IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12468-D

KEITH INCHIERCHIERE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

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

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

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

I.

A.

Reasonable jurists would not debate the District Court's denial of Mr. Inchierchiere's claim for ineffective assistance of counsel. Under Strickland v. Washington, 466 U.S. 668, 694, 131 S. Ct. 733, 739 (1984), a defendant can establish an ineffective assistance claim by showing his "counsel's performance fell below an objective standard of reasonableness," Padilla v. Kentucky, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) (quotation marks omitted), and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different," Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Id.

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

Mr. Inchierchiere argues he suffered Strickland prejudice when his retained counsel failed to appear, because Inchierchiere was wrongfully denied his "counsel of choice." See United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 2562 (2006). However, the record makes clear the trial court did not wrongfully deny Mr. Inchierchiere the benefit of retaining counsel. The trial court instructed Mr. Inchierchiere to retain counsel—if he wished—by July 24, 2009, but Inchierchiere did not attempt to retain counsel until October 1, 2009, four days before the start of trial. On the day of trial, the government opposed continuing the trial because of the needs of witnesses and the victim in the case. Gonzalez-Lopez

itself recognized that a trial court has "wide latitude in balancing the right to counsel . . . against the demands of its calendar," and must sometimes "make scheduling . . . decisions that effectively exclude a defendant's first choice of counsel." Id. at 152, 126 S. Ct. at 2565–66. Under these circumstances, the trial court did not abuse its discretion by denying Mr. Inchierchiere a continuance and depriving him of his choice of counsel. See Morris v. Slappy, 461 U.S. 1, 11–12, 103 S. Ct. 1610, 1616 (1983) (holding "broad discretion must be granted to trial courts on matters of continuances"). On this record, reasonable jurists would not debate that Mr. Inchierchiere was not prejudiced because he could not have his counsel of choice.

B.

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

Reasonable jurists would also not debate whether Mr. Inchierchiere suffered ineffective assistance of counsel under Cronic. Even accepting that the first day of his trial was a critical stage, Mr. Inchierchiere was not actually denied counsel at this

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

II.

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

Here, reasonable jurists would not debate that Mr. Inchierchiere's public defender provided effective assistance of counsel. Even if the public defender misjudged Mr. Inchierchiere's sentencing exposure or did not mention the trial judge's reputation for harsh sentencing, Mr. Inchierchiere cannot show Strickland prejudice. The record shows Mr. Inchierchiere knew his full sentencing exposure when he entered his guilty plea. Mr. Inchierchiere's plea form and plea colloquy informed him he could receive any sentence up to the statutory maximum sentence of life. Mr. Inchierchiere also testified at the plea hearing that he received no promises of a particular sentence or range of sentences. Mr. Inchierchiere's testimony on these matters is presumed to be true. See United States v. Medlock,

12 F.3d 185, 187 (11th Cir. 1994). Because Mr. Inchierchiere was clearly advised by the plea agreement and colloquy of his sentencing exposure, he cannot show he suffered prejudice from his counsel's poor predictions of the sentence the trial judge would impose. Beyond that, the public defender could have reasonably recommended that Mr. Inchierchiere plead guilty precisely because he knew the trial judge sentenced harshly. See Martin v. Sec'y, Fl. Dep't of Corr., 699 F. App'x 866, 871–72 (11th Cir. 2017) (unpublished) (per curiam) (recognizing admitting guilt as "a strategy designed to improve [the defendant's] chances of getting a lesser sentence before a judge known for harsh sentencing").

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

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE