No.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL PRANCE,

Petitioner,

v.

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

Respondent.

On Petition for a Writ of Certiorari
to The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is a Sixth Amendment right to counsel during plea withdrawal proceedings?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Michael Prance (Petitioner), Dane K. Chase, Esquire (Petitioner's Counsel), and Ashley Moody (Attorney General, State of Florida).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Amendments

Statutes

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeal, *infra*, is attached as Appendix B.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1291, was entered on May 8, 2019. However, a timely motion for reconsideration was filed and not denied until July 23, 2019. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF FACTS

On July 7, 2009, the State Attorney of the Sixth Judicial Circuit in and for Pinellas County, Florida, filed an information in case number 09-12774, charging Mr. Prance with robbery and grand theft of a motor vehicle in violation of section 812.13(2)(c), Florida Statutes (2009), and section 812.014, Florida Statutes (2009), respectively. On July 24, 2009, an information was filed in case number 09-13740, charging Mr. Prance

with burglary in violation of section 810.02(4)(a), Florida Statutes (2009). On December 1, 2010, Mr. Prance pled guilty as charged.

A sentencing hearing was held on December 9, 2010, during which Mr. Prance moved to withdraw his guilty plea arguing, *inter alia*, his plea was induced by counsel's erroneous assurance that he would receive a sentence of no more than 15 years imprisonment if he pled guilty. The trial court then proceeded with a hearing on Mr. Prance's motion where Mr. Prance represented himself, and where both Mr. Prance and his trial counsel testified under oath as party opponents. The trial court ultimately denied Mr. Prance's Motion, and sentenced him to a total of 30 years imprisonment.

Mr. Prance then appealed to the Second District Court of Appeal, State of Florida, and argued that the trial court failed to hold a hearing in conformance with *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) and that Mr. Prance therefore had not knowingly and voluntarily waived his right to counsel during the motion to withdraw plea proceedings, and, as such, Mr. Prance was entitled to have his Judgment and Sentence reversed, and to the appointment of counsel to assist him with his motion to withdraw plea. However, his appeal was Per Curiam Affirmed without explanation.

Thereafter, Mr. Prance filed a Petition under 28 U.S.C. § 2254 and a Memorandum of Law in Support thereof, arguing the state court's denial of relief on his *Faretta* claim was contrary to, and/or constituted an unreasonable application of clearly established federal law, and, as such, he was entitled to federal habeas relief.

The district court then proceeded to examine whether Mr. Prance had been denied his right to counsel during his sentencing and motion to withdraw plea proceedings separately. With respect to the motion to withdraw plea proceedings, the district court denied relief finding that "[s]ince the Supreme Court has not decided that the Sixth Amendment right to counsel adheres to a plea withdrawal hearing, the state court's decision on the claim that the trial court failed to conduct a *Faretta* hearing is not contrary to or an unreasonable application of federal law as clearly established by the Supreme Court." *Id.* at 14. The district court then denied Mr. Prance a certificate of appealability and in forma pauperis status for appeal.

Mr. Prance then filed a Notice of Appeal and Motion for a Certificate of Appealability in the Eleventh Circuit Court of Appeal. However, the Eleventh Circuit denied Mr. Prance's Motion, finding that Mr. Prance had failed to demonstrate that precedent from The United States Supreme Court establishes that there is a Sixth Amendment right to counsel during a motion to withdraw plea proceeding and, even if such a right existed, Mr. Prance had failed to demonstrate prejudice.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT THE SIXTH AMENDMENT RIGHT TO COUNSEL EXTENDS TO PLEA WITHDRAWAL PROCEEDINGS.

At issue in this Petition is whether there is a Sixth Amendment right to counsel during a motion to withdraw plea proceeding.

This Court has explained that criminal defendants have a right to counsel at all "critical stages" of the proceeding, and must be provided counsel at all critical stages unless they have knowingly and intelligently relinquished the right to counsel. *See, Iowa v. Tovar*, 541 U.S. 77, 80–81, 124 S. Ct. 1379, 1383, 158 L. Ed. 2d 209 (2004)("The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process."); *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975) ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits.") (citations omitted). A critical stage is any stage in the proceeding which holds "significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 696, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914 (2002).

With respect to the issue of whether a criminal defendant enjoys the right to counsel during a motion to withdraw plea proceeding, "[e]very court of appeals that has considered the question has concluded that a plea withdrawal hearing is a 'critical stage' of the proceedings." *Fiorito v. United States*, 821 F.3d 999, 1005 (8th Cir. 2016)

