NO:

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY CARVER,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

Jacqueline E. Shapiro
40 N.W. 3rd Street, PH 1
Miami, Florida 33128
Tel. 305-403-8207
shapiro.miamilaw@gmail.com
Counsel for Petitioner

QUESTION PRESENTED

In *Lee v. United States*, 137 S.Ct. 1958, 1966 (2017), the Court held that a per se rule barring relief for ineffectiveness of plea counsel in the absence of a likelihood of a better outcome for the defendant at trial is not appropriate and that "a defendant's decisionmaking ... may not turn solely on the likelihood of conviction after trial." The Court explained that where counsel's errors cause the defendant to misapprehends the consequences of pleading guilty and there is a reasonable probability that those consequences were so adverse as to cause the defendant to reject the plea, relief may be warranted. *Id*. at 1967–68. Petitioner moved under 28 U.S.C. § 2255 to vacate his conviction alleging that but for plea counsel's misrepresentations regarding whether Petitioner's conduct violated the law, Petitioner would have believed himself actually innocent of the charge and thus unwilling to falsely admit guilt. The district court denied relief because Petitioner failed to show a likelihood of prevailing at trial.

The question presented is:

Where plea counsel erroneously convinces a defendant to believe that he is guilty of an offense, may the guilty-pleading defendant obtain relief from the plea based on counsel's ineffectiveness, even if the defendant is unable to show a likelihood of prevailing at trial, if the defendant can show at an evidentiary hearing that he would not falsely have admitted guilt?

INTERESTED PARTIES

The are no parties interested in the proceeding other than those named in the caption of the appellate decision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

PETITION FOR WRIT OF CERTIORARI

Timothy Carver respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 19-14615 in that court on June 17, 2020, *Carver v. United States*, denying Petitioner's motion for a certificate of appealability.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1) along with that court's order denying rehearing (App. 2).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1255 and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 17, 2020, and rehearing was denied on October 8, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. amend. VI (Right to Counsel):

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253(c):

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

On October 3, 2012, Petitioner filed a motion under 28 U.S.C. § 2255 to vacate his sentence that resulted from a guilty plea proceeding and two separate trials, all stemming from a single indictment charging him with one count of attempting to use a computer and the internet to entice a minor in violation of 18 U.S.C. § 2422(b) ("Count One") and with one count of committing Count One while being required to register as a sex offender in violation of 18 U.S.C. § 2260A ("Count Two"). App. 15–16. The original § 2255 motion was referred to a magistrate judge who recommended denying Petitioner's motion, a recommendation that was adopted by the district court.

App. 18. Petitioner appealed the denial of his § 2255 motion, and the Eleventh Circuit vacated the district court's decision and remanded "with instructions to fully address" his claims of ineffective assistance of counsel and resulting involuntariness of his guilty pleas "in the first instance, and to hold an evidentiary hearing unless a full consideration of these claims reveals that no hearing is required." App. 11.

On remand, Petitioner filed a renewed § 2255 motion. App. 18. His motion was again referred to a magistrate judge who in a Report and Recommendation ("Report") recommended denying Petitioner's motion without holding an evidentiary hearing. App. 29. Petitioner objected to the magistrate's Report, but the district court adopted the magistrate judge's recommendation, denied Petitioner's motion, and declined to issue a certificate of appealability. App. 12. In the Eleventh Circuit, Petitioner sought a certificate of appealability as to whether the court of appeals should reverse and remand for the conducting of an evidentiary hearing on grounds raised in Petitioner's 28 U.S.C. § 2255 motion, including: Petitioner's claim of ineffective assistance of plea counsel when he entered a plea of guilty to Count One, and that his guilty plea was rendered involuntary by plea counsel's misadvice regarding the elements of the offense. App. 31. The Eleventh Circuit denied the request for a certificate of appealability. App. 1.

Petitioner's guilty plea to Count One of the superseding indictment was entered on May 8, 2008; he proceeded to a bench trial on Count Two the same day. App. 15. He was found guilty of Count Two and sentenced to a total of 360 months, consisting of consecutive sentences of 240 months for Count One and 120 months for Count Two.

App. 16. Petitioner appealed and the Eleventh Circuit affirmed his conviction on Count One, but vacated and remanded on Count Two because Petitioner had never waived his right to a jury trial. *United States v. Carver*, 348 F. App'x 449, 450–452 (11th Cir. 2009). Petitioner was then convicted at a jury trial on Count Two, at which his conviction of Count One was the principal evidence, and his conviction on Count Two was affirmed on direct appeal. *United States v. Carver*, 422 F. App'x 796 (11th Cir. 2011).

