconsistences in the statements made them untrustworthy. Barrass responded that Travis's statements were against his penal interest because he could be prosecuted for shooting Cummings and for possessing and using a firearm while on probation.

The trial court held a hearing on the motion. The trial court determined that Travis's admissions to defending another person were not sufficiently against his penal interest to qualify for the exception to the rule excluding hearsay evidence

under Florida law, *id.* § 90.804(2)(c), or under federal law, Fed. R. Evid. 804(b)(3), but the trial court withheld ruling on the motion to determine Travis's availability for trial. The trial court explained that it "chose to follow U.S. Supreme Court and Florida Supreme Court" precedent governing the issue. Barrass objected and filed a memorandum in which he argued, for the first time, that excluding the evidence "would deprive him of his U.S. and State of Florida constitutional rights to due process of law, the right to call witnesses on his behalf, the right to assert a defense, and his right to a fair trial" under *Holmes v. South Carolina*, 547 U.S. 319 (2006), *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Green v. Georgia*, 442 U.S. 95 (1979), and *Washington v. Texas*, 388 U.S. 14 (1967).

The trial court held a second hearing on the pretrial motion. Barrass's investigator testified that Travis was unwilling to testify at trial but agreed to provide a tape-recorded statement that he shot Cummings. The trial court ruled that Travis was unavailable and that his admission was excluded "under 804." The trial court allowed Barrass to proffer testimony from Bauer and from Chily about Travis's statements and to admit transcripts of Baker's and Palacios's depositions. After each proffer, the trial court ruled that the respective statement did not qualify "under 804" as a declaration against Travis's penal interest. The trial court also summarily rejected Barrass's arguments that Travis's statements, viewed in context, were against his penal interest, *see Williamson v. United States*, 512 U.S.

594 (1994), and that excluding the evidence "absolutely gutted [his] defense" and "prevented him from getting a fair trial and being able to defend himself" like the defendant in *Holmes*, 126 S. Ct. 1727.

The jury found Barrass guilty of the lesser-included offense of attempted second degree murder after hearing the testimonies of Cummings, Brian Cespedes, one of Cummings's neighbors, and the arresting officer to whom Barrass confessed, and the audio recording of Barrass's interview. Cummings testified that he wrestled with Barrass, he heard gunshots that he did not think Barrass fired, and when he fled, he experienced a burning sensation in his back. Cespedes testified that he saw Travis fire a silver handgun twice into the air and, after he heard a third gunshot that sounded different, Barrass pointed a black handgun in Cespedes's face. Cummings's neighbor testified that he woke to the sound of fireworks, he saw Barrass holding a handgun as he approached Cespedes and Mike, and then he heard Cummings scream in pain and shout that he had been shot. The officer who arrested Barrass testified that he found no evidence of a silver handgun, that he seized a black handgun from Barrass's truck, and that Barrass admitted to shooting Cummings in self-defense. During the interview, Barrass confessed that he wrestled Cummings, retreated to his truck, and after Cummings warned him to stay away or he would be shot "like a dog," he retrieved his gun from his truck and shot

four times in Cummings's direction because, based on their previous scuffles, he thought Cummings was armed.

Barrass argued to the jury that he was innocent. He elicited from Cummings on cross-examination that he never saw or felt Barrass holding a gun. Barrass impeached Cespedes and had him admit that he never mentioned a silver handgun to the police. And Barrass testified that he falsely confessed to shooting Cummings to protect Travis. Barrass stated that Cummings punched him senseless, he heard two gunshots and saw Cummings flee, and he then saw his gun in Travis's hand, who stated that he shot Cummings.

Barrass twice challenged without success his attempted second degree murder conviction in the state courts. Barrass argued on direct appeal that Travis's statements constituted declarations against penal interest that were excepted from the state rule that excluded hearsay evidence, Fla. Stat. § 90.804(2)(c), and that the trial court failed "to protect [his] federal and Florida constitutional rights to due process and compulsory process" as required by *Chambers* and *Holmes*. The Florida appellate court affirmed summarily Barrass's conviction. *Barrass v. State*, 13 So. 3d 476 (Fla. Dist. Ct. App. 2009). Barrass moved for state postconviction relief and sought to compel Travis to testify on the ground that his statement to the investigator constituted newly-discovered evidence because the passage of time made it unnecessary to invoke his right against self-incrimination under the Fifth

Amendment. *See* Fla. R. Crim. P. 3.850. The trial court denied Barrass's motion, and the Florida appellate court affirmed summarily, *Barrass v. State*, 109 So. 3d 1163 (Fla. Dist. Ct. App. 2013).

Barrass filed a federal petition for a writ of habeas corpus, which the district court denied. The district court ruled that the decision of the state courts was not contrary to clearly established federal law because "the Supreme Court has never addressed whether the state court's evidentiary ruling—that testimony regarding a third-party's confession should be excluded if the confession provided for a complete defense—violates a criminal defendant's right to present a complete defense." The district court also ruled that "the state court's specific evidentiary ruling [was] not an unreasonable application of general constitutional principles."

## II. STANDARD OF REVIEW

We review *de novo* the denial of a petition for a writ of habeas corpus. *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1243 (11th Cir. 2017). Our review is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996, which "establishes a highly deferential standard for reviewing state court judgments." *Parker v. Sec'y for the Dep't of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003). Under the Act, a federal court may not grant a state prisoner a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim 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." 28 U.S.C. § 2254(d). Because the Act provides that factual findings of the state courts are "presumed to be correct," the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

## III. DISCUSSION

Barrass raises two arguments on appeal. First, Barrass argues that the district court erred by deferring to the decision of the state courts because those courts failed to decide his claim that excluding evidence of an alternative shooter violated his federal right to present a meaningful defense. *See* 28 U.S.C. § 2254(d)(1). Barrass argues, that under a *de novo* standard of review, he should prevail on that claim. Second, Barrass argues, in the alternative, that the state courts ruled contrary to or unreasonably applied clearly established federal law. We address each argument in turn.

### *A. The District Court Correctly Deferred to the Decision of the Florida Courts.*

"When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted." *Johnson v. Williams*, 568 U.S. 289, 301 (2013). "That presumption

stands unless rebutted by evidence from the state court's decision and the record in the case that 'leads very clearly to the conclusion that the federal claim was inadvertently overlooked in state court.'" *Pittman*, 871 F.3d at 1245 (quoting *Childers v. Floyd*, 736 F.3d 1331, 1334 (11th Cir. 2013)). In the light of the record, the decision of the Florida courts was entitled to deference.

The state trial court perceived during pretrial proceedings that the exclusion of Travis's statements could implicate Barrass's constitutional rights. Before trial, the prosecutor argued to exclude Travis's statements under state law, Fla. Stat. § 90.804(2)(c), yet the trial court excluded the evidence for failing to "meet the criteria" for admission "under State law" and under "Federal law which [had the] similar rule [in Federal Rule of Evidence] 804[(b)(3)]." The trial court also highlighted that it was "follow[ing] U.S. Supreme Court and Florida Supreme Court" precedent in reaching its decision.

The trial court also rejected summarily Barrass's specific written and oral arguments that the exclusion of Travis's statements deprived him of his rights to due process, to develop his defense, and to a fair trial as articulated in *Holmes*, 547 U.S. 319, *Chambers*, 410 U.S. 284, *Green*, 442 U.S. 95, and *Washington*, 388 U.S. 14. A summary rejection of an argument qualifies as an adjudication of the merits and warrants deference. *See Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245,

1254–55 (11th Cir. 2002). The summary decision to deny Barrass's federal claim was entitled to deference.

The state appellate court considered Barrass's federal claim too. On direct appeal, Barrass argued that, "even if [Travis's] statement did not strictly comply with the criteria of section 90.804(2)(c), the statement was admissible to protect Barrass's federal and Florida constitutional rights to due process and compulsory process." And Barrass dedicated six pages of his argument to explaining why the exclusion of Travis's statements violated his right to present a defense as articulated in *Holmes* and *Chambers*. The state, in turn, devoted three pages to addressing how "the exclusion of [Travis's] statement did not violate [Barrass's] constitutional rights." Nothing in this record "leads very clearly to the conclusion that [Barrass's] federal claim was inadvertently overlooked" by the Florida courts. *See Pittman*, 871 F.3d at 1245 (quoting *Childers*, 736 F.3d at 1334).

*B. The Decision by the State Courts Was Not Contrary To or an Unreasonable Application of Clearly Established Federal Law.*

Supreme Court precedent establishes that criminal defendants have a clearly established right to present a meaningful defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Pittman*, 871 F.3d at 1246 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

That right is tempered by the defendant's obligation to "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* (quoting *Chambers*, 410 U.S. at 302). The state enjoys "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Holmes*, 547 U.S. at 324, like "[t]he hearsay rule," which serves the important purpose of excluding statements that "are subject to particular hazards," *Williamson*, 512 U.S. at 598. *See Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). If the rule is "'arbitrary or disproportionate to the purposes [it is] designed to serve' [it] must fall to the accused's right to present a defense." *Pittman*, 871 F.3d at 1246 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)); *Holmes*, 547 U.S. at 325.

Barrass argues that the exclusion of Travis's statement violated his right to due process by depriving him of the defense that another person shot Cummings. Barrass argues that the decision of the state courts was contrary to and an unreasonable application of *Chambers v. Mississippi*, 410 U.S. 298, and *Green v. Georgia*, 442 U.S. 95. For the decision to fall within the "contrary to" clause of section 2254(d), the state courts had to reach "a conclusion opposite to that reached by the Supreme Court on a question of law" or to "decide[] a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Pittman*, 871 F.3d at 1244 (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (alterations

adopted). To constitute an "unreasonable application" of clearly established federal law, the state courts must have "identifie[d] the correct governing legal principle from the Supreme Court's decisions but unreasonably applie[d] that principle to the facts." *Id.* at 1246 (quoting *Williams*, 529 U.S. at 413) (alteration adopted).

The Florida courts excluded Barrass's evidence on the ground it failed to qualify for the exception to the hearsay rule for declarations against interest. The trial court found that Travis's statement was exculpatory and, hence, lacked the characteristic that is fundamental to a declaration against interest. *See* Fla. Stat. § 90.804(2)(c); Fed. R. Evid. 804(b)(3). The trial court reasoned that Travis's statement was not, as required under Florida law, "at the time of its making, . . . so far contrary to [Travis's] . . . interest . . . that a person in [his] position would not have made the statement unless he . . . believed it to be true," *see* Fla. Stat. § 90.804(2)(c), and failed to create "so great a tendency . . . to expose [him] to . . . criminal liability" to make the statement admissible under federal law. *See* Fed. R. Evid. 804(b)(3)(A).

We presume that the finding of the state courts that Travis's statements were exculpatory is correct, and Barrass offers no evidence, let alone clear and convincing evidence, to rebut that presumption. *See* 28 U.S.C. § 2254(e)(1). "[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context," *Williamson*, 512 U.S. at 603, "which require[s] careful

examination of all the circumstances surrounding the criminal activity involved," *id.* at 604. Travis's statements were not self-inculpatory because they supported a legal excuse for his conduct. On each occasion that Travis confessed to shooting Cummings, he stated that he did so to protect Barrass. *See* Fla. Stat. § 776.012. Travis's exculpatory statements were not "so far contrary to [his penal] . . . interest" as to make them admissible. *See* Fla. Stat. § 90.804(2)(c).

The state courts did not reach a legal conclusion contrary to *Chambers* or *Green*. The Supreme Court has never held that the exclusion of a third-party's exculpatory confession based on a well-established evidentiary rule violates a defendant's right to present a complete defense. *Chambers* and *Green* hold that the exclusion of trustworthy third-party inculpatory confessions based on the mechanistic application of outdated evidentiary rules violates a defendant's right to due process. *Chambers*, 410 U.S. at 293–94; *Green*, 442 U.S. at 96–97. The defendants in *Chambers* and *Green* were unable to introduce the inculpatory confessions because the states where the crimes occurred, unlike most other states, had not recognized an exception to the hearsay rule for declarations against penal interest, which would have rendered the confessions admissible. *Chambers*, 410 U.S. at 298–301; *Green*, 442 U.S. at 97 & n.1. In contrast, the Florida courts applied the hearsay exception endorsed in *Chambers* and *Green* and determined

that, unlike the inculpatory confessions in those cases, Travis's exculpatory statement failed to qualify as a declaration against his penal interest.

Barrass's case is materially distinguishable from *Chambers* and *Green*. Travis's statements were exculpatory, which is a far cry from the third-party confessions in *Chambers*, which were "self-incriminatory and unquestionably against interest," 410 U.S. at 301, and the third-party confession in *Green*, which also "was against interest," 442 U.S. at 97. Barrass twice admitted to shooting Cummings, but the defendants in *Chambers* and *Green* steadfastly maintained that they were innocent.

The circumstances surrounding Barrass's statements also do not provide "persuasive assurances of trustworthiness," *Chambers*, 410 U.S. at 302, or "substantial reasons . . . to assume [their] reliability," *Green*, 442 U.S. at 97. As the prosecutor argued in the motion *in limine*, Travis told Barrass's witnesses different stories, and those stories differed from the version of events Barrass recounted at trial. The trial court could have thought that Travis fabricated a story that would mutually benefit himself and his friend Barrass. Travis's admissions provided him a legal excuse for his use of force against Cummings and Barrass a defense too. Travis's admission also was suspect given his refusal to testify at trial, but his willingness to provide hearsay evidence for Barrass to use at trial. And, in striking

contrast to *Chambers* and *Green*, no physical evidence connected Travis to the shooting.

Finally, unlike in *Chambers* and *Green*, the exclusion of Travis's statements did not prevent Barrass from presenting his defense of an alternative shooter. Barrass testified that Travis shot Cummings, and Cummings testified that he never saw Barrass with a gun. The decision to exclude Barrass's evidence does not conflict with *Chambers* and *Green*.

The state courts also reasonably applied clearly established federal law in excluding Travis's hearsay. *Chambers* and related precedents instruct that "an accused [seeking] to present witnesses in his own defense" "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302; *see Holmes*, 547 U.S. at 326 ("[T]he Constitution permits judges 'to exclude evidence that is "repetitive . . ., only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues."'"); *Egelhoff*, 518 U.S. at 53 (stating its precedents do not "undermine the principle that the introduction of relevant evidence can be limited by the State for a 'valid' reason"). The state courts reasonably determined that the rules governing the admission of hearsay in Florida were consistent with the "state's legitimate interest in excluding unreliable and untrustworthy testimony from a jury's consideration." *See Pittman*, 871 F.3d at

1248. And we cannot say that the state courts unreasonably applied *Chambers* by excluding Travis's statements as inadmissible hearsay. Travis's statements were exculpatory instead of being against his penal interest, *see* Fla. Stat. § 90.804(2)(c); Fed. R. Evid. 804(b)(3), and the trial court reasonably could have found that Barrass's confessions and his witnesses' testimony failed to provide the type of "persuasive assurances of trustworthiness" that existed in *Chambers*, 410 U.S. at 302. The state courts reasonably concluded that the rules regulating hearsay are neither arbitrary nor disproportionate to the interests they serve, and the state courts reasonably concluded that the application of those rules did not violate Barrass's right to present a complete defense.

## IV. CONCLUSION

We **AFFIRM** the denial of Barrass's petition for a writ of habeas corpus.

# A-3

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 14-24885-CIV-LENARD/WHITE

**ERIC CHRISTOPHER BARRASS,**

Petitioner,

v.

**JULIE L. JONES, SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS,**

Respondent.
_____/

**JUDGMENT**

**THIS CAUSE** is before the Court following the Court's Order Adopting Report of Magistrate Judge (D.E. 32), Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (D.E. 1), Denying Certificate of Appealability, and Closing Case, entered March 13, 2018. (D.E. 43.) Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, it is hereby **ORDERED AND ADJUDGED** that:

Judgment is entered against Petitioner Eric Christopher Barrass and in favor of Respondent Julie L. Jones. This case remains CLOSED.

**DONE AND ORDERED** in Chambers at Miami, Florida this 13th day of March, 2018.

Joan A. Lenard

**JOAN A. LENARD**
**UNITED STATES DISTRICT JUDGE**

# A-4

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 14-24885-CIV-LENARD/WHITE

**ERIC CHRISTOPHER BARRASS,**

Petitioner,

v.

**JULIE JONES, SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS,**

Respondent.
_____/

**ORDER DENYING PETITIONER'S § 2254 PETITION; DENYING A CERTIFICATE OF APPEALABILITY; AND CLOSING CASE**

**THIS CAUSE** is before the Court on Eric Christopher Barrass' ("Petitioner") § 2254 Petition filed on December 29, 2014. (D.E. 1.) Petitioner attacks his conviction and sentence in F06-26018 (Eleventh Judicial Circuit for Miami-Dade County), arguing, in relevant part, that his constitutional right to due process was violated when the state court applied the Florida Rules of Evidence to preclude him from presenting evidence integral to his theory of defense.[1] Id. The undersigned referred this matter to Magistrate Judge Patrick White, who entered a Report and Recommendation on November 25, 2015. (D.E. 32.) Judge White recommends that the Court grant habeas relief as to claim one

[1] The Petitioner raised three additional claims in his § 2254 Petition. Judge White recommended that claims two, three and four be denied and Petitioner did not object to the Magistrate Judge's Report. Having reviewed the Report for clear error, see Thomas v. Arn, 474 U.S. 140, 150 & n.8 (1985), the undersigned adopts Judge White's conclusion that claims two, three and four be denied.

and order that the Petitioner either be retried or released within sixty (60) days. Id. Julie Jones, in her capacity as the Secretary of the Florida Department of Corrections, (hereinafter, "Respondent") filed objections to the Report on December 9, 2015. (D.E. 33.) Petitioner filed his Response to the State's objections on December 29, 2015. (D.E. 34.) The Court thereafter appointed the Federal Public Defender to represent Petitioner and file a supplemental response to the State's objections on his behalf. (D.E. 36.) Petitioner's Supplemental Response was filed on March 28, 2017. (D.E. 41.)

Having considered Petitioner's habeas claims, the Magistrate Judge's Report, the Respondent's Objections, Petitioner's initial and Supplemental Responses to Respondent's Objections, and the underlying record, the Court finds as follows.

## I. Background[2]

In 2006, Petitioner participated in a brawl with several other individuals. A firearm was discharged and the man with whom the Petitioner was fighting, Tim Cummings ("Cummings"), was shot. Shortly after the incident, Petitioner was arrested and charged with attempted first degree murder, aggravated assault with a deadly weapon and battery.

Petitioner's defense at trial was that his companion, Christopher Travis ("Travis"), actually shot Cummings. Petitioner concedes that he admitted to shooting Cummings; but

[2] The relevant facts are taken from the Magistrate's Report, the parties' pleadings and the underlying state court record.

asserts that he did so to protect Travis from going back to prison.[3] He maintains that he felt indebted to Travis, because Travis purportedly saved his life by shooting Cummings.

Travis allegedly admitted to multiple witnesses that he shot Cummings to prevent the Petitioner from getting seriously injured or killed during the brawl. Travis also gave a sworn statement to a private investigator admitting to the shooting. However, he refused to testify at Petitioner's trial, choosing instead to invoke his Fifth Amendment right against self-incrimination.

At trial, Petitioner attempted to present evidence of Travis' various confessions to the jury through the testimony of several individuals to whom Travis had confessed. The state trial judge excluded this evidence, finding that Travis' statements did not fall under any of the hearsay exceptions enumerated in Fla. Stat. § 90.804. Specifically, the state court concluded that Travis' statements were not against his penal interest because Travis stated he acted in defense of another – which was a full defense to the crime. The state court reasoned that a confession containing a complete defense is not against the confessor's penal interest.

At the conclusion of the trial, the jury found Petitioner guilty of attempted second degree murder and aggravated assault with a deadly weapon. On February 13, 2007, he was adjudicated guilty, see State of Florida v. Barrass, F-06-026018 (11th Judicial Circuit for Miami-Dade County) (D.E. 295 and 296) and sentenced to twenty-five years

[3] Travis was on probation at the time of the shooting.

imprisonment, id. at D.E. 294.[4] He appealed his conviction and sentence to the Florida Third District Court of Appeals, which affirmed the trial judge in a *per curiam* opinion. Petitioner then filed several post-conviction motions in state court – all of which were denied. Thereafter, he filed the instant Petition on December 29, 2014, seeking federal habeas relief. (D.E. 1.)