(citing, *Hines v. Miller*, 318 F.3d 157, 167 (2d Cir.2003) (Winter, J., dissenting) (collecting cases); *Forbes v. United States,* 574 F.3d 101, 106 (2d Cir.2009) ("A motion to withdraw a guilty plea is a critical stage of a criminal proceeding."); *United States v. Segarra–Rivera,* 473 F.3d 381, 384 (1st Cir.2007) (same); *United States v. Garrett,* 90 F.3d 210, 212 (7th Cir.1996) (same); *United States v. Crowley,* 529 F.2d 1066, 1069 (3d Cir.1976) (same); *United States v. Joslin,* 434 F.2d 526, 529–30 (D.C.Cir.1970) (same); *See also, Berry v. State,* 630 So.2d 127, 129 (Ala.Crim.App.1993); *Lewis v. United States,* 446 A.2d 837, 841 (D.C.1982); *People v. Skelly,* 28 A.D.2d 728, 281 N.Y.S.2d 633, 634 (1967); *Fortson v. State,* 272 Ga. 457, 532 S.E.2d 102, 104 (2000); *People v. Holmes,* 12 Ill.App.3d 1, 297 N.E.2d 204, 206 (1973); *Martin v. State,* 588 N.E.2d 1291, 1293 (Ind.Ct.App.1992); *Beals v. State,* 106 Nev. 729, 802 P.2d 2, 4 (1990); *Randall v. State,* 861 P.2d 314, 316 (Okla.Crim.App.1993); *Browning v. Commonwealth,* 19 Va.App. 295, 452 S.E.2d 360, 362 (1994); *State v. Harell,* 80 Wash.App. 802, 911 P.2d 1034, 1035 (1996); *Kepford v. State*, 64 So. 3d 189, 192 (Fla. 2d DCA 2011).

Given that this Court has explicitly held that a criminal defendant has a right to counsel at all critical stages of a proceeding, which it has described as any stage of the proceedings which holds "significant consequences for the accused," *see, Bell*, 535 U.S. at 696, 122 S. Ct. at 1851, it cannot reasonably be said that criminal defendants have no right to counsel during a motion to withdraw plea proceeding. More specifically, no reasonable argument could be made that a motion to withdraw plea proceeding does not hold "significant consequences" for a criminal defendant, as the outcome of such

proceedings determines whether the defendant will face sentencing or receive a trial to determine his guilt on his purported offenses. The proposition that a criminal defendant enjoys the right to counsel during a motion to withdraw plea proceeding has been universally accepted by courts across the nation for decades, and the Eleventh Circuit has offered no explanation how a jurist of reason could conclude no such right exits under this Court's current precedent. Accordingly, this Court should take this opportunity and establish that the Sixth Amendment right to counsel extends to plea withdrawal proceedings such that the complete denial of counsel at such a proceeding is per se reversible. *See, Tovar*, 541 U.S. at 80–81, 124 S. Ct. at 1383; *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541; *Bell*, 535 U.S. at 696, 122 S. Ct. at 1851; *see also, United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984) (Prejudice is presumed where there is a complete denial of counsel); *United States v. Roy*, 855 F.3d 1133, 1144 (11th Cir. 2017), *cert. denied,* 138 S. Ct. 1279, 200 L. Ed. 2d 475 (2018) ("prejudice is to be presumed, and therefore the harmless error rule does not apply, when a criminal defendant has been completely denied the right to counsel for a critical stage of the trial, which is an error that contaminates the entire proceeding.") (citing, *Cronic*, 466 U.S. at 659 & n.25, 104 S.Ct. at 2047 & n.25).

The question then becomes why should this Court expend resources to make explicit that which is universally understood? The answer to that question lies in how federal claims raised by state inmates are reviewed in federal court. Pursuant to the Anti-Terrorism and Effective Death Penalty Act:

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

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) **resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or**
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2) (emphasis added).

Regrettably, in practice, the circuit courts have taken the view that regardless of how clear it is the right to counsel extends to plea withdrawal proceedings, until this Court states the obvious, state courts remain free to deny counsel during such proceedings. *See, e.g., Hines*, 318 F.3d at 163 (2d Cir. 2003) (Denying habeas relief over Justice Winter's dissent because The Supreme Court has not addressed the issue of a criminal defendant's right to counsel during a plea withdrawal proceeding); *Peters v. Chandler*, 292 F. App'x 453, 457–58 (6th Cir. 2008) (Denying habeas relief over Justice Clay's dissent because the issue of whether a criminal defendant enjoys the right to counsel during a plea withdrawal proceeding has not been addressed by The United States Supreme Court). Mr. Prance is merely the latest to be denied relief on this issue, not because he is wrong, but because this Court simply hasn't taken the time to state the obvious. Respectfully, the time is now for this Court to make explicit that which is already known; the Sixth Amendment right to counsel extends to plea withdrawal proceedings. Simply put, an opinion from this Court which explicitly states that the Sixth Amendment right to counsel extends to plea withdrawal proceedings is

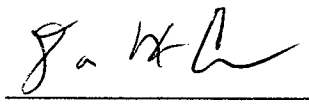
necessary to insure that state court defendants enjoy the full panoply of rights guaranteed them by the Sixth Amendment that federal defendants do.