Petitioner's § 2255 motion alleged that if had he been properly advised by plea counsel, he would have proceeded to trial on Count One. App. 21–22. Specifically, Petitioner alleged that his plea counsel misadvised him by not explaining to him the elements of an attempt offense (Count One), specifically the intent requirement, under 18 U.S.C. § 2422(b). *Id*. He also alleged that plea counsel did not consult with him regarding his defenses to the attempt charge. Petitioner explained that if plea counsel had properly advised Petitioner of the elements of Count One, Petitioner would not have believed himself to be guilty—he would have proceeded to trial because he did not have the specific intent to entice a minor, and he was simply engaging in fantasy talk with an undercover agent who was setting up a sting operation. The evidentiary support for Petitioner's belief included the unusual facts that the undercover agent had to drive far outside of his jurisdiction to pick up Petitioner (who otherwise would not have left or even met with the agent, much less proceeded beyond talk) and the agent then provided Petitioner with incriminating objects in order to create the illusion that Petitioner was actually trying to involve a minor in a sex crime.

Plea counsel's failure to properly advise Petitioner on the elements of Count One was compounded by the fact that the superseding indictment did not expressly state the elements of an attempt offense, and the government's summary of the elements of the offense during the plea colloquy failed to adequately describe an attempt offense. *See Carver*, 348 F. App'x at 450–452 (recognizing the errors in the plea colloquy and superseding indictment, but holding that it did not require reversal on the basis of the transcript record on direct appeal).

In denying § 2255 relief, the district court misinterpreted this Court's decision in *Lee v. United States*, 137 S.Ct. 1958 (2017), and created a prejudice analysis that was not appropriate to the issue. The district court found that *Lee* creates two categories of ineffective assistance of counsel, each with a separate prejudice analysis: one where counsel misadvises a defendant regarding the consequences of pleading guilty, and another where counsel's error "affects a defendant's likelihood of success at trial." App. 24 (district court concludes: "The second type of error—and the one that is at issue here—affects a defendant's likelihood of success at trial. ... Where the prospect of success at trial is at issue, a defendant must show he would have been better off going to trial."). The district court erroneously concluded that Petitioner's claim that plea counsel misadvised him regarding the elements of the offense, falls into the second (trial outcome likelihood) category and that Petitioner was not prejudiced because he cannot show that he would have been better off going to trial. *Id*. at 24–25.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantee of effective assistance of counsel is violated where deficient advice of counsel convinces the defendant of his guilt of the offense, and but for the deficient performance, the defendant, believing himself innocent, would not have entered the plea.

The Eleventh Circuit's decision rejecting Petitioner's motion for certificate of appealability merits issuance of a writ of certiorari. The deficient performance which Petitioner alleged does not neatly fall into the narrow prejudice categories used by the district court, and the district court's failure to understand the scope of the prejudice analysis set forth by this Court in *Lee* warranted the grant of a certificate of appealability. Petitioner alleged, without contradiction, that counsel misadvised him regarding the elements of the attempt offense, and that had he been properly advised, Petitioner would not have believed himself to be guilty and thus would not have falsely admitted guilt. Thus, regardless of his chance of success at trial, Petitioner would have proceeded to trial because he could not, and should not, enter a guilty plea when he did not believe himself to be guilty. Thus, the proper test for prejudice under *Lee* for circumstances like Petitioner's is whether there is a "'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee v. United States*, 137 S.Ct. 1958, 1965 (2017) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). At the very least, jurists of reason could debate how *Lee* should apply to the type of counsel ineffectiveness that Petitioner alleged, and this Court should grant the writ in this case so that a certificate of appealability may issue.

Petitioner was prejudiced "by the 'denial of the entire judicial proceeding . . . to which he had a right.'" *Lee*, 137 S.Ct. at 1965 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). Petitioner's decision to go to trial on Count Two showed that he was not averse to going to trial even where there would be substantial difficulties proving his innocence. An evidentiary hearing was necessary where nothing in the record contradicted any claim made by Petitioner. Notably, plea counsel did not, insofar as the record shows, in any way deny Petitioner's claims, and the initial decision on appeal from the plea confirmed errors in the statement of the elements at the plea colloquy itself. *See Carver*, 348 F. App'x at 451 ("neither the superseding indictment nor the government's summary of the elements of the offense stated expressly the elements of an attempt offense").

Plea counsel's misadvice to Petitioner cannot be determined without an evidentiary hearing, and the record does not otherwise show that he is not entitled to relief. *See United States v. Tolliver*, 800 F.3d 138, 141–42 (3d Cir. 2015) (requiring an evidentiary hearing where record does not conclusively show that defendant was not entitled to relief).