The undersigned referred this matter to Magistrate Judge White, who after reviewing the Petitioner's claims, the Respondent's briefing and the underlying state court record, recommends granting habeas relief and ordering that the Petitioner be retried or released within sixty (60) days. (D.E. 32.) The Respondent filed a single objection to the Magistrate Judge's Report, arguing that Chambers v. Mississippi, 410 U.S. 284 (1973) is distinguishable and that the state trial judge did not act contrary to clearly established federal law. (D.E. 33.) The Court will address Respondent's objection.

## II. Discussion

### A. Habeas Standards

Federal courts are authorized, in limited situations, to issue habeas corpus relief for persons in state custody. See Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, § 302(a), 110 Stat. 1248. The AEDPA provides, in relevant part, that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

[4] The full state court docket can be found at https://www2.miami-dadeclerk.com/cjis/casesearch.aspx.

> 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.

28 U.S.C. § 2254(d). Therefore, a state prisoner's § 2254(d) claims may only be granted in three situations: (1) the state court's decision "was contrary to" federal law then clearly established in the holdings of the Supreme Court, § 2254(d)(1); (2) the state court's judgment "involved an unreasonable application of" clearly established federal law, § 2254(d)(1); or (3) state court's decision "was based on an unreasonable determination of the facts" in light of the record before the state court, § 2254(d)(2). See Harrington v. Richter, 562 U.S. 86, 97–98 (2011); Williams v. Taylor, 529 U.S. 362, 412 (2000).

In Harrington, the Supreme Court stated that § 2254(d) is a part "of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." 562 U.S. at 103. Section 2254(d) establishes a "difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 171, 131 S. Ct. 1388, 1391, 179

L. Ed. 2d 557 (2011) (quoting Harrington, 562 at 102; Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)).

**B. Petitioner's Claim**

It is indisputable that criminal defendants have a clearly established constitutional right to present a complete defense:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.

Crane v. Kentucky, 476 U.S. 683, 690 (1986) (internal quotation marks omitted), accord Holmes v. South Carolina, 547 U.S. 319, 324 (2006). Petitioner asserts that the state court's decision to exclude evidence of Travis' prior confessions deprived him of his right to present a complete defense. The Court must decide whether the state court's evidentiary ruling triggers relief pursuant to § 2254.

As an initial matter, Petitioner's claim does not trigger § 2254(d)(2)'s "unreasonable determination of the facts" prong. Therefore, relief is unavailable under that provision. Nevertheless, the Court must determine whether habeas relief is appropriate under either the "contrary to" or "unreasonable application of" prongs of § 2254(d)(1).

The difference between § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses has been explained as follows:

> A state-court decision is contrary to [] clearly established precedents if it applies a rule that contradicts the governing

> law set forth in [the Supreme Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [the Supreme Court] but reaches a different result. A state-court decision involves an unreasonable application of [the Supreme] Court's clearly established precedents if the state court applies [the] Court's precedents to the facts in an objectively unreasonable manner.

Brown v. Payton, 544 U.S. 133, 141 (2005). In an attempt to fit his claim within the "contrary to" paradigm, Petitioner generalizes the state court's decision, arguing that it is contrary to the Supreme Court's precedents which establish the right to assert a complete defense.[5] However, the state court's evidentiary ruling did not directly "contradict" governing Supreme Court precedent or "reach a different result" based on facts that were "materially indistinguishable" from a Supreme Court case. The state court's evidentiary ruling was based on its reading of Fla. Stat. § 90.804 and did not turn on a question of federal law. Accordingly, Petitioner is not entitled to relief under § 2254's "contrary to"

[5] The Petitioner and the Magistrate Judge cite several cases for the proposition that state evidentiary rules may give way to constitutional concerns under certain circumstances. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (South Carolina's evidentiary rule that a third-party's guilt is only admissible if it is not too remote or speculative is reasonable on its face; however, the state court "radically changed and extended the rule" by focusing on the "the strength of the prosecution's case" and erred by excluding evidence of alleged statements of guilt made by a third-party); Rock v. Arkansas, 483 U.S. 44, 61 (1987) (rule prohibiting hypnotically refreshed testimony was unconstitutional because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections."); Chambers v. Mississippi, 410 U.S. 284, 302–303 (exclusion of hearsay statements critical to defense which "bore persuasive assurances of trustworthiness," coupled with refusal to permit cross-examination of the declarant, violated defendant's right to due process); Washington v. Texas, 388 U.S. 14 (1967) (holding that a state statute barring a person who had been charged as a participant in a crime from testifying in defense of another alleged participant unless the witness had been acquitted arbitrarily impinged upon a criminal defendant's right to present a full defense). However, each of these cases was decided on direct appeal. The analysis at this stage, given the constraints of § 2254, is significantly different.

clause. The Court must nonetheless decide whether Petitioner may seek relief pursuant to § 2254(d)(1)'s "unreasonable application" clause.

When considering whether the state court applied a rule that was unreasonable in light of established Supreme Court precedent, the habeas court should consider the rule's specificity. Harrington, 562 U.S. at 101. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Id. (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." Id. (quoting Knowles v. Mirzayance, 556 U.S. 111, 122 (2009)). Ever mindful of the deference federal courts must show to criminal judgments entered by state courts, the Supreme Court has stated that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision." Id.

Here, the clearly established federal rule asserted by the Petitioner – that criminal defendants have a constitutional right to present a criminal defense – is very general. The state court's ruling was a specific evidentiary ruling that arguably implicated Petitioner's constitutional right. However, the Supreme Court has never addressed whether the state court's evidentiary ruling – that testimony regarding a third-party's confession should be excluded if the confession provided for a complete defense – violates a criminal

defendant's right to present a complete defense. Therefore, the state court's specific evidentiary ruling is not an unreasonable application of general constitutional principles.

This conclusion is bolstered by the fact that multiple federal courts – including two courts of appeal – agree with the state court's application of the penal interest exception and have entered similar orders. See United States v. Henley, 766 F.3d 893 (8th Cir. 2014); United States v. Shryock, 342 F.3d 948 (9th Cir. 2003); United States v. Slatten, 865 F.3d 767 (D.C. Cir. 2017); Pierson v. Berghuis, 2013 WL 4067619 (W.D. Mich. 2013); Chahine v. McQuiggin, 2012 WL 2094407 (E.D. Mich. 2012). When federal courts widely disagree on a legal question, it is difficult to say that it is clearly established by the Supreme Court. See Carey v. Musladin, 549 U.S. 70, 76–77 (2006) (evidence that lower courts have "diverged widely" shows that a State court did not unreasonably apply clearly established federal law); Miller v. Colson, 94 F.3d 691, 698 (6th Cir. 2012) (noting that a "disagreement among the circuit courts is evidence that a certain matter of federal law is not clearly established"); Tunstall v. Hopkins, 306 F.3d 601, 611 (8th Cir. 2002) (observing that "[w]hen the federal circuits disagree on the application of [a Supreme Court precedent], it is difficult to say the [State] court's decision is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court"). It is equally difficult to argue that the rule of law proffered by the Petitioner is clearly established by the Supreme Court when federal courts routinely ignore or disagree with that rule. Here, federal courts have issued rulings that are virtually identical to the state court's evidentiary ruling in this

case. Presumably, these federal courts would not have excluded evidence of a third party's confession if a narrow application of the penal interest exception violated the Due Process and Confrontation clauses of the Constitution. Therefore, the Court finds that the state court's application of Fla. Stat. § 90.804's penal interest exception was not an unreasonable application of clearly established federal law. Accordingly, habeas relief must be denied.

## III. Conclusion

For the reasons set forth above, it is **ORDERED AND ADJUDGED** that:

(1) The Magistrate Judge's Report (D.E. 32) filed on November 25, 2015, is **ADOPTED IN PART AND REJECTED IN PART**;

(2) Respondent's Objection (D.E. 33) filed on December 9, 2015, is **GRANTED**;

(3) Petitioner's § 2254 Petition (D.E. 1) filed on December 29, 2014, is **DENIED** as to Claim One and **DENIED** as to all other claims;

(4) A certificate of appealability shall not issue; and

(5) This case is **CLOSED**;

**DONE AND ORDERED** in Chambers at Miami, Florida this 13th day of March, 2018.

Joan A. Lenard

**JOAN A. LENARD**
**UNITED STATES DISTRICT JUDGE**

# A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-CIV-24885-LENARD
MAGISTRATE JUDGE P.A. WHITE

ERIC CHRISTOPHER BARRASS, :

Petitioner, :

v. : **REPORT OF MAGISTRATE JUDGE**

JULIE JONES, :

Respondent. :

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Introduction

Eric Christopher Barrass, who is presently confined at Apalachee Correctional Institution in Sneads, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence in case number F06-26018, entered in the Eleventh Judicial Circuit Court of Miami-Dade County.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

The court has before it the petition for writ of habeas corpus with appendix of exhibits (volume I) [DE#1], Petitioner's memorandum of law in support thereof [DE#5], Petitioner's amended memorandum of law with appendix of exhibits (volume II) [DE##10, 11], Petitioner's response to an order to respond to the limitations period [DE#12], Respondent's response to an order to show cause with appendix of exhibits [DE##18, 20], Respondent's notices of filing transcripts [DE##21, 22, 23, 24], Petitioner's reply with appendix of exhibits (volume III) [DE##26, 27],

Respondent's supplemental response to the order to show cause [DE#28], and Respondent's additional appendix [DE#30].

Claims

Ground One: The trial court denied petitioner's constitutional due process right to present a defense under the Fifth, Sixth, and Fourteenth Amendments by excluding multiple confessions of a third party, including a sworn recorded statement admitting culpability as the actual shooter, as not against penal interest where statements were clearly inculpatory, contained requisite indicia of reliability and the declarant was unavailable due to invocation of his Fifth Amendment protection after being threatened by the state with charges in the instant case.

Ground Two: The trial court denied petitioner's constitutional due process right to present a defense under the Fifth, Sixth, and Fourteenth Amendments by excluding multiple confessions of a third party as not qualifying as excited utterances where the statements were made by declarant while still under the stress and excitement caused by the event, the statement was directly related to the event and declarant did not have time or capacity to reflect prior to making the statement as statements were made beginning just minutes after the shooting.