Consequently, this Court should grant the instant petition for writ of certiorari, unequivocally establish that the Sixth Amendment right to counsel applies during plea withdrawal proceedings, and ultimately order that a new motion to withdraw plea proceeding be held where Mr. Prance is represented by counsel. *See, Tovar*, 541 U.S. at 80-81; *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541; *Fiorito*, 821 F.3d at 1005; *Cronic*, 466 U.S. at 659.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Prance's Petition for Writ of Certiorari, and establish that the Sixth Amendment right to counsel extends to plea withdrawal proceedings.

Respectfully Submitted,



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INDEX TO APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL J. PRANCE,

Applicant,

v. CASE NO. 8:15-cv-681-T-23AAS

SECRETARY, Department of Corrections,

Respondent.
_____/

ORDER

Michael J. Prance through counsel applies under 28 U.S.C. § 2254 for the writ of habeas corpus (Doc. 1) and challenges the validity of his state convictions for robbery, grand theft of a motor vehicle, and burglary of a structure. The respondent admits the application's timeliness. (Doc. 5 at 4) Numerous exhibits ("Resp. Ex. __") support the response. (Doc. 7) Prance's habeas counsel replied. (Doc. 8) The respondent correctly argues that Prance fails to prove entitlement to relief.

FACTS[1]

Prance was charged with robbery and grand theft and, in a separate information, with burglary of a structure. After trial began on the robbery and grand theft charges, Prance entered a guilty plea both to those charges and to the burglary

[1] This factual summary derives from the transcript of the plea hearing and the initial brief on direct appeal. (Resp. Exs. 4 and 8)

charge, but with no agreement on the sentence. The state court thoroughly questioned Prance to ensure that he was pleading voluntarily, knowingly, and intelligently. Prance advised that he understood that, if he qualified as a habitual offender, the state court could sentence him to a maximum of fifty years with a fifteen-year mandatory minimum prison term as a prison releasee re-offender. (Resp. Ex. 4 at 252)

According to the factual basis (Resp. Ex. 4 at 254–56) provided to support the robbery and grand theft charges, on June 18, 2009, between 1:00 p.m. and 1:15 p.m. Prance stole a 1999 Ford truck with a trailer. Prance drove the truck to the Seminole mall. Wearing sunglasses and carrying a backpack — both taken from the truck — Prance entered the RBC bank in the mall about 1:48 p.m., demanded money, and stated he would shoot and kill the teller if Prance was not given the money. Prance received $2,882 and a dye pack. As Prance fled the scene in the stolen pick-up truck, bank employees saw the dye pack explode and observed the last digits of the license plate, which matched the license plate on the trailer.

The truck was discovered about fifteen minutes later in a parking lot on Seminole Boulevard. Prance entered a bar and then a pool hall, after which he was arrested while attempting to leave on a bus. Prance had red dye on his hair, face, and hands. He possessed the stolen backpack, which contained the cash from the robbery, the dye pack, and a wallet belonging to a landscaping service employee.

Prance was wearing the same shoes and pants captured on the bank's video surveillance. Bank employees identified Prance from a photo pack as the robber.

According to the factual basis (Resp. Ex. 4 at 257–58) provided to support the burglary charge, the prosecutor represented that a Re/Max office was burglarized between June 17, 2009, at 11:15 p.m., when staff closed the office, and June 18, 2009, at 8:26 a.m, when an employee arrived at the office. The employee discovered that his camera was missing from the desk drawer. Police found the camera in the backpack that Prance stole from the pick-up truck.[2]

After accepting Prance's open plea, the trial court deferred sentencing. At the December 9, 2010, sentencing, the prosecutor requested the imposition of a fifty-year aggregate sentence based on Prance's twenty-five prior felony convictions over twenty-six years. (Resp. Ex. 7 at 198– 200) Prance candidly acknowledged that he qualified as a habitual offender. Even so, his defense counsel sought mitigation of sentence on his behalf. While recalling a conversation about "15 years," defense counsel agreed that Prance entered an open plea. The trial judge confirmed that he would consider mitigating circumstances and advised that he would not impose a fifty-year sentence. (Resp. Ex. 7 at 202–04)

Addressing the state court, Prance stated that the detective told him both that everyone could see that Prance was "in pretty bad shape" when he entered the bank

[2] According to the arrest affidavit (attached to the order denying post-conviction relief in part (Resp. Ex. 29, ex. G)), Prance admitted that he both possessed the stolen camera and was in the area of the burglary.

and that Prance addressed the male, but not the female, teller. (Resp. Ex. 7 at 206) He further argued, as mitigation, (1) that he cooperated with police, confessed, and repeatedly stated he was sorry; (2) that he was unarmed; (3) that he was the only one who was scared at the time; and (4) that he did not threaten anyone. (Resp. Ex. 7 at 205–08) Prance further proclaimed, "I cannot in any way, with any kind of good sense whatsoever agree to anything more than 15 years. That's insane. I mean, I would be 70 years old. I just can't imagine anybody would want more than that from me. I mean, what would be the point of going over past 70 years?" (Resp. Ex. 7 at 208)