The impact of counsel's advice on a defendant's belief about their guilt or innocence does not neatly fit into the two categories created by the district court in its analysis of *Lee*. Instead, the correct prejudice analysis is whether there is a "'reasonable probability that, but for counsel's errors,'" Petitioner "'would not have pleaded guilty and would have insisted on going to trial.'" *Lee*, 137 S.Ct. at 1965 (quoting *Hill v. Lockhart*, 474 U.S. at 59). And there is contemporaneous evidence that

Petitioner would have chosen to go to trial: His decision to go to trial on Count Two of the superseding indictment shows that he was not averse to going to trial even where there would be substantial difficulties proving his innocence. *See, e.g.*, *Tovar Mendoza v. Hatch*, 620 F.3d 1261, 1269 (10th Cir. 2010) (finding a defendant's guilty plea involuntary on collateral review with the assistance of an evidentiary hearing).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.
Counsel for Petitioner

Miami, Florida
March 2021

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14615-C

TIMOTHY WAYNE CARVER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Appellant's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14615-C

TIMOTHY WAYNE CARVER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: NEWSOM and LAGOA, Circuit Judges.

BY THE COURT:

Timothy Wayne Carver has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's June 17, 2020, order denying a certificate of appealability in his appeal of the district court's denial of his renewed 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Upon review, Carver's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-15769
Non-Argument Calendar

D.C. Docket Nos. 2:12-cv-14353-JEM,
2:08-cr-14003-JEM-1

TIMOTHY WAYNE CARVER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(January 12, 2018)

Before TJOFLAT, MARTIN, and NEWSOM, Circuit Judges.

PER CURIAM:

Timothy Wayne Carver, a federal prisoner, appeals the denial of his 28 U.S.C. § 2255 motion to vacate his convictions for attempting to use the internet to entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b)

("Count One"), and committing that offense while required to register as a sex offender, in violation of 18 U.S.C. § 2260A ("Count Two"). He argues the district court erred by not addressing some of the claims in his § 2255 motion and in denying his motion for an evidentiary hearing. After careful review, we vacate and remand for further proceedings.

I.

According to the stipulation of facts from Carver's guilty plea to Count One, Carver communicated through an internet chat room with an undercover officer who was posing as the father of a minor girl with mental impairments. Carver eventually agreed to pay $70 and meet the undercover officer at a set location, where the officer would pick up Carver and drive him to the girl so he could engage in sexual activity with her. Carver went to the meeting with condoms and the agreed-upon $70 and was arrested after he got in the officer's car.

Carver pled guilty to Count One and proceeded to a bench trial on Count Two. At his bench trial, Carver stipulated that he was convicted of the offense described in Count One and that he had previously been convicted of a sex crime. The judge found him guilty of Count Two. Carver appealed, arguing that his guilty plea was invalid and that he'd never formally waived his right to a jury trial on Count Two. This Court affirmed Carver's plea on Count One, but remanded for a jury trial on Count Two. A jury then found Carver guilty of Count Two. On

direct appeal of Carver's Count Two conviction, his second appeal, this Court affirmed.

Carver filed a § 2255 motion to vacate his sentence that raised three grounds for relief. In Ground One, he claimed "ineffective assistance of counsel in relation to jury trial." He listed a number of counsel's deficiencies: counsel's failure to advise him of his right to contest his guilt at trial; counsel's failure to adequately advise him regarding the stipulations of fact that led to the conviction; and counsel's failure to put on evidence that he did not specifically intend to entice a minor to have sex. In Ground Two, Carver claimed "ineffective assistance of counsel in relation to entry of a guilty plea," arguing that his attorney failed to advise him of the specific intent element of the offense charged in Count 1. He said he did not intend to "persuade anyone of anything" and would not have pled guilty if he understood the intent requirement. Finally, in Ground Three, Carver claimed that his guilty plea for Count One was unknowing and involuntary because it was based on a misunderstanding of the law and his defenses.

A magistrate judge issued a Report and Recommendation ("R&R"), recommending that the district court deny Carver's motion without an evidentiary hearing. The magistrate judge wrote "[a]ll of the Movant's arguments essentially concern his decision to plead guilty to Count 1." In effect, the magistrate judge construed Ground One, which Carver titled "ineffective assistance of counsel in

relation to jury trial," as a claim of actual innocence relating to his guilty plea. The magistrate judge also did not address each separate allegation of ineffective assistance. Carver objected, arguing that the R&R "fail[ed] to address the principal issue raised by the § 2255 motion: ineffective assistance of trial counsel." Carver also argued that an evidentiary hearing was warranted for his ineffective assistance of counsel claims. The district court overruled Carver's objections, adopted the R&R, and denied Carver's § 2255 motion.