Ground Three: The trial court denied petitioner's constitutional due process right to present a defense under the Fifth, Sixths and Fourteenth Amendments by adopting, and allowing the State to adopt, factually contradictory positions in regards to the statement of Christopher Travis, the third party declarant who admitted under oath and to multiple individuals, responsibility for the shooting for which defendant was convicted thereby violating law of the case doctrine and estoppel principles and denying petitioner an evidentiary hearing on his post-conviction claim that under clearly established state law and applicable precedence in regards to newly available testimony, would have resulted in evidence being admitted that was unavailable at trial due to witness' invocation of his Fifth Amendment protections and the nature of the evidence is that which would require a new trial likely resulting in an acquittal or a significantly lesser sentence.

Ground Four: The trial court denied petitioner's constitutional due process rights under the Fifth, Sixth, and Fourteenth Amendments in regards to sentencing when it adopted factually contradictory positions in regards to the statement of Christopher Travis the third party declarant who admitted, under oath and to multiple individuals, responsibility for the shooting for which petitioner was convicted and sentenced had the court admitted the statements at trial or alternatively had adhered to law of the case and estoppel principles in petitioner's post-conviction claims, the requisite "beyond a reasonable doubt" threshold would not have been met in regards to the firearm s enhancement and minimum mandatory sentencing requirements under FL.ST. 775.087 (10-20-Life) resulting in a significantly lower sentence without mandatory provisions.

## Background[1]

Petitioner was charged by information with attempted first degree murder, and aggravated assault with a firearm. The charges stemmed from an incident wherein Petitioner became engaged in a fist fight with the victim, Tim Cummings, in the presence of multiple witnesses, some of who were also fighting with each other.

During the incident, multiple shots were fired. Petitioner was arrested at the scene, and stated that he was defending himself. Petitioner later provided a taped statement, wherein he admitted to the shooting.

Petitioner's defense at trial was that his companion, Christopher Travis, was the one who shot Cummings. Petitioner's theory was that he admitted to the shooting in order to protect Travis, because he believed Travis had saved his life.

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[1]The relevant procedural history of Petitioner's underlying criminal case is not in dispute. A detailed recitation thereof, with citations to the record, can be found in Respondent's response and supplemental response (DE##18, 28). The court thus sets forth here only those portions of the procedural history that are necessary and relevant to an understanding and resolution of the issues and claims raised in the instant petition. Unless otherwise noted, citations to exhibits are to the exhibits to Respondent's response.

Shortly after the incident, Travis admitted to multiple witnesses that he was the one who shot Cummings. Travis also then later gave a sworn statement to that effect to a private investigator. Prior to trial, however, Travis asserted his Fifth Amendment privilege, and refused to testify for the defense.

At trial, Petitioner unsuccessfully attempted to introduce Travis' statements that he was the real shooter. Petitioner then testified in his own defense, stating that he had decided to take full blame for the shooting in the hopes that Travis would not get in trouble. Petitioner testified that this was the reason for his post-arrest statement and that, other then getting beaten up, his statement about what he had done was not true.

The jury found Petitioner guilty of attempted second degree murder, and aggravated assault with a firearm. Petitioner was sentenced to 25 years in state prison on the first count and three (3) years on the second, the sentences to run concurrent with each other.

Petitioner appealed his conviction and sentence to Florida's Third District Court of Appeal, which affirmed in a *per curiam* decision. Thereafter, Petitioner unsuccessfully pursued a motion for DNA testing with the state trial court, a state motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, an amended 3.850 motion with four (4) supplements, and a state petition for writ of habeas corpus.

Petitioner now seeks relief from this court in the instant federal petition, which Respondent concedes is timely filed.

Exhaustion - Procedural Bar

Respondent asserts that the claims Petitioner seeks to raise in Grounds Three and Four of the instant petition were not properly exhausted in the state courts, and are now procedurally barred. Respondent further contends that, regardless, any portions of

Grounds Three and Four that were raised in the state courts did not allege a violation of Petitioner's federal constitutional rights.

It is well-settled that a state prisoner must exhaust his state remedies prior to challenging his conviction in a habeas petition filed in federal court. See 28 U.S.C. §2254(b), ©.[2] The rationale for the exhaustion requirement centers on the proper relationship between state and federal courts: "This rule of comity reduces friction between the state and federal court systems by avoiding the 'unseam[lines]' of a federal district court's overturning a state-court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." O'Sullivan V. Boerckel, 526 U.S. 838, 845 (1999) (alteration in original); see also Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995)(exhaustion requirement provides State the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights")(quoting Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)(citation omitted))

In order to ensure that state courts have the first opportunity to hear all claims, state prisoners are required "to

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[2]The terms of 28 U.S.C. §2254(b) and (c) provide in pertinent part as follows:

> (b)(1) 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 unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . .
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

present the state courts with the same claim [they urge] upon the federal courts." Picard, 404 U.S. at 275. "It is not sufficient merely that the federal habeas petitioner has been through the state courts . . . nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made." Kelley v. Sec'y for Dept. of Corr., 377 F.3d 1317, 1343-44 (11th Cir. 2004)(citing Picard, 404 U.S. at 275-76 and Anderson v. Harless, 459 U.S. 4, 6 (1982)). Rather, a habeas petitioner must have presented the federal constitutional claims in such a way that the state courts were alerted to the issues and had an opportunity to rule on them. Picard, 404 U.S. at 275-77; Jimenez v. Fla. Dep't of Corr., 481 F.3d 1337 (11th Cir. 2007). This requirement is met when the claims are presented to the state court "such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." Kelley, 377 F.3d at 1344-45 (citing Picard, 404 U.S. at 277). For instance, a habeas petitioner wishing to raise a federal issue in state court can do so "by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" Baldwin v. Reese, 541 U.S. 27, 32 (2004); see also McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005)(the exhaustion requirement must be applied with common sense and in light of its underlying purpose; that is, to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary). However, the exhaustion doctrine requires a habeas petitioner to do more than "scatter some makeshift needles in the haystack of the state court record." McNair, 416 F.3d at 1302-03.[3]

[3]In his initial state-court brief, the petitioner in McNair cited one federal case in a string of citations to state cases, and stated in a closing paragraph of his argument that there was a violation of his rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments. McNair, 416 F.3d at 1303.

Moreover, "[c]ursory and conclusional" sentences (unaccompanied by citations to federal law" ordinarily will not suffice. Zeigler v. Crosby, 345 F.3d 1300, 1308 n.5 (11th Cir. 2003).[4]

When a state allows review of a constitutional violation either on direct appeal or by collateral attack, a prisoner need only exhaust one avenue before seeking habeas corpus relief. Turner v. Compoy, 827 F.2 526, 529 (9th Cir. 1987). However, if a state "mandates a particular procedure to be used to the exclusion of other avenues of seeking relief," the correct avenue must be fully exhausted. Id. A state prisoner thus satisfies the exhaustion requirement by fairly presenting his claim to the appropriate state courts at all appellate stages afforded under state law. Baldwin, 541 U.S. at 29; O'Sullivan, 526 U.S. at 845. In sum, the exhaustion requirement is satisfied when a federal claim is fairly presented to the state's highest court, either on direct appeal or on collateral review. Reedman v. Thomas, 305 Fed.Appx. 544, 545 (11th Cir. 2008)(citing Castille v. Peoples, 489 U.S. 346, 351 (1989)).

The exhaustion requirement is also satisfied when a federal claim has not been presented (or fairly presented) to the state court, but it is clear that the claim would be prospectively procedurally barred under state law. Gray v. Netherland, 518 U.S. 152, 161-63 (1996)(citations omitted). In such a case, the petitioner no longer has a state-court remedy available within the

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The court found these references to federal law were insufficient to meet the fair presentment requirement, and noted that it was important that the petitioner never mentioned the applicable federal standards in his brief, but relied on state law for his arguments. Id.

[4]In his appellate state-court brief, the petitioner in Zeigler stated that he was "denied due process and a fair trial," but cited no cases discussing the United States Constitution. Zeigler, 345 F.3d at 1307. The court held that the petitioner failed to fairly present his federal claims to the state courts, noting that his state appellate brief could be interpreted as asserting a fair trial claim under the Due Process Clause of the Florida Constitution. Id. at 1308 n.5.

meaning of §2255(b), and the procedurally barred claim will thus be deemed exhausted by the federal courts. Id.[5] These claims will also be deemed procedurally defaulted by the federal courts, since the state courts would find them to be procedurally barred under state law. See, Mize v. Hall, 532 F.3d 1184, 1190 (11th Cir. 2008); Collier v. Jones, 910 F.2d 770, 773 (11th Cir. 1984). In keeping with the same rationale, the exhaustion requirement is further satisfied when a federal claim has in fact been presented to the state courts, but explicitly rejected on state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 731-32 (1991)(a habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion, since there are no state remedies any longer "available" to him). In both instances, however, the state procedural bar that gives rise to exhaustion may also provide an independent and adequate state-law ground for the conviction and sentence, and thereby preclude federal review of the procedurally defaulted claim. See, Gray, 518 U.S. at 161-62; Coleman, 501 U.S. at 729 n. 1, 730-31. In the first instance, the federal court must determine whether any future attempt to exhaust state remedies would be futile under the state's procedural default doctrine. Bailey v. Nagle, 172 F.3d 1299, 1303 (11th Cir. 2003).[6]

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[5]This is so because §2255(b)'s exhaustion requirement refers only to remedies still available at the time of the federal petition. Gray, 518 U.S. at 161-62; see also O'Sullivan, 516 U.S. at 848 (stating that the majority did not disagree with Justice Stevens' description of the interplay between the doctrines on exhaustion and procedural default).

[6]When a petitioner fails to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find his claims procedurally barred, then there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which petitioner actually presented his claims. Coleman, 501 U.S. at 735 n.1; see also Chambers v. Thompson, 150 F.3d 1324, 1327 (11th Cir. 1998)(if a petitioner failed to raise an issue in the state court and under state law would be procedurally barred from doing so, federal courts should apply the state procedural default law and hold the claim to be barred); Grubbs v. Singletary, 120 F.3d 1174, 1177-78 (11th Cir.1997)(same); Snowden v. Singletary, 135 F.3d 732, 736 (11th Cir.1998)("[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law

In the second instance, the federal court must determine whether the state's procedural default ruling rested on adequate state grounds independent of the federal question. See Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989).

A habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim in state court and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999).[7] To show prejudice, a petitioner must demonstrate there is a reasonable probability the outcome of the proceeding would have been different. See Crawford v. Head, 311 F.3d 1288, 1327-28 (11th Cir. 2002). Under exceptional circumstances, however, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, such as "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96. This exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see, also, Bousley v. United States, 523 U.S. 614, 623 (1998)("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992)("the miscarriage of

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procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief.").

[7]A meritorious claim of ineffective assistance of counsel can constitute cause. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000).

justice exception is concerned with actual as compared to legal innocence").[8]

Here, Respondent argues that Petitioner did not exhaust the claims he seeks to raise in Grounds Three and Four because Petitioner did not raise them in the appeal of the denial of his 3.850 motion. Moreover, Respondent contends that any portion of these claims that were exhausted did not allege a violation of Petitioner's federal constitutional rights.

In Ground Three, Petitioner alleges verbatim:

> The trial court denied petitioner's constitutional due process right to present a defense under the Fifth, Sixths and Fourteenth Amendments by adopting, and allowing the State to adopt, factually contradictory positions in regards to the statement of Christopher Travis, the third party declarant who admitted under oath and to multiple individuals, responsibility for the shooting for which defendant was convicted thereby violating law of the case doctrine and estoppel principles and denying petitioner an evidentiary hearing on his post-conviction claim that under clearly established state law and applicable precedence in regards to newly available testimony, would have resulted in evidence being admitted that was unavailable at trial due to witness' invocation of his Fifth Amendment protections and the nature of the evidence is that which would require a new trial likely resulting in an acquittal or a significantly lesser sentence.

DE#1. In support of this claim, Petitioner alleges that under the law of the case doctrine, estoppel principles, and the statute of limitations, Travis could no longer be prosecuted for the shooting, and therefore could no longer invoke any Fifth Amendment right. Petitioner further alleges that Travis could thus be compelled to

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[8]A prisoner claiming actual innocence as a means of escaping a procedural default "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror wold have found petitioner guilty beyond a reasonable doubt.'" House v. Bell, 547 U.S. 518, 536-37 (2006). And because claims of actual innocence generally require exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, the standard is demanding and in the vast majority of cases claims of actual innocence will rarely be successful. See, Id. at 537-38.

testify at an evidentiary hearing, that his compelled testimony would constitute newly-discovered evidence, and that this newly-discovered evidence would meet the standard for granting a new trial. According to Petitioner, the state trial court thus erred when it summarily denied his 3.850 motion seeking a new trial on this basis. Id.

Ground Three thus appears to be nothing other than a claim that the state trial court violated Petitioner's constitutional rights when it summarily denied his 3.850 motion. Indeed, in his reply, Petitioner concedes as much. See DE#26. However, the parties agree that Petitioner raised this ground in his 3.850 motion. See DE#1, p.14 (Ground Three, ¶(d)); DE#28, p.13. The court will thus accept for the sake of argument that Ground Three asserts some claim of newly-discovered evidence that bears on the constitutionality of Petitioner's detention that Petitioner also raised in his 3.850 motion.[9]

Review of the record reveals that Petitioner raised the following point on appeal from the denial of his 3.850 motion:

> THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON BARRASS' CLAIM THAT TRAVIS' PROFFERED TESTIMONY THAT HE, NOT BARRASS, SHOT CUMMINGS IS NEWLY DISCOVERED EVIDENCE WHERE BARRASS SWORE THAT TRAVIS IS NOW AVAILABLE AND WILL TESTIFY CONSISTENT WITH HIS PRETRIAL, SWORN STATEMENT THAT HE, NOT BARRASS, SHOT CUMMNINGS.

Exh.V. Thus, to the extent that Ground Three claims that the state trial court erred in summarily denying his 3.850 because Travis' testimony constituted newly-discovered evidence, Petitioner did exhaust this portion of Ground Three.

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[9]It is well-settled that federal habeas relief is available on the basis on newly-discovered evidence only where the evidence bears on the constitutionality of the petitioner's detention, not where the evidence goes only to guilt or innocence. See Swindle v. Davis, 846 F.2d 706, 707 (11th Cir. 1988) (citations omitted).

However, Respondent is correct that Petitioner did not thereby exhaust any federal constitutional claim. Rather, in his initial brief, Petitioner argued only that the state trial court erred in summarily denying his 3.850 motion under Florida law. Exh.V. Specifically, Petitioner argued that an evidentiary hearing is warranted under Florida law where a motion for post-conviction relief asserting newly-discovered evidence is facially sufficient and not conclusively refuted by the record, and further argued that his 3.850 motion met this standard. Id. And in support of this argument, Petitioner cited only to Florida statutes and Florida cases establishing the relevant standards under Florida law. Id. As such, Petitioner did not substantively brief or argue any federal issues bearing on the constitutionality of his detention that may have been asserted in the summarily-denied claims. Petitioner thus not only abandoned any such claims that he may have raised in his 3.850 motion by not raising them on appeal from the denial of that motion,[10] but he also thereby failed to "fairly present" them to the Third District Court of Appeal. Therefore, Petitioner did not exhaust his available state remedies with respect to any such claims for purposes of federal habeas corpus review. See 28 U.S.C. § 2254(b)(1), (c); Picard, 404 U.S. at 275-77. Moreover, any such claims are now prospectively procedurally barred pursuant to state law, because Petitioner cannot now take a second appeal from the denial of his 3.850 motion. Consequently, any federal claims asserted in Ground Three that Petitioner may

[10]Pursuant to Florida law, the movant in a state 3.850 proceeding for post-conviction relief must present legal argument in support of his claims in his initial brief on appeal following denial of the motion by the trial court; otherwise, the claims will be deemed abandoned, regardless of whether they were summarily denied by the trial court or not. See Ward v. State, 19 So.3d 1060, 1061 (Fla. 5th DCA 2009)(en banc); Watson v. State, 975 So.2d 572 (Fla. 1st DCA 2008)(same); Austin v. State, 968 So.2d 1049 (Fla. 5th DCA 2007)(same); Prince v. State, 40 So.3d 11 (Fla. 4th DCA 2010); Hammond v. State, 34 So.3d 58 (Fla. 4th DCA 2010); Williams v. State, 24 So.3d 1252 (Fla. 1st DCA 2009); see also, c.f., Marshall v. State, 854 So. 2d 1235 (Fla. 2003); Shere v. State, 742 So. 2d 215, 218 n.6 (Fla. 1999).

have raised in his 3.850 motion bearing on the constitutionality of Petitioner's detention are procedurally defaulted for purposes of federal habeas review. See Mize, 532 F.3d at 1190; Smith, 256 F.3d at 1138; Collier, 910 F.2d at 773.

Petitioner claims that he did exhaust his federal claims by raising and arguing them in his reply brief on appeal from the denial of his 3.850 motion. DE#26, p.2.[11] Specifically, Petitioner claims that he "argued the constitutional violations under" New Hampshire v. Maine, 522 U.S. 742, 749-55 (2001), Smith v. Groose, 205 F.3d 1045 (8th Cir. 2002), Carter v. State, 980 So.2d 473 (Fla.2008), MacFarland v. State, 929 So.2d 549 (Fla. 5th DCA 2006), Florida Dept. of Transp. v. Juliano, 801 So.2d 101 (Fla.2001), Swain v. State, 911 So.2d 140 (Fla. 3d DCA 2005), and United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997). However, review of Petitioner's reply brief reveals that Petitioner did not cite these cases in conjunction with any argument that his federal constitutional rights were somehow violated. See DE#11, Exh.R.[12] Rather, Petitioner cited these cases in support of his argument regarding why Travis could no longer be prosecuted for the shooting and could thus be compelled to testify, and that Petitioner was therefore entitled to an evidentiary hearing on his 3.850 motion. Id.

Regardless, the state court's failure to hold an evidentiary hearing on a petitioner's 3.850 motion is not a basis for federal habeas relief. Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir.1987). Therefore, insofar as this claim is based on the state court's failure to hold an evidentiary hearing, such failure is not

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[11]To the extent that Petitioner may mean to assert a claim of actual innocence in order to avoid the procedural bar, see DE#26, p.3, review of the record reveals that Petitioner cannot meet the demanding standard for such claims. See House, 547 U.S. at 537-38.

[12]Respondent was unable to locate Petitioner's reply brief and file it with the court (DE#28, p.8 n.2), but Petitioner has provided it (DE#11, Exh.R).

contrary to, or an unreasonable application of federal law. Anderson v. Sec'y, Dep't. of Corr., 462 F.3d 1319, 1330 (11th Cir.2006).

In Ground Four, Petitioner alleges verbatim:

> The trial court denied petitioner's constitutional due process rights under the Fifth, Sixth. and Fourteenth Amendments in regards to sentencing when it adopted factually contradictory positions in regards to the statement of Christopher Travis the third party declarant who admitted, under oath and to multiple individuals, responsibility for the shooting for which petitioner was convicted and sentenced had the court admitted the statements at trial or alternatively had adhered to law of the case and estoppel principles in petitioner's post-conviction claims, the requisite "beyond a reasonable doubt" threshold would not have been met in regards to the firearm s enhancement and minimum mandatory sentencing requirements under FL.ST. 775.087 (10-20-Life) resulting in a significantly lower sentence without mandatory provisions.

DE#1. In support of this claim, Petitioner alleges that the jury made a specific finding that he personally possessed and discharged a firearm causing bodily harm to the victim which, in turn, subjected him to a firearms enhancement at sentencing pursuant to Florida law. Petitioner further alleges that Travis' statements constituted newly-discovered evidence that would have exculpated him of the enhancement, and that the state trial court thus erred when it summarily denied his 3.850 motion. Id. Specifically, Petitioner alleges:

> Petitioner raised a claim of newly available evidence, under clearly established state law and precedent. relying on the law of the case and estoppel principles to forward his claims. During post-conviction proceedings, both the Court and the State adopted inherently factually contradictory positions in regards to Travis' statement, particularly in reference to the penal interest aspect of Travis' statements. Had the Trial Court adhered to estoppel principles and the law of the case regarding Travis' statements an evidentiary hearing would have been held. Upon this hearing, Travis would have testified

> that he, not Petitioner, shot Mr. Cummings and, under clearly established law and precedent, Petitioner would have received a new trial resulting in an acquittal or lesser sentence as Travis' testimony would provide the requisite reasonable doubt as to Petitioner's guilt and specifically the firearms enhancement.