Disputing Prance's representations about the underlying facts, the prosecutor advised the state court that Prance slammed the backpack on the counter and that, while his hand was in the backpack, Prance told the teller, "I'm going to shoot and kill you. I will kill you if you don't give me the money out of the top drawer." The prosecutor stated (1) that the teller was fearful that Prance would kill him if Prance discovered the dye pack and (2) that the teller was so frightened that he did not want to appear in court. In addition, the prosecutor argued that Prance offered a "cagey" confession by stating, "Well[,] I was there maybe." (Resp. Ex. 7 at 209)

Prance advised the trial court that he thought he was going to get only fifteen years in prison and had no idea he could receive a greater sentence. The trial court asked defense counsel if he represented to Prance that he would receive only fifteen

years in prison if he entered an open plea. Counsel responded, "No, sir." The following exchange occurred (Resp. Ex. 7 at 219–20):

> [Prance]: Oh, good heavens. This is — I don't — Your Honor, I'd like to withdraw anything that I had to do with any of this whatsoever. And we'll to [sic] proceed from there. I'll go without counsel, have a *Nelson* hearing, whatever you want to do, sir. This is — I don't mean any disrespect.
>
> The Court: All right. All right.
>
> [Prance]: I just can't.
>
> The Court: All right. All right. We'll have a motion to withdraw a plea right now, okay?
>
> [Prance]: I'm sorry, sir?
>
> The Court: We'll have a motion to withdraw a plea right now; do you want to do that? Okay, now —
>
> [Prance]: Yes. I'm sorry, sir. I really am.

The trial court addressed the good cause requirement under Florida law for withdrawal of a plea before sentencing and inquired of Prance as follows (Resp. Ex. 7 at 221-22):

> [The Court]: All right. So you said that you wanted to proceed without a lawyer on this; is that right?
>
> [Prance]: I will have to at this point. I don't know what else to do, sir.
>
> The Court: All right. So what good cause is there for you to withdraw your plea at this point?
>
> [Prance]: And I understand that's a very tricky question. I have looked at several cases involving *Nelson* hearings and *Faretta* hearings and all of that stuff. I have had the time looking them

> up — you [sic] it's — I don't want to have a position where I have to degrade anybody whatsoever . . . .

After hearing from Prance, the prosecutor, and defense counsel, the trial court held that Prance showed no just cause to withdraw his plea. The trial court, who took Prance's guilty plea, found that he understood that he entered an open plea. Also, the trial court found both that the prosecutor promised the defense no sentencing recommendation of a fifteen-year term and that the prosecutor rejected defense counsel's fifteen-year offer, a suggestion offered after the jury was selected. (Resp. Ex. 7 at 230–31)

The state court sentenced Prance (1) as a prison releasee re-offender to thirty years imprisonment with a fifteen-year minimum mandatory prison term on the robbery charge and (2) as a habitual felony offender to concurrent prison terms of ten years on the burglary and grand theft charges. The subsequent direct appeal and later petition alleging ineffective assistance of appellate counsel were unsuccessful. The motion for post-conviction relief was unsuccessful (other than to amend the judgment to strike a discretionary fine).

EXHAUSTION AND PROCEDURAL DEFAULT

An applicant must exhaust available state remedies before presenting his claim to a federal habeas court. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). As explained in *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), "the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal

constitutional claims before those claims are presented to the federal courts, [so] state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

"[T]o exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1352–53 (11th Cir. 2012). Exhaustion is not met when the applicant has merely been through the state courts or presented all the facts necessary to support his claim. *See Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1343–44 (11th Cir. 2004). "The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined." 377 F.3d at 1345 (citation omitted).

When an applicant fails to properly exhaust a federal claim in state court and state law bars the unexhausted claim, the claim is procedurally defaulted. *Bailey v. Nagle*, 172 F.3d 1299, 1302–03 (11th Cir. 1999). Procedural default can be excused if the applicant establishes (1) cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error or (2) a fundamental miscarriage of justice, that is, actual innocence. 172 F.3d. at 1306.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges "a matter 'adjudicated on the merits in State court' to show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018) (quoting 28 U.S.C. § 2254(d)). A habeas applicant "meets this demanding standard only when he shows that the state court's decision was 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Dunn v. Madison*, 138 S. Ct. 9, 11 (2017) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

INEFFECTIVE ASSISTANCE OF COUNSEL

Prance claims ineffective assistance of appellate counsel, a difficult claim to sustain. "[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*) (quoting *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)). To demonstrate that counsel was constitutionally ineffective, an applicant must show both that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the applicant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Philmore v. McNeil*,

575 F.3d 1251, 1264 (11th Cir. 2009) ("Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland.*"). The court presumes that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Appellate counsel has no duty to raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). The exercise of judgment involved in framing an appeal makes it "difficult to demonstrate that [appellate] counsel was incompetent" for omitting a particular claim. *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000) (citation omitted). To establish prejudice, the applicant must show a reasonable probability that he would have prevailed on appeal but for counsel's deficient performance. *Robbins*, 528 U.S. at 285.

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted).

DISCUSSION

Ground One

Prance argues that "he did not knowingly, intelligently, and voluntarily waive his Sixth Amendment right to counsel as required by *Faretta v. California*, 422 U.S. 806 (1975)." (Doc. 1 at 5) Prance contends that after he heard the prosecutor's sentencing recommendation, he requested discharge of his trial counsel. (Doc. 2

at 7). Prance alleges that the trial judge "instantly granted said request" and after he moved to withdraw his plea, the trial judge held a hearing on the motion without appointing Prance conflict-free counsel or holding a *Faretta* hearing. (Doc. 2 at 7)

Under *Faretta*, a defendant in a state criminal trial has a right to self-representation. To exercise that right, a defendant must competently, knowingly, and intelligently waive his right to counsel. *Faretta*, 422 U.S. at 835. In his memorandum (Doc. 2) in support of his application, Prance argues (1) that he did not knowingly, intelligently, and voluntarily waive his Sixth Amendment right to counsel and (2) that he was not appointed conflict-free counsel. Contrary to the respondent's argument (Doc. 5 at 7), Prance exhausted the first component of this ground. Prance's argument on direct appeal that no *Faretta* hearing was conducted (Resp. Ex. 8 at 8) was sufficient to alert the state appellate court to a claim that Prance did not knowingly and voluntarily waive his Sixth Amendment right to counsel.

Prance did not, however, exhaust the second component of this ground, his distinct claim (Doc. 2 at 7) that the trial court did not appoint him conflict-free counsel. He raised this claim on direct appeal, but only in terms of state law. Prance presented as his first issue in his state appellate brief that "the trial court erred in failing to appoint conflict-free counsel when it became apparent during the motion to withdraw" his guilty pleas "that there was an adversarial relationship" between Prance and defense counsel. (Resp. Ex. 8 at 7) Specifically, Prance argued that

"once he and his attorney "assumed adversarial roles" he was no longer represented by counsel and was entitled to representation by conflict-free counsel to "assist him with presenting his issues that defense counsel's misrepresentations had led him to enter guilty pleas." (Resp. Ex. 8 at 8).[3] Prance's appellate counsel supported these arguments with state decisions, including *Krautheim v. State*, 38 So. 3d 802, 804–05 (Fla. 2d DCA 2010) (holding that "[a] motion to withdraw plea is a critical stage of the proceedings at which a defendant is entitled . . . to have counsel represent him" and that "once it becomes clear that a defendant and his counsel are in an adversarial relationship with respect to the defendant's entry of his plea, the defendant is entitled to the appointment of conflict-free counsel to represent him and to assist him with respect to his motion to withdraw plea."). Prance cited neither the Sixth Amendment nor a federal case deciding on constitutional principles a claim of trial error (in not appointing new counsel). *See Baldwin v. Reese*, 541 U.S. 27, 32 (2004) ("A litigant . . . can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing . . . 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.'"). Although he cited *Faretta* for his argument that he did not knowingly and voluntarily waive his right to counsel, Prance did not cite a federal

[3] To the extent Prance argues that the trial court did not adhere to state procedures, such argument presents an issue of state law not cognizable on federal habeas review. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."). Federal habeas relief is available only if a state prisoner is in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a).

case decided on constitutional grounds for his argument that he was entitled to conflict-free counsel to represent him on the motion to withdraw his plea.

Prance's failure to disclose a federal basis for his claim of lack of conflict-free counsel for the plea-withdrawal motion deprived the state appellate court of a "full and fair opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. at 845. Consequently, this aspect of ground one is procedurally defaulted. He can present this claim neither in a second direct appeal, *see* Fla. R. App. P. 9.140(b)(3) (a defendant wishing to appeal a final judgment must do so within "30 days following rendition of a written order imposing sentence"), nor in a motion for post-conviction relief. *See* Fla. R. Crim. P. 3.850(c) ("This rule does not authorize relief on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.").

Prance demonstrates neither cause and prejudice excusing his default nor a fundamental miscarriage of justice. *See Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001). This failure renders Prance's claim that he was not appointed conflict-free counsel procedurally barred from federal review. As a consequence, Prance is entitled to review only on his claim that he did not knowingly, intelligently, and voluntarily waive his Sixth Amendment right to counsel.

Because the state appellate court's decision offers no reasoned explanation and the district court cannot "look through" that decision to a lower court opinion, the

district court employs the *Richter* test. When there is no reasoned state-court decision on the merits, the federal court "'must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.'" *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (quoting *Richter*, 562 U.S. at 102).

"The starting point for cases subject to § 2254(d)(1) is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States that governs the habeas petitioner's claims." *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000), and *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). "'[C]learly established Federal law'" for purposes of Section 2254(d)(1) includes only "'the holdings, as opposed to the dicta,' of [the Supreme Court's] decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014) (citing *Howes v. Fields*, 565 U.S. 499, 505 (2012)).