This appeal followed. We granted a certificate of appealability ("COA") to address the following issues:

> [1] Whether the District Court misconstrued the claims asserted in ground one of Mr. Carver's § 2255 motion alleging the ineffective assistance of Mr. Carver's trial counsel, or violated Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992) (en banc), by failing to properly address those claims?
>
> [2] Whether the District Court erred in denying all of Mr. Carver's claims without conducting an evidentiary hearing?

We address each issue in turn.

II.

In a proceeding on a 28 U.S.C. § 2255 motion to vacate, we review the district court's factual findings for clear error and its legal conclusions de novo. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam). The scope of review is limited to the issues specified in the COA. Murray v. United States, 145 F.3d 1249, 1250–51 (11th Cir. 1998) (per curiam).

In Clisby v. Jones, we held that if a district court fails to address each claim raised in a habeas petition, we "will vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims." 960 F.2d at 938; see also Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009) (per curiam) (applying Clisby to § 2255 motions). Under Clisby, our only role is to determine whether a district court failed to address a claim; we do not address whether the underlying claim is meritorious. Dupree v. Warden, 715 F.3d 1295, 1299 (11th Cir. 2013). To qualify for relief under Clisby, though, "[a] habeas petitioner must present a claim in clear and simple language such that the district court may not misunderstand it." Id.

In addition, "the district court must develop a record sufficient to facilitate our review of all issues pertinent to . . . the ultimate merit of any issues for which a COA is granted." Long v. United States, 626 F.3d 1167, 1170 (11th Cir. 2010) (per curiam). When a district court summarily denies a § 2255 motion, we will vacate and remand when "an adequate appellate review of the basis for the district court's decision requires something more than a mere summary denial." Broadwater v. United States, 292 F.3d 1302, 1304 (11th Cir. 2002) (per curiam).

Here, the district court erred by failing to address all of the claims in Carver's § 2255 motion. The magistrate judge read all of Carver's arguments to "essentially concern his decision to plead guilty to Count 1." But Ground One of

Carver's § 2255 motion specifically related to his trial on Count Two, not his guilty plea on Count One. And because the magistrate judge construed Ground One of Carver's motion as "essentially one of actual innocence," not ineffective assistance of trial counsel, he did not analyze Carver's claims of trial counsel's ineffectiveness under the framework set out in Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052 (1984). In addition, the magistrate judge did not specifically address some of Carver's arguments in support of Ground One, including that his trial counsel failed to investigate certain aspects of his case. A denial of those arguments without discussion does not provide us with an adequate basis for appellate review. See Broadwater, 292 F.3d at 1304.

Further, contrary to the government's assertions, neither the wording of Ground One nor the fact that Carver is counseled defeat his claims of Clisby error. While Carver's counseled petition is not afforded the liberal construction given to pro se parties, taken together, his § 2255 motion and his objection to the R&R were sufficiently clear to alert the district court that he had raised a claim for ineffective assistance of trial counsel on Count Two that had not been addressed by the magistrate judge. See Dupree, 715 F.3d at 1299. We therefore vacate and remand for the district court to address in the first instance Carver's claims for ineffective assistance of trial counsel alleged in Ground One of his § 2255 motion.

III.

We review the denial of an evidentiary hearing for abuse of discretion. Winthrop-Redin v. United States, 767 F.3d 1210, 1215 (11th Cir. 2014). An evidentiary hearing must be held on a § 2255 motion to vacate "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). "[I]f the petitioner alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." Aron v. United States, 291 F.3d 708, 714–15 (11th Cir. 2002) (quotation omitted). But if a petitioner's claims "are merely conclusory allegations unsupported by specifics, or if the record refutes the applicant's factual allegations or otherwise precludes habeas relief," a district court is not required to hold an evidentiary hearing. Allen v. Sec'y, Fla. Dep't of Corr., 611 F.3d 740, 745 (11th Cir. 2010) (quotations and citation omitted).

"To show that he is entitled to an evidentiary hearing on his ineffective assistance of counsel claim, [Carver's] § 2255 motion must allege facts that would show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense." Griffith v. United States, 871 F.3d 1321, 1329 (11th Cir. 2017) (quotation omitted). When a defendant has pled guilty, he can show deficient performance by demonstrating that his counsel did not provide him "with an understanding of the law in relation to the facts, so that [he] may make an informed and conscious choice" between pleading guilty and going to

trial. See Stano v. Dugger, 921 F.2d 1125, 1151 (11th Cir. 1991) (quotation omitted). He "can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1965 (2017).