Id. This claim is thus appears to be nothing more than a mere re-iteration of Ground Three that simply specifically takes issue with the firearms enhancement. Indeed, Petitioner admits that "the claim may be duplicitous," but argues that it "is exhausted and constitutional but should be considered a 'sub-claim' to claims 1, 2, and 3 if the Court feels otherwise." DE#26, pp.3-4. The court finds and concludes that this claim is a mere re-iteration and/or sub-claim of Ground Three (as opposed to Grounds One and Two). Consequently, this claim fails for the same reasons set forth in the discussion of Ground Three, above.

Standard of Review

A prisoner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001). A state court decision is "contrary to" or an "unreasonable application of" the Supreme Court's clearly established precedent within the meaning of § 2254(d)(1) only if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives

at a result different from Supreme Court precedent. Brown v. Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. A federal court must presume the correctness of the state court's factual findings, unless the petitioner overcomes them by clear and convincing evidence. See, 28 U.S.C. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). So long as neither the reasoning nor the result of the state court decision contradicts Supreme Court decisions, the state court's decision will not be disturbed. See Early v. Packer, 537 U.S. 3, 8 (2002).

Discussion

In Ground One, Petitioner claims verbatim:

> The trial court denied petitioner's constitutional due process right to present a defense under the Fifth, Sixth, and Fourteenth Amendments by excluding multiple confessions of a third party, including a sworn recorded statement admitting culpability as the actual shooter, as not against penal interest where statements were clearly inculpatory, contained requisite indicia of reliability and the declarant was unavailable due to invocation of his Fifth Amendment protection after being threatened by the state with charges in the instant case.

DE#1. In support of this claim, Petitioner alleges that the trial court erred in excluding Travis' statements that he was the real shooter. Specifically, Petitioner alleges that the state conceded that Travis was unavailable, that Travis' statements were clearly against his penal interest, and that the state trial court never even addressed the reliability of the statements. According to Petitioner, Travis' statements were properly admissible under the exception to the hearsay rule for statements against penal interest and, regardless, the state trial court's exclusion of them violated his right to due process and compulsory process.

Review of the record reveals that Petitioner sought to introduce Travis' statements as statements against penal interest under Fla. Stat. § 90.804. Conversely, the State sought to exclude the statements made by Travis for failing to satisfy the

requirements of § 90.804. The state trial court conducted hearings on the matter on January 25 & 31, 2007. At issue were oral statements Travis made to witnesses civilian witnesses Christina Bauer, Cassandra Chily, Shawn Baker and David Palacios around the time of the incident, as well as a sworn statement that Travis made to private investigator Stephen Roadruck a period of time thereafter. With regard to whether these were statements against penal interest within Florida's exception to the hearsay rule and under federal law, the court initially ruled that the fact that Travis had apparently stated that he acted in Petitioner's defense provided him with a justification for the shooting and that, therefore, the statements did not qualify for the exception. The court nevertheless heard testimony from several of these witnesses regarding the statements thereafter.

Stephen Roadruck, a former police officer and private investigator, testified that he met with Travis on August 19, 2007, approximately two weeks after the incident. Tr., 1/31/07, p.94. Travis was calm at the time. Id. at 95. Travis admitted that he was in fact the one who shot the person Petitioner was accused of shooting. Id. at 98. Travis said he was not willing to testify in court, but did agree to give a sworn, taped-recorded statement. Id. at 98-99. The statement was admitted and made part of the record. Id. at 96-97; 87-88.[13] After hearing this testimony, the court declined to change its ruling that Travis' statement to

[13]In the statement, Travis stated that, shortly after 6:00 am on August 6, 2007, he went with Petitioner and others to a house where Petitioner was having problems with two guys who were threatening him. DE#11, Exh.A. Travis stated that he knew Petitioner had a gun in his truck. Id. Travis further stated that, when they arrived, one of the guys punched Petitioner, knocked him to the ground. Id. The man continued hitting Petitioner, walked over to his own truck and got what appeared to be a gun from underneath the passenger seat, and walked back over pointing it at Petitioner. Id. Travis thought Petitioner was going to be killed, so he got the gun he knew Petitioner had in his truck and fired one shot in the back shoulder blade area of the man he thought was going to kill Petitioner. Id. Travis stated that at no time did Petitioner ever fire a gun. Id.

Roadruck did not qualify a statement against penal interest. Id. at 103.

Christina Bauer testified that she was a friend of Petitioner, and also of Christopher Travis. Id. at 106-07. On the morning of August 6, 2006, Ms. Bauer was at the location of the incident. Id. at 107-08. At one point, everyone ran outside and was running around. Id. at 108-09. Petitioner and Travis were there, and both left. Id. at 108. Shortly thereafter, Travis returned and was running around in circles, clearly scared and trying to hide. Id. at 110. When Ms. Bauer asked what happened, Travis stated that he had just saved Petitioner's life - that someone was trying to execute him. Id. More specifically, Travis stated that he had shot the person who was trying to "execute" Petitioner. Id. at 113. He then went and hid in a shed when the police began driving by. Id. at 114. A few weeks later, Ms. Bauer spoke to Travis again, Travis confirmed that he had shot somebody. Id. at 116. With regard to Petitioner having "turned himself in," Travis stated that perhaps because he had saved Petitioner's life, that Petitioner was trying to protect him. Id. at 117. After hearing this testimony, the court declined to change its ruling that Travis' statement to Ms. Bauer did not qualify as a statement against penal interest. Id. at 125.

Cassandra Chily also testified that she knew Petitioner, Travis, and the victim. Id. at 132-33. At about three or four in the afternoon on August 6, 2006, Travis went to Chily's house for a ride home. Id. at 133. Ms. Chily understood that the incident had occurred around 6 o'clock that morning. Id. at 134. Travis was difficult to understand because he was crying. Id. He was shaking, upset, and scared. Id. Travis told Chily about the fight, that Petitioner was unconscious, and that he had saved Petitioner's life by getting a gun and shooting the person who was going to kill Petitioner in the back. Id. The following day,

Travis was equally upset and told Chily he was afraid that he was going back to jail and was going to leave town due to the incident. Id. at 134-36 After hearing this testimony, the court similarly declined to change its ruling that Travis' statement to Ms. Chily did not qualify as a statement against penal interest. Id. at 144.

In light of the court's rulings with regards to the statements Travis made to Roadruck, Bauer and Chily, Petitioner proffered the depositions of Shawn Baker and David Palaciios, both of whom had testified under oath that they had a similar conversation with Travis on the day of or soon after the incident. Id. at 156-57. The state agreed that, although there were some inconsistencies between the statements, in all of the statements Travis was claiming he shot Cummings to save Petitioner. Id. at 157. After hearing argument, the court affirmed its ruling that none of the statements to Bauer, Chily, Baker, Palacios or Roadruck qualified as statements against interest because in every statement Travis consistently claimed that he shot Cummings in Petitioner's defense. Id. at 160-61.

The victim, Tim Cummings, testified at trial. Tr., 2/7/07. Cummings testified that, early in the morning of August 6, Petitioner drove by his house, and then returned about 15 minutes later. Id. at 373-74. Four men jumped out, and Cummings and Petitioner started wrestling and hitting each other. Id. at 375-76. During the fight, Cummnings heard nearby gunshots, but testified that they could not have been coming from Petitioner. Id. at 377, 435. Cummings began to run and, while he was running, he felt an electrical, stinging, burning sensation in his back. Id. at 378. While he was wrestling with Petitioner, Cummings never felt of saw Petitioner with a gun. Id. at 437, 442.

Brain Cespedes, who was involved in the incident, also testified. Id. at 454-509. Cespedes testified that Petitioner first drove by Cummings' house, and then returned about five to ten

minutes later with three other people in his truck. Id. at 464-65. Everyone got out, and Cummings and Petitioner started to fight. Id. One of Petitioner's companions, Mike Hannan, was standing nearby, and Cespedes and Hannan then started to fight. Id. at 464-65, 496). During this time, Cespedes was within five feet of Travis, and testified that he saw Travis fire two shots into the air from a silver gun. Id. at 467-68, 498-99. As the fight continued Cespedes heard another shot, which sounded different from the first shots. Id. at 468. He then saw Petitioner approach him, point a black gun in his face, and tell him to get off of Hannan. Id. at 469. On cross examination, Cespedes admitted telling police in a sworn statement that there was only one black gun. Id. at 500.

Dennis Phipps, a friend of Cummings and acquaintance of Petitioner's, also testified. Tr., 2/7/07, pp.516-17. Phipps testified that he was awakened on the morning of August 6 by the sound of two loud pops. Id. at 525-38. When he looked out his window, he saw Cespedes fighting with Hannan. Id. at 526-27, 552, 557. Phipps then saw Petitioner walk up to where Cespedes and Hannan were fighting, point a gun at them, and tell Hannan to get in the truck. Id. at 529-530, 552. Phipps did not see where Petitioner got the gun. Id. at 553. Phipps then heard Cummings screaming that he had been shot. Id. at 530-31.

Officer McQueen, the first officer to arrive on the scene, testified that after Petitioner was taken into custody, he heard Petitioner say that he was defending himself against someone who was hitting him. Tr., 2/8/07, p. 597. Detective Tangredi, the lead detective, interviewed Petitioner after providing Miranda warnings. Id. at 645. The tape recording of this interview was played for the jury, but apparently not made part of the record. Id. at 647-48; see also DE#20, Exh.D, p.10. However, it is

undisputed that, in it, Petitioner admits to shooting Cummings. See DE#20, Exh.D, p.10; Exh.E.

Petitioner testified in his own defense. Tr., 2/12/07, pp.989-1088. Petitioner testified that, on the morning of August 6, he drove by Phipps house and saw Cummings outside. Id. at 1013. Cummings waved Petitioner down, invited Petitioner to fight, and threatened Petitioner's family. Id. at 1013-15.

Petitioner, who is licensed to carry a firearm, drove to Travis' house and quickly got Travis, Mike Hannan, and Andrew Fields to return to where he saw Cummings, in the hopes of talking to Cummings and resolve the issue with the threats. Id. at 1016, 1022-3). After the men returned, Petitioner got out of his truck and told Cummings they needed to talk. Id. at 1024). At this point, Petitioner and Cummings began to fight. Id. at 1024-25. During the fight, Petitioner heard gunshots. Immediately after the shots, he saw Cummings go over him and run across the street. Id. at 1026.