Prance's Sixth Amendment right to counsel claim

"The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v Tovar*, 541 U.S. 77, 80-81 (2004). "The entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres." 541 U.S. at 81 (citations omitted). *See also Missouri v. Frye*, 566 U.S. 134, 140 (2012) ("The Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings. . . .

Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.") (internal citations and quotation marks omitted). A defendant also has the right to "proceed without counsel when he voluntarily and intelligently elects to do so." *Faretta*, 422 U.S. at 807. However, the Supreme Court has not held that a plea withdrawal hearing is a critical stage to which the right to counsel attaches.

In his habeas memorandum (Doc. 2 at 4), Prance argues that the trial court conducted no inquiry into factors set out in *Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir. 1986), for determining whether the record establishes a knowing and intelligent waiver of counsel. However, no Supreme Court precedent establishes that a hearing on a request at sentencing to withdraw a guilty plea — the circumstances presented in Prance's case — is a discrete critical stage requiring the assistance of counsel that would implicate *Faretta*. Since the Supreme Court has not decided that the Sixth Amendment right to counsel adheres to a plea withdrawal hearing, the state court's decision on the claim that the trial court failed to conduct a *Faretta* hearing is not contrary to or an unreasonable application of federal law as clearly established by the Supreme Court.

Prance argues (Doc. 2) that the state court "immediately" granted his request to discharge counsel and proceeded to address his motion to withdraw his plea. After determining the applicable standard for a motion to withdraw plea before sentencing, the state court stated: "All right. So you said that you wanted to proceed

without a lawyer on this; is that right?" Prance responded, "I will have to at this point. I don't know what else to do." Although the trial court stated "all right" and inquired what "good cause" Prance had for plea withdrawal, the trial court did not state that counsel was discharged. (Resp. Ex. 8 at 221) Additionally, the record discloses that the trial court did not consider Prance as proceeding *pro se* for sentencing purposes. After finding no just cause to withdraw the plea and pronouncing sentence, the trial court inquired of the prosecutor and defense counsel whether there was anything else, and each gave a negative response. And when Prance inquired if he should ask for an appeal, the trial court advised him that "you will have to deal with Mr. O'Leary [defense counsel] on that." Prance responded, "Oh, no thanks." (Resp. Ex. 7 at 236–37) These exchanges support a reasonable finding that the state court had not discharged defense counsel.

In his reply (Doc. 8 at 4), Prance argues both that defense counsel's representation ceased "at the moment" he moved at sentencing to withdraw his plea and that "the deprivation of counsel itself is the prejudice entitling" him to relief. A defendant can be constructively denied counsel if (1) counsel is prevented from assisting the defendant at a critical stage, (2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," or (3) counsel "actively represented conflicting interests." *See United States v. Cronic*, 466 U.S. 648, 659-61 and nn. 25, 28 (1984) (internal quotation marks and citation omitted). *Cronic* limits the presumption of prejudice to cases where defense counsel "entirely fails to subject

the prosecution's case to meaningful adversarial testing" in the trial or where there is "the complete denial of counsel" at a "critical stage of [the] trial." *Cronic*, 466 U.S. at 659. Prance demonstrates no *Cronic* error. As stated earlier, the Supreme Court has not established that a plea withdrawal hearing is a critical stage that requires counsel. Further, Prance advances no argument that his counsel entirely failed to subject the prosecution's case to meaningful testing. Prance entered a voluntary guilty plea after trial commenced.

Even Prance's interpretation of the record — that the trial court granted his motion to dismiss counsel — requires no presumption of prejudice under *Cronic*. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), decided after *Cronic*, the Court stated that "most constitutional errors can be harmless," including violations of the Sixth Amendment. *Id.* at 306–07. *Fulminante* cited *Coleman v. Alabama*, 399 U.S. 1 (1970), in which the Court held that the denial of counsel to a defendant at a preliminary hearing in violation of the Sixth Amendment was subject to harmless error review, even though that hearing was a "critical stage" of the state's criminal process. 399 U.S. at 9–10.[4]

Here, Prance does not dispute that counsel represented him at trial, the plea proceedings, and the allocution phase of the sentencing proceedings. *See Gardner v.*

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[4] *See, e.g., United States v. Roy*, 855 F.3d 1133, 1160 (11th Cir. 2017) (*en banc*) (holding that counsel's seven-minute absence during Roy's jury trial was harmless beyond a reasonable doubt because overwhelming evidence, offered when counsel was present, proved counts pertinent to testimony given during counsel's absence), *cert. denied*, 138 S. Ct. 1279 (2018).