Given that a remand is appropriate for further consideration of Carver's claims pursuant to Clisby, a ruling on Carver's appeal of the denial of his motion for an evidentiary hearing would be premature. As to Ground One, because the district court failed to address Carver's ineffective assistance of trial counsel claims, we cannot say whether the district court determined that the claims were affirmatively contradicted by the record or otherwise clearly barred on their face. Therefore we do not have a sufficient record for deciding whether it abused its discretion in making that determination. See Allen, 611 F.3d at 745. In light of the Clisby error and undeveloped record as to Ground One, we vacate and remand for reconsideration of whether an evidentiary hearing is warranted for Carver's Ground One claims.

As to Grounds Two and Three, the reasoning for denying an evidentiary hearing is also unclear. The R&R states "in light of the arguments and record," the court did not "see need for a hearing." But the R&R did not point to specific evidence in the record that contradicted Carver's claims of ineffective assistance of

counsel. We recognize that trial records are "often incomplete or inadequate" for the purposes of an ineffective assistance claim. Massaro v. United States, 538 U.S. 500, 504–05, 123 S. Ct. 1690, 1694 (2003). And contrary to statements in the R&R, a guilty plea does not bar Carver's claims that he received ineffective assistance of counsel in deciding whether to plead guilty or go to trial. See Lee, 137 S. Ct. at 1965. In his § 2255 motion, Carver said his attorney misinformed him of the intent requirement and possible defenses he could have pursued for Count One. He also said he would not have pled guilty if he had been properly informed. In light of the limited record before us, we cannot say that the "records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). We therefore vacate and remand with instructions to fully address Grounds Two and Three under Strickland in the first instance, and to hold an evidentiary hearing unless a full consideration of these claims reveals that no hearing is required.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
Case Number: 12-14353-CIV-MARTINEZ-MAYNARD
Case No. 08-14003-CR-JEM

TIMOTHY WAYNE CARVER,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS MATTER is before the Court on Movant's Renewed Motion to Vacate filed pursuant to 28 U.S.C. § 2255, following remand from the Eleventh Circuit Court of Appeals, [ECF No. 34 (renewed motion to vacate), ECF No. 26 (remand)]. Magistrate Judge Shaniek M. Maynard filed a Report and Recommendation, [ECF No. 37], recommending that Movant's § 2255 Motion to Vacate be DENIED, and that no certificate of appealability issue. Movant timely filed objections to the Magistrate Judge's Report and Recommendation, [ECF No. 38].

The Court has reviewed the entire file and record, has made a *de novo* review of the issues that Movant's objections to the Report and Recommendation present, and is otherwise fully advised in the premises. The Court finds the issues raised in Movant's objections are already addressed in Magistrate Judge Maynard's well-reasoned Report and Recommendation. Accordingly, after careful consideration, it is hereby

ADJUDGED that United States Magistrate Judge Maynard's Report and Recommendation, [ECF No. 37], is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ORDERED AND ADJUDGED that

1. Movant's Renewed Motion to Vacate filed pursuant to 28 U.S.C. § 2255, [ECF No.

34][1], is **DENIED**. No certificate of appealability shall issue.

2. This case is **CLOSED**, and any pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 19 day of September, 2019.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Maynard
All Counsel of Record

[1] *See* [ECF No. 1 (original motion to vacate)].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-14353-CIV-MARTINEZ/MAYNARD

TIMOTHY WAYNE CARVER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION ON CARVER'S RENEWED MOTION TO VACATE [D.E. 34]

THIS CAUSE comes before this Court upon the above referenced Motion to Vacate under 28 U.S.C. § 2255 filed by Movant Timothy Wayne Carver ("Carver"). CIV D.E. 34.[1] Having reviewed the Motion, the respective briefings, and the record, this Court recommends that the Motion be denied for reasons that follow.

BACKGROUND

On December 17, 2007, Carver initiated a conversation through an internet chat room with an undercover agent posing as the father of a fictional eleven-year-old girl with mental impairments. CIV D.E. 7-9. During the conversation, Carver agreed to pay seventy dollars in exchange for oral and vaginal sexual intercourse with the child. *Id.* They arranged to meet the following day. *Id.* On December 18, 2007, Carver met the agent at a skating rink in Indian River County, Florida. *Id.* Carver told the agent that he wanted to have sex with the child and he brought

[1] Some documents cited herein have been docketed in the underlying criminal action (08–14003–CR–Martinez/Lynch), while others have been docketed in the instant civil action (12–14353–CIV–Martinez/Maynard) only. Documents docketed in the underlying criminal action will be given the designation "CR" before the Docket Entry. Documents docketed in the present civil action will be given the designation "CIV" throughout this Report and Recommendation.

seventy dollars for payment, two condoms and a teddy bear. *Id.* Shortly thereafter, Carver was arrested by law enforcement. *Id.*

On February 14, 2008, a federal grand jury returned a two-count Superseding Indictment charging Carver with (1) attempting to use a computer and the internet to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) ("Count One"), and (2) committing Count One while being required to register as a sex offender in violation of 18 U.S.C. § 2260(a) ("Count Two"). CR D.E. 24.