Petitioner then saw Travis standing near the sidewalk holding Petitioner's black firearm. Id. When he asked Travis what he had done, Travis responded, "I shot him,... he had a gun." Id. Petitioner, who was still dazed, took his gun from Travis, disarmed it, and told Travis to get in the truck. Id. at 1027.

Petitioner then saw Cespedes on top of Mike Hannan, hitting him. Id. at 1027-28). Petitioner pointed his gun at Cespedes, told him to stop hitting Hannan, and yelled. Id. at 1028. Petitioner grabbed Hannan, told him to get in the truck, got in the truck himself, and drove off. Id. at 1028-9.

Petitioner dropped then men off at Travis' house, and then drove back to the scene of the fight. Id. at 1029. Petitioner testified that he realized Travis had saved his life, and believed Travis would get into trouble for what he had done. Id. at 1029-30. By the time he arrived back at the scene, he had placed

his firearm, two clips, and a single cartridge he removed from the chamber, on the floor of his car. Id. at 1031. As he pulled up, he was immediately taken into custody. Id.

Petitioner testified that, at this point, he had decided he would not let Travis get in trouble for saving his life. Id. at 1032. He decided to take full blame for the shooting, in hopes that Travis would not get in trouble. Id. Therefore, he told police that he had shot Cummings in self-defense. Id. Petitioner testified that, other than getting beaten up, his statement about what he had done was not true. Id. at 1034-5.

Florida Statute § 90.804(1) sets forth provisions relating to hearsay exceptions where the declarant is unavailable. Subsection (2) enumerates hearsay exceptions which are not excluded under S. 90.802, provided that the declarant is unavailable as a witness. Subsection (c) allows for such an exception in connection with statements against interest, and provides as follows:

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Florida courts have nevertheless recognized the "general principle that state evidence rules must, in some instances, yield to greater principles established by the Constitution . . . to require the admission of a confession by a third party." Curtis v. State, 876 So.2d 13, 19 (Fla. 1st DCA 2004).

In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Supreme Court held that due process requirements can supersede application of state hearsay rules, and

that where testimony contains sufficient indicia of reliability and directly affects the ascertainment of guilt or innocence, the strict application of the hearsay rule cannot be employed to disallow the evidence. In Chambers, the petitioner Leon Chambers wanted to present evidence that a third party, Gable McDonald, had committed the crime in question. Id. at 292. As part of this effort, Chambers attempted to present testimony of three witnesses to whom McDonald had confessed. Id. at 292-93. The trial court, upholding the state's hearsay objections, refused to allow the testimony. Id. at 293. Explaining that "the hearsay rule may not be applied mechanistically to defeat the ends of justice," the Supreme Court determined that the specific "facts and circumstances" of the case warranted admission of the testimony. Id. at 302-03. The exclusion of the evidence "coupled with the State's refusal to permit Chambers to cross-examine McDonald [due to Mississippi's "voucher rule"], denied him a trial in accord with traditional and fundamental standards of due process," which include "the right to a fair opportunity to defend against the State's accusations." Id. at 294. In deciding that Chambers should have been allowed to introduce the hearsay testimony of the three witnesses, the Court focused on the reliability of the out-of-court statements. The Court highlighted four factors to be considered in assessing reliability: (1) the time of the declaration and the party to whom the declaration was made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is really against a declarant's penal interest; and (4) the availability of the declarant as a witness, that is, whether the state could cross-examine him regarding his statements. Id. at 300-01. The court concluded that the testimony rejected by the trial court bore persuasive assurances of trustworthiness, and was also critical to Chambers' defense. Id. at 302. Under these circumstances, therefore, its exclusion

denied Chambers a trial in accord with traditional and fundamental standards of due process. Id.

Florida courts have consistently applied the constitutional analysis in Chambers, despite the exception in section 90.804(2)(c), Florida Statutes, for declarations against penal interest. Curtis, 876 So.2d at 20 (citations omitted). "As these opinions implicitly recognize, a trial judge may be required to admit a third-party confession under constitutional principles, even if it does not qualify as a declaration against penal interest under the state law of evidence." Id. at 21. In Curtis, Florida's First District Court of Appeal vacated the defendant's first degree murder conviction based on the trial court's exclusion of evidence that another suspect had confessed to the crime. Id. at 15-16. The defendant was the second suspect tried for the robber and murder of the victim. Id. at 16. The state had originally charged and tried Brenton Butler, who had been identified by the victim's husband and confessed to police. Id. The trial court granted the state's motion to exclude Butler's confession based on the state's argument that Butler was available to testify, and had given a deposition repudiating his earlier confession and denying that he shot the victim. Id. In deciding that Curtis should have been allowed to introduce Butler's confessions, the court applied the Chambers factors. Id. at 21-23. The court concluded that, although the confession did not meet all of the technical requirements of the declaration against penal interest exception to the hearsay rule, it bore sufficient indicia of reliability to be admissible in evidenced as a matter of constitutional law. Id. at 15. It was also a critical piece of evidence in the case, providing an important link in Curtis' theory of the case. Id. at 16, 23. Its exclusion thus violated Curtis' right to due process of law. Id. at 15.

Here, the balance of factors tips overwhelmingly in Petitioner's favor. Like the confessions in Chambers and Curtis, Travis' statements in this case provided sufficient indicia of reliability to be admissible as a matter of constitutional law, and were critical to Petitioner's theory of the case. Their exclusion under these circumstances thus violated Petitioner's right to due process of law.

With regard to the factors bearing on reliability, the first point that the Chambers court made was that the confessions were spontaneous. "By this, the Court did not mean that the statements had been blurted out, but rather that they were made without any compulsion and without apparent motive to lie. Curtis, 876 So.2d at 21. In Chambers, the excluded confessions were made in private conversations with friends shortly after the incident. 410 U.S. 292-93, 289, 300. In Curtis, the confessions were made to police. 876 So.2d at 18.

Here, it is undisputed that Travis' statements to Bauer, Chily, Baker and Palacios were statements made to friends shortly after the incident. They were also made without any compulsion and without any apparent motive to lie. They thus bear indicia of reliability, insofar as they qualify as "spontaneous" within the meaning of Chambers. See Chambers, 410 U.S. at 300; Curtis, 876 So.2d at 21. Travis' statement to Roadruck is more akin to a confession made to a police officer, which may be considered reliable to the extent that it subjects the declarant to prosecution. See Curtis, 876 So.2d at 21 (citations omitted); see also Jones v. State, 709 So.2d 512, 525 (Fla.1998)(equating confession made to police with confession made spontaneously to a friend).

The second factor the Chambers court relied upon was that the excluded confessions were corroborated by some other evidence in the case. Here, as in Chambers, the "sheer number of independent

confessions" provides additional corroboration for each. See Chambers, 410 U.S. at 300. The fact that Cespedes saw Travis with a gun immediately before Cummings was shot similarly corroborates his confessions. Id.

Respondent argues that Travis' statements were not properly corroborated because Brian Cespedes' testimony "creates circumstances to indicate that [Travis] shot his silver gun in the air and that Petitioner then used his gun to shoot the subsequent shots which contained the one that hit Cummings." DE#28, p.21. This argument assumes Travis did in fact have his own silver gun. However, Cespedes could have been mistaken. The fact that Cespedes heard shots which he thought sounded different does not change the analysis. Cespedes could have been mistaken about that as well. Indeed, as set forth above, Cespedes admitted on cross-examination that he told police in a sworn statement that there was only one black gun.

What Respondent argues, in essence, is that Cespedes' testimony could support the conclusion that Petitioner was the shooter. However, that is not the relevant inquiry. With regard to the second factor, the relevant inquiry is whether the confession is corroborated by "some other evidence in the case." Chambers, 410 U.S. at 300. As Chambers illustrates, the existence of evidence potentially implicating the defendant does not mean that a confession is not "properly corroborated."

Chambers is similar to the instant case insofar as it involved a shooting in a crowd, where multiple shots were fired and there was conflicting testimony as to what had occurred. See 410 U.S. at 285-86. One witness testified that he saw Chambers fire the fatal shot, while another was sure that he did not. Id. There was, however, evidence that the third party was seen with a gun immediately after the shooting, and proof that he did in fact own a weapon of the caliber that shot the victim. Id. at 300. The

court concluded that this provided additional corroboration for the confession. Id.

Here, there is no dispute that Travis was seen in possession of a firearm, apparently discharging it into the air, immediately before Cummings was shot. The fact that Cespedes' testimony could support the conclusion that there were two guns does not render Cespedes testimony "uncorroborative" of Travis' confession. As noted above, Cespedes could have been mistaken, and admitted on cross-examination that he had told police there was only one black gun. Moreover, there was never any second or silver gun recovered. Simply stated, the fact remains that Travis was seen with a gun immediately before Cummings was shot, which is "some other evidence" corroborating his confession. See Chambers 410 U.S. at 300.

Respondent also argues that Travis' statements were not properly corroborated because they were "inconsistent as to crucial facts such as time and events." DE#28, p.20. Specifically, Respondent argues that in his statements to Roadruck, Bauer, Chily, and Baker, Travis claimed that he observed Cummings with a gun at Petitioner's head, so he ran to get Petitioner's gun to save his life, but that in his statement to Palacios Travis said that he saw Petitioner getting badly beaten, so he ran to get Petitioner's gun. Id. Assuming this was the substance of Travis' statement to Palacios,[14] this is a single alleged difference that does not render Travis' statements unreliable under the facts and circumstances of this case. Indeed, this difference does not even necessarily render Travis' statement to Palacios inconsistent with his statements to the other witnesses. It is undisputed that Petitioner and Cummings were engaged in a fight immediately before the shooting. Regardless, the fact that one of Travis' five

[14]Although they were made part of the state-court record, it appears that Respondent had not filed Bauer, Chily, Baker and Palacios' depositions.

statements differed slightly in this regard does not mean that they were not "properly corroborated." See Curtis, 876 So.2d at 18 (trial court erred in excluding evidence that another person confessed to the crime, despite the fact that the person had given a written confession, which differed in details from previous oral confession).

Whether Travis' confession was truly a statement against penal interest within scope of the third Chambers' factor presents somewhat of a paradox. Travis' statements were "in a very real sense self-incriminatory," Chambers, 410 U.S. at 301, insofar as they inculpated him in the shooting. Travis was not vague about his role or what he had done, nor did he attempt to shift the blame to Petitioner, but rather he categorically stated that he was the one he was the one who shot Cummings. See Curtis, 876 So.2d at 22 ("Butler categorically stated that he was the one who shot Mrs. Stephens. There can be no doubt that this statement was inculpatory."). However, the Chambers court also noted that the statements in that case were "unquestionably against interest." See 410 U.S. at 301. In assessing this factor, the Chambers Court considered it important that declarant "stood nothing to benefit by disclosing his role in the shooting . . . and . . . must have been aware of the possibility that disclosure would lead to criminal prosecution." 410 U.S. at 301.

Respondent argues that Travis' statement was thus not a statement against penal interest, because it included facts that provided a potential defense. This was the trial court's basis for excluding Travis' statements as not against his penal interest under the Florida Rules of Evidence. As set forth above, it is undisputed that Travis consistently stated that he had acted in Petitioner's defense, and that he had saved Petitioner's life because someone was going to "execute" Petitioner. However, whether Travis' statements contained facts that might have provided

him with a *defense* is not the relevant inquiry for purposes of determining whether Travis' statements were admissible as a matter of constitutional law. See Chambers, 410 U.S. at 301. Rather, the question is whether Travis stood to benefit anything, and whether he must have subjectively been aware *of the possibility that his statements could lead to criminal prosecution*. Id.

Here, the record discloses nothing that Travis would have to gain by taking responsibility for the shooting. Moreover, Travis must have been aware of the possibility that his statements could be against his interest. The fact that someone claims self-defense does not preclude criminal prosecution. Moreover, it is undisputed that Travis was on probation at the time of the incident. And as set forth above, Chily testified that Travis told her that he was afraid he was going back to jail, and was going to leave town due to the incident. Under these circumstances, the testimony rejected by the trial court was well within the basic rationale of the exception for declarations against interest. See Id. at 301 (testimony should have been admitted where, *inter alia*, declarant told witness not to "mess him up" after confessing); see also Wrighter v. State, No. 08-99-00109-CR, 2003 WL 318527, *3-4 (Tex. App. - El Paso, Feb. 13, 2003)(affirming trial court's admission of co-perpetrator's hearsay statement admitting murder although claiming self-defense as statement against penal interest)(unpublished opinion).

The final part of the Chambers test asks whether the declarant is available for cross-examination. In Chambers, the declarant was present in the courtroom and under oath, and the Court deemed it significant that he could have been cross-examined by the state, and his demeanor and responses weighed by the jury. Here, Travis was unavailable for cross-examination, having taken the Fifth Amendment. Petitioner's case thus differs from Chambers in this regard. However, the Chambers factors are not exhaustive or

absolute, and therefore the declarant's unavailability for cross-examination is not dispositive. See Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004)(applying Chambers factors and concluding defendants' due process rights were violated by exclusion of third-party statements that were both reliable and crucial to the defense where declarant had invoked the Fifth Amendment). Indeed, in Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (per curiam), the Supreme Court applied the Chambers rationale when the declarant was not available for cross-examination.

In sum, the hearsay statements at issue here (1) were made "under circumstances that provided considerable assurance of their reliability;" and (2) were critical to Petitioner's defense that the confessing party committed the crime. See Chambers, 410 U.S. at 289, 300-02. Not only were Travis' statements reliable, they were material and would have substantially bolstered Petitioner's claims that Petitioner took responsibility for the shooting in order to protect Travis. Under these facts and circumstances, the Florida courts' mechanistic application of the hearsay rule and exclusion of Travis' statements denied Petitioner a trial "in accord with traditional and fundamental standards of due process." See Id. at 302. The state court's disposition of this claim is thus in conflict with clearly established federal law and objectively unreasonable in this case. Consequently, petitioner is entitled to federal habeas corpus relief on this claim. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405-06.

In Ground Two, Petitioner claims verbatim:

> The trial court denied petitioner's constitutional due process right to present a defense under the Fifth, Sixth, and Fourteenth Amendments by excluding multiple confessions of a third party as not qualifying as excited utterances where the statements were made by declarant while still under the stress and excitement caused by the event, the statement was directly related to the event and declarant did not have time or capacity to reflect prior to making the statement as statements were made

beginning just minutes after the shooting.

In support of this claim, Petitioner alleges that the trial court erred in excluding Travis' statements to Bauer, Chily, Baker and Palacios that he was the real shooter. Specifically, Petitioner alleges that the state court concluded that the statements did not qualify as excited utterances because Travis had time to engage in reflective thought. According to Petitioner, Travis' statements were properly admissible under the exception to the hearsay rule for excited utterances and, regardless, the state trial court's exclusion of them violated his right to due process and compulsory process.

Review of the record reveals that Petitioner also sought to introduce Travis' statements to Bauer, Chily, Baker and Palacios as excited utterances under Fla. Stat. § 90.803. Conversely, the State sought to exclude the statements made by Travis for failing to satisfy the requirements of § 90.803. After the January 2007 hearing on the matter, the trial court granted the State's motion to exclude the statements, holding that they failed to meet the statutory requirements for admission under the exception for excited utterances to the hearsay rule.

Florida Statute § 90.803(2), defines an excited utterance as follows:

> A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In State v. Jano, 524 So. 2d 660, 661 (Fla. 1988), the Florida Supreme Court explained that the essential elements necessary to fall within the excited utterance exception to the hearsay rule are that: (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must be

made while the person is under the stress of excitement caused by the event.

As with Ground One, whether Travis' statements to Bauer, Chily, Baker and Palacios qualified as excited utterances was an evidentiary ruling. Federal courts possess only limited authority to consider state evidentiary rulings in habeas corpus proceedings. Burgett v. Texas, 389 U.S. 109, 113-114, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); Estelle v. McGuire, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)("It is not the province of a federal court to reexamine state-court determinations of state-law questions."). Absent a showing that the exclusion of the evidence violated a specific constitutional guarantee, therefore, a federal court can issue a writ of habeas corpus on the basis of a state court evidentiary ruling only when the ruling was of such magnitude as to deny the defendant a fundamentally fair trial See Boykins v. Wainwright, 737 F.2d 1539, 1544 (11th Cir. 1984). To render a state-court proceeding fundamentally unfair, the excluded evidence must be "material in the sense of a crucial, critical, highly significant factor." Id. Moreover, such trial court errors are subject to the harmless error analysis and will not be the basis of federal habeas relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

Here, it cannot be said that state court's exclusion of the statements to Bauer, Chily, Baker and Palacios on the basis that they did not qualify as excited utterances denied Petitioner a fundamentally fair trial. Initially, this may seem counter-intuitive in light of the court's conclusion in Ground One, above, that exclusion of the same statements did violate Petitioner's due process rights. However, as set forth in the discussion of Ground One above, the reason the statements were admissible as a matter of constitutional law is because they bore sufficient indicia of

reliability as statements against penal interest. See Chambers, 410 U.S. at 302 (stating that the testimony rejected by the trial court was "well within the basic rationale of the exception for declarations against interest"). The same cannot be said of Petitioner's statements as excited utterances.

It is true that Travis was apparently scared and upset when he made the statements to Bauer, Chily, Baker and Palacios.[15] However, that alone does not bring his statements to them within the basic rationale of the exception for excited utterances. Rather, a key factor bearing on the reliability of a statement as an excited utterance is whether the statement was made before the declarant had an opportunity to reflect and deliberate. See Advisory Committee's Note on Fed.R.Evid. 803(2)(stating that the theory behind the exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication"); Jano, 524 So. 2d 661 (stating that essential elements of the exception include that the statements have been made before there was time to contrive or misrepresent).

Here, review of the record reveals that the state court's determination that the statements were made after Travis had an opportunity to engage in reflective thought was not unreasonable. As such, the statements did not fall "well within the basic rationale" of the exception for excited utterances to make them admissible as a matter of constitutional law. See Chambers, 410 U.S. at 302. Stated another way, had Travis' statements to Bauer, Chily, Baker and Palacios not borne sufficient indicia of reliability as statements against interest, their exclusion would

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[15]As previously noted, it appears that Respondent has not filed Bauer, Chily, Baker and Palacios' depositions. However, as set forth in the discussion of Ground One, above, Bauer and Chily testified at the hearings with regard to the circumstances of Travis statements to them, and Petitioner proffered that the statements to Baker and Palacios were substantially similar.

not have denied him due process because they did not bear sufficient indicia of reliability as excited utterances.

Based on the foregoing, the state court's disposition of this claim is not in conflict with clearly established federal law or based on an unreasonable determination of the facts. Consequently, petitioner is not entitled to federal habeas corpus relief on this claim. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405-06.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts (hereinafter "Habeas Rules"). Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petitioner's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the petitioner

can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that some of Petitioner's claims are barred on procedural grounds and that one of Petitioner's remaining claims fails on the merits, the court considers whether Petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find debatable the correctness of the court's procedural rulings. The court further concludes that reasonable jurists would not find the court's treatment of Petitioner's remaining claim debatable and that none of the issues are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84; see also Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); Rose, 252 F.3d at 684.

## Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be conditionally GRANTED based on the denial of Petitioner's right to due process as claimed in Ground One, and that the State either release Petitioner from

incarceration, or grant him a new trial within 60 days. It is further recommended that this petition for writ of habeas corpus be DENIED on all other grounds, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections to the recommendation that no certificate of appealability be issued.

SIGNED this 24th day of November, 2015.

UNITED STATES MAGISTRATE JUDGE

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# A-6

13 So.3d 476 (Table)
Unpublished Disposition
(The decision of the Florida District Court of Appeal is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
District Court of Appeal of Florida, Third District.

Eric Christopher BARRASS, Appellant,
v.
The STATE of Florida, Appellee.

No. 3D07–1144.
|
July 15, 2009.

An Appeal from the Circuit Court for Miami–Dade County, Leonard E. Glick, Judge.

**Attorneys and Law Firms**

Robbins, Tunkey, Ross, Amsel, Raben & Waxman and Benjamin S. Waxman, for appellant.

Bill McCollum, Attorney General, and Linda S. Katz, Assistant Attorney General, for appellee.

Before, WELLS, SUAREZ, and CORTIÑAS, JJ.

**Opinion**

PER CURIAM.

*1 Affirmed.

**All Citations**

13 So.3d 476 (Table), 2009 WL 2055209

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