Florida, 430 U.S. 349, 358 (1977) ("[S]entencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel."). And counsel represented Prance when he stated both that he wanted nothing to do with his plea and that he "thought this was going to be 15 years PRR." (Resp. Ex. 7 at 219) In addition, Prance was represented when (1) the trial court advised him that no one said that he was going to get 15 years and Prance responded, "Well, I just — don't want to do it," and (2) the trial court asked defense counsel if he had represented to Prance that Prance was only going to get 15 years if he entered an open plea and counsel responded, "[n]o, sir." (Resp. Ex. 7 at 219) No Supreme Court decision requires a presumption of prejudice under the circumstances in Prance's case. Also, given that defense counsel sought sentence mitigation on Prance's behalf, the state court had a reasonable basis to find that Prance failed to show he suffered a complete denial of counsel at a critical stage of the proceedings.

The state court's decision on the claim that Prance did not validly waive his Sixth Amendment right to counsel is not contrary to or an unreasonable application of federal law as clearly established by the Supreme Court.

Entitlement to "conflict- free" counsel claim

Even if Prance properly exhausted his claim that he was entitled to "conflict-free"counsel for the motion to withdraw his plea, the claim warrants no relief. The Sixth Amendment right to counsel guarantees to an accused the concomitant rights to conflict-free representation and the effective assistance of

counsel. When a defendant has a constitutional right to counsel, he has a corresponding right to representation by counsel that is free from a conflict of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). Prance presents no claim that defense counsel labored under an actual conflict of interest, *see Cuyler v Sullivan*, 466 U.S. 335, 348 (1980), and he presents no meritorious argument that the Sixth Amendment required that the trial judge supply him with a new attorney.[5] Prance argues an irreconcilable conflict existed between Prance and defense counsel but cites no Supreme Court precedent holding that the defendant has a Sixth Amendment right to appointment of new counsel when, as here, the record of the plea proceedings is sufficient to show that the defendant entered a voluntary guilty plea with no agreement on the sentencing outcome.

Although the trial court heard Prance on his motion to withdraw his plea, Prance's reasons for plea withdrawal were refuted by the record, specifically, his statements in his plea form and to the trial court. Prance executed a plea form stating that no one had promised him anything to entice him to enter his change of plea and that he understood the plea was an open plea. (Resp. Ex. 3 at 179) At the plea hearing, Prance acknowledged that he understood both that he would be sentenced to a minimum mandatory prison term if he qualified as a prison releasee re-offender and that he could be sentenced to fifty years in prison if he qualified as a habitual

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[5] Defense counsel was Prance's second appointed counsel. The trial court permitted Prance's original counsel to withdraw in August, 2010. (Resp. Ex. 12 at 6)

offender. (Resp. Ex. 4 at 12–13) In light of Prance's representation in his plea form that no one gave him a promise in exchange for his plea and in light of his statements at the plea hearing, which carry a strong presumption of veracity, *see Blackledge v. Allison*, 431 U.S. 63, 73 (1977), the state court could reasonably find that the record refuted Prance's claim that the prosecutor represented that he would not seek more than a fifteen-year sentence. As a consequence, the state appellate court could reasonably conclude that even if the issue were available for review, Prance demonstrated no violation of the Sixth Amendment when the trial court did not appoint new counsel to pursue the motion to withdraw his plea.

The state decision on the claims raised in this ground is not contrary to or an unreasonable application of federal law as clearly established by the Supreme Court and is not based on an unreasonable determination of the facts. Ground One warrants no relief.

Ground Two

Prance contends that his appellate counsel rendered ineffective assistance by not raising on direct appeal an argument that the state court failed to conduct a *Nelson*[6] inquiry "upon his request to discharge counsel." (Doc. 1 at 7) Prance contends that prior to his plea and sentencing, he sent a letter requesting his counsel's discharge and, when the trial court asked him during the sentencing hearing if he

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[6] *See Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973) (addressing the procedure that a state court must follow when a criminal defendant in Florida requests dismissal of his court-appointed counsel).

would like to proceed without counsel, Prance stated that he would do so because he did not know "what else to do." (Doc. 2 at 12) He argues that the judge proceeded to a hearing on the motion to withdraw the plea and did not conduct a *Nelson* inquiry into Prance's reasons for dismissing his counsel. (Doc. 2 at 12) Prance presented this claim of ineffective assistance of appellate counsel in his state petition under Rule 9.141(d), Florida Rules of Appellate Procedure. (Resp. Ex. 16) The state court's denial (Resp. Ex. 19) warrants deference as an adjudication of this ground on the merits. *See Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

Prance's claim of ineffective appellate counsel fails to meet *Strickland*'s performance component. First, he did not preserve a *Nelson* hearing issue for appeal. As his habeas counsel points out (Doc. 1 at 2, Prance wrote a letter to the trial court before trial requesting discharge of defense counsel. In the letter, Prance cited state law to argue that the trial court must conduct a preliminary *Nelson* inquiry to determine whether a defendant persists in discharging counsel, thereby waiving his right to appointed counsel and exercising his right of self-representation. Prance stated both that "I insist respectfully to proceed *pro se* and that "a trial is out of the question on December 1, 2010." (Resp. Ex. 16, attach. November 24, 2010, letter) However, Prance requested no ruling on his request when he entered an open guilty

plea on December 1, 2010. Although he cited *Nelson* and moved to dismiss counsel after he heard the prosecutor's sentencing recommendation, Prance presented no argument that the trial court must conduct a *Nelson* inquiry.

In his reply (Doc. 8 at 8), Prance argues that the trial court failed to conduct a *Nelson* inquiry before the hearing on his motion to withdraw his plea. However, he does not dispute that he requested neither a *Nelson* hearing nor appointment of substitute counsel when he moved at sentencing to discharge defense counsel. As a consequence, the state appellate court had a reasonable basis for concluding that Prance failed to demonstrate his appellate counsel performed deficiently in not raising the unpreserved argument.

Second, the necessity and sufficiency of a *Nelson* inquiry is a matter of Florida law. Although "the issue of ineffective assistance — even when based on the failure of counsel to raise a state law claim — is one of constitutional dimension," the district court "must defer to the state's construction of its own law" when the validity of the claim that appellate counsel failed to raise turns on state law. *See Pinkney v. Secretary, Dep't of Corr.*, 876 F.3d 1290, 1295 (11th Cir. 2017) (quoting *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984) (superseded by statute on other grounds)). To the extent the *Nelson* hearing issue was available for review, the state appellate court answered the question of what would have happened under Florida law had Prance's appellate counsel argued that the state trial court erred by failing to conduct a *Nelson* inquiry. *See, e.g., Callahan v. Campbell*, 427 F.3d 897, 932 (11th Cir.

2005) (holding that the state appellate court had already answered the question of what would have happened had counsel objected to the introduction of petitioner's statements based on state decisions — the objection would have been overruled — and therefore, counsel was not ineffective for failing to make that objection). The district court is bound by the state appellate court's determinations of state law. As a consequence Prance fails to show both that his appellate counsel performed deficiently by not raising the *Nelson* claim and that a reasonable probability exists Prance would have prevailed on appeal had counsel argued that the trial court erred by not conducting a *Nelson* inquiry.

The state decision is not contrary to or an unreasonable application of *Strickland* and involves no unreasonable determination of the facts in light of the evidence. Ground Two warrants no relief.

Accordingly, Prance's application for the writ of habeas corpus (Doc. 1) is **DENIED**. Prance's "second motion for judgment on petition filed under 28 U.S.C. 2254" (Doc. 12) is **DENIED**. The clerk must enter a judgment against Prance and **CLOSE** this action.

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

Prance is not entitled to a certificate of appealability ("COA"). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his application. 28 U.S.C. § 2253(c)(1). Rather, a district court must first

issue a COA. Section 2253(c)(2) permits issuing a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a COA, Prance must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because he has failed to make the requisite showing, Prance is entitled to neither a certificate of appealability nor an appeal *in forma pauperis*.

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

ORDERED in Tampa, Florida, on September 28, 2018.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14540-H

MICHAEL J. PRANCE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Michael J. Prance is a Florida prisoner serving a 35-year total sentence after pleading guilty to robbery, grand theft of a motor vehicle, and burglary of a structure. He moves this Court for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in the appeal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition, in which he claimed, in relevant part, that the state trial court had violated his Sixth Amendment rights by conducting a hearing following his motion to withdraw his guilty plea without providing him counsel.[1]

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a § 2254 petition

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[1] Prance's petition raised an additional claim, which counsel has not challenged on appeal. Accordingly, it is abandoned. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) (holding that legal claims not raised on appeal are abandoned).

on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

On appeal, Prance argues that the district court erred by denying him a COA, as he had a federal right to counsel during the hearing on his motion to withdraw his guilty plea. In support of this claim, he contends that numerous other circuit courts of appeal and state supreme courts have determined that a criminal defendant has a right to counsel during a hearing on a motion to withdraw a guilty plea.

The state postconviction court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts by denying this claim. Prance failed to identify any clearly established federal law from the U.S. Supreme Court in support of his position, as required by 28 U.S.C. § 2254(d). His assertions that other courts have ruled in support of his position does not establish that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law. Moreover, he failed to show any prejudice, in light of his previous statement under oath that he understood that he was not entitled to a sentence of a particular length. *See Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (noting that "most constitutional errors can be harmless," including violations of the Sixth Amendment); *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (stating "the representations of the defendant . . . [at a plea proceeding] constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity").

Accordingly, reasonable jurists would not debate the denial of Prance's petition. Therefore, his motion for a COA is DENIED, and his motion for leave to proceed IFP is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14540-H

MICHAEL J. PRANCE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: JORDAN and BRANCH, Circuit Judges.

BY THE COURT:

Michael J. Prance has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated May 8, 2019, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis* in the appeal of the denial of his 28 U.S.C. § 2254 habeas corpus petition. Because Prance has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.