On May 8, 2008, District Judge Jose E. Martinez conducted a change of plea hearing in accordance with the outline set forth in the Bench Book for District Judges. CIV D.E. 7-8. Under oath, Carver acknowledged that he received a copy of the Superseding Indictment and had reviewed its provisions with his attorney. CIV D.E. 7-8. He said he understood the charge in Count One and the possible maximum penalties he faced. *Id.* at 7. He stated that he was fully satisfied with the counsel, representation and advice given to him by his lawyer. *Id.* at 4. He said that no one had made him any promises or assurances of any kind in an effort to induce him to plead guilty and no one attempted in any way to force him to plead guilty. *Id.* at 14. He said he understood all the rights he was waiving or giving up as a result of pleading guilty to Count One. *Id.* at 5-6. The Court found Carver's plea of guilty to be a knowing and voluntary plea. *Id.* at 15.

Carver proceeded to a bench trial on Count Two, CR D.E. 116, which required proof that Carver attempted to induce a minor to engage in sexual activity (Count One) while being required by federal or state law to register as a sex offender. During the trial, the parties stipulated that Carver previously was convicted of lewd and lascivious acts upon a child in violation of Fla. Stat. § 800.04 in 1990. The government also introduced documents detailing Carver's supervised release history, including a signed acknowledgement that Carver was required to register as a sex

offender. *Id.* at 145. On July 14, 2008, Judge Martinez found Carver guilty of Count Two and entered findings of fact and conclusions of law. CR D.E. 55. At sentencing, Judge Martinez imposed a term of 240 months imprisonment for Count One, which was below the advisory sentencing guidelines range. For Count Two, Carver was sentenced to a mandatory minimum term of imprisonment of 120 months, to run consecutively. Carver's total sentence was 360 months' imprisonment, followed by a lifetime of supervised release. CR D.E. 66. Carver was also required to pay a special assessment of $200.

On September 15, 2008, Carver appealed his convictions. CR D.E. 70. *See United States v. Carver*, 348 F.App'x. 449, 452 (11th Cir. 2009); CR D.E. 79. On appeal, Carver argued that his guilty plea to Count One was defective because he did not understand the nature of the charge. Specifically, Carver complained that the government described the elements of a completed § 2422(b) offense at the plea hearing when it should have described the elements of an attempted offense because the case involved a fictitious minor. Carver also argued that his conviction on Count Two was invalid because it resulted from a bench trial and he had not waived his right to a trial by a jury. The Eleventh Circuit affirmed Carver's conviction on Count One, finding that the record as a whole supported the district court's determination that Carver entered a knowing and voluntary plea. The Eleventh Circuit vacated and remanded as to Count Two, however, because the record contained no evidence Carver had waived his right to a jury trial.

On February 16, 2010, Carver proceeded to a jury trial on Count Two. CR D.E. 95. The parties stipulated during trial that Carver had pleaded guilty to Count One. CR D.E. 116 at 7, 145. They also stipulated that Carver was convicted of committing a lewd and lascivious assault on a child in 1990 in violation of Fla. Stat. § 800.04, for which he was sentenced to three- and one-half years in state prison followed by ten years of probation. *Id.* at 146. To prove that Carver was

required to register as a sex offender, the government offered testimony by Richard Ambrum, Carver's supervisory probation officer. *Id.* at 147. Mr. Ambrum testified that Fla. Stat. § 943.0435, which went into effect on September 1, 1997, requires that sexual offenders convicted of committing Fla. Stat. § 800.04, and who were released from incarceration in state prison after October 1, 1997, are required to register as sex offenders. *Id.* at 157-163. Mr. Ambrum testified that Carver was released from prison after the Florida sex offender registration statute went into effect, and he therefore was required to register as a sex offender when he was released from prison for a violation of probation in 2000.[2] *Id.* at 164. The government also submitted into evidence a signed acknowledgement that Carver was required to register as a sex offender. *Id.* at 145.

After a one-day trial, the jury returned a guilty verdict. CR D.E. 102. Upon conviction, the district court sentenced Carver to the same sentence he had previously received. CR D.E. 104.

Carver appealed the jury's verdict, arguing that § 2260 was unconstitutional and the government's evidence was insufficient to prove his guilt. The Eleventh Circuit denied Carver's appeal on both grounds. *See United States v. Carver*, 422 F. App'x 796 (11th Cir. 2011) (affirming Carver's convictions); CR D.E. 127. Carver appealed to the United States Supreme Court which denied certiorari on October 12, 2011. *Carver v. United States*, 565 U.S. 936, 132 S. Ct. 389 (2011); CV D.E. 7-29.

On October 3, 2012, Carver filed a motion under 28 U.S.C. § 2255 to vacate his sentence. CIV D.E. 1. Carver raised three grounds for relief. First, Carver alleged ineffective assistance of counsel during his jury trial. Carver claimed trial counsel was deficient in several respects including failing to advise him of his right to contest his guilt at trial, failing to adequately advise

[2] Richard Ambrum testified from his recollection that Carver was released from state prison in March of 2000. CR D.E. 116 at 166. This testimony is inconsistent with the stipulation that Carver was released on August 24, 2000. *Id.* at 145-146. The Court credits that Carver was released from state prison at some point in 2000, which is still within the purview of the requirement to register as a sex offender after October 1, 1997 provided for in Fla. Stat. § 943.0435.

him regarding the stipulations of fact that led to his conviction, and failing to put on evidence that he did not specifically intend to entice a minor for sex. Next, Carver complained about the representation he received prior to entering a guilty plea on Count One. He argued that plea counsel was ineffective for failing to advise him of the specific intent and substantial step requirements of proving attempt. Lastly, Carver argued that his guilty plea to Count One was involuntary because it was based on a misunderstanding of the law and the available defenses. The district court referred the motion to Magistrate Judge Frank J. Lynch, Jr. for report and recommendation. Judge Lynch recommended denial of Carver's § 2255 motion because Carver's guilty plea to Count One was knowing and voluntary, and all of Carver's arguments "essentially concern[ed] his decision to plead guilty to Count One." CIV D.E. 8 at 9. The district court adopted the recommendation and denied Carver's motion by written order. CIV D.E. 10.

On December 29, 2014, Carver appealed the order denying his § 2255 motion. *Carver v. United States,* 772 Fed. App'x. 906 (11th Cir.2018); CIV D.E. 11. He argued that the district court erred by not addressing his claims of ineffective assistance of counsel. The Eleventh Circuit agreed and vacated and remanded based on *Clisby v.* Jones, 960 F.2d 925 (11th Cir. 1992). *See Clisby*, 960 F.2d at 925 (holding that if a district court fails to address each claim raised in a habeas petition, the Court "will vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims.").

On May 21, 2018, Carver filed a renewed motion to vacate under § 2255. CIV D.E. 34. The motion was referred to the undersigned for report and recommendation.

DISCUSSION

Carver raises three grounds in his renewed § 2255 motion: (1) ineffective assistance of counsel during the jury trial on Count Two because counsel did not contest Carver's guilt as to Count One; (2) ineffective assistance of plea counsel because counsel did not explain the specific

intent and substantial step requirements of attempted enticement of a minor in violation of § 2422(b); and (3) involuntariness of his guilty plea to Count One.

I. Carver Did Not Receive Ineffective Assistance of Counsel.

Carver alleges that he received ineffective assistance of counsel when deciding to plead guilty to Count One and during his jury trial on Count Two. The Supreme Court has established a two-prong test for deciding whether a defendant has received ineffective assistance of counsel. The defendant must show (1) that counsel's performance was deficient, and (2) that the defendant's rights were prejudiced as a result of the attorney's substandard performance. *Gomez-Diaz v. United States*, 433 F.3d 788, 791 (11th Cir. 2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984) (internal citations omitted)). *See also Gordon v. United States*, 518 F.3d 1291, 1297 (11th Cir. 2008). To satisfy the "deficient performance" element, the defendant must show that the quality of his counsel's representation was objectively unreasonable. *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000). That is, that it fell short of an objective standard of reasonableness under prevailing professional norms and in light of the full circumstances and particular facts of the case. *Id.* To establish prejudice, the defendant must show a reasonable probability that the outcome would have been different had his attorney not made the complained-of error. *Strickland*, 466 U.S. at 694. Because a petitioner must satisfy both prongs of the *Strickland* test to show ineffective assistance of counsel, a court "need not address the performance prong if the petitioner cannot meet the prejudice prong and vice versa." *Ward v. Hall*, 592 F.3d 1144, 1163 (11th Cir. 2010).

A. Carver's trial counsel was not ineffective.

Carver's first argument is that trial counsel was ineffective for advising him to stipulate that he had previously pleaded guilty to Count One. Carver says counsel should not have advised him to stipulate but should have told him he could contest or move to suppress his guilty plea to

Count One; counsel should have investigated the circumstances of his arrest on Count One and raised entrapment or some other defense; and counsel should have told him the undercover agent had been reprimanded for misconduct in an unrelated matter. The government argues, among other things, that Carver fails to show prejudice.

Carver fails to show deficient performance or prejudice. Carver pleaded guilty to and was convicted of the offense charged in Count One in May 2008. The Eleventh Circuit affirmed the plea and conviction in 2009. *Carver*, 348 F. App'x at 452. The legal effect of Carver's guilty plea was an admission to each element of the formal criminal charge. *Blohm v. Comm'r*, 994 F.2d 1542, 1554 (11th Cir. 1993). *See United States v. Green*, 873 F.3d 846, 864 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2620 (2018) (explaining "a guilty plea is more than a confession which admits that the accused did various acts. It is an admission that he committed the crime charged against him.") (internal quotations omitted). When Carver went to trial in 2010, his guilt of Count One was a readily provable matter. Had he not stipulated, the government could have introduced a certified copy of the judgment and conviction under Fed. R. Evid. 803(22).[3] "It is often wise for counsel to stipulate to … easily proven matters[.]" *Poole v. United States*, 832 F.2d 561, 564 (11th Cir. 1987) (noting that "[c]ourts have even encouraged such stipulations").

There were also strategic reasons to stipulate that Carver had pled guilty to Count One. If counsel had not done so, the government might have proved Count One by offering direct evidence, including numerous chats in which Carver arranged to have sex with what he believed was a mentally disabled eleven year old child. During those conversations, Carver described in graphic detail what he wanted to do to the child and admitted to two prior attempts at sex with children as well as abuse of his own daughter. By stipulating, counsel avoided having the jury

[3] Fed. R. Evid. 803(22) states that evidence of a final judgment of conviction based on a guilty plea is admissible if the evidence is admitted to prove "any fact essential to the judgment."

hear details that might have prejudiced them against him client. Counsel's advice was therefore reasonable and supported by sound trial strategy. *See United States v. Gonzales*, 342 F. App'x 446, 448 (11th Cir. 2009) (quoting *United States v. Stephens*, 609 F.2d 230, 232-33 (5th Cir. 1980)) (agreeing to stipulate is not ineffective assistance of counsel so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy); *see also United States v. Williams*, 403 F. App'x 707, 709 (3d Cir. 2010) (stipulating is not ineffective assistance of counsel absent a showing that counsel had evidence that would have been useful in rebutting the stipulated evidence).

Carver's claim that his trial counsel should have raised a defense of officer misconduct and entrapment because the undercover agent in this case was later reprimanded in an unrelated matter fails to satisfy the *Strickland* standard. Carver must show under *Strickland* that his attorney's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. Here, there is no evidence to suggest that any later reprimand of the undercover agent was linked to Carver's case, so there was no reason for trial counsel to have raised the issue. As will be explained in greater detail below, Carver's claim of entrapment is also unsupported. "Counsel is not required to present every nonfrivolous defense[.]" *Dell v. United States*, 710 F.3d 1267, 1281 (11th Cir. 2013) (internal citations omitted). Trial counsel was not ineffective for failing to raise non-meritorious issues. *See Chandler*, 240 F.3d at 917.

B. Carver's plea counsel was not ineffective.

Next Carver argues that his plea counsel was ineffective for not advising him about the legal requirements of an attempt offense before he entered his guilty plea. Because he was not properly advised, Carver says he thought he was pleading guilty to "uttering words that in

themselves violated the statute," and not intending to cause a minor to engage in sexual activity. CIV D.E. 34 at 16. Carver claims that if counsel had advised him correctly, he would not have pleaded guilty and instead would have gone to trial.

A defendant is entitled to effective assistance of counsel when deciding whether to accept a plea offer. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). To succeed on an ineffective assistance of counsel claim involving a guilty plea, a petitioner must show (1) that counsel's representation fell below an objective standard of reasonableness; and (2) a reasonable probability that but for counsel's unprofessional error he would not have pleaded guilty but would instead have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985) (extending *Strickland's* test to cases involving guilty pleas). To overcome an otherwise voluntary plea, a defendant must establish that the advice he received from counsel in relation to the plea was not within the range of competence demanded of attorneys in criminal cases. *See Premo v. Moore*, 562 U.S. 115, 121–26 (2011). A defendant must convince the court that a decision to reject a plea would have been rational under the circumstances. *Dodd v. United States*, 709 F. App'x 593, 594 (11th Cir. 2017) (citing *Padilla*, 559 U.S. at 372).

The record refutes Carver's claim that he did not understand the charge in Count One because counsel failed to advise him of the legal requirements. Carver testified under oath that he understood the charge in Count One, had an opportunity to fully discuss it and the case in general with his attorney, and was fully satisfied with his attorney's representation and advice. CIV D.E. 7-8 at 4. He confirmed that his plea was undertaken freely and voluntarily and with full understanding of the potential consequences. Carver was advised that the government had to prove Carver "knowingly used a computer to persuade, induce, entice, or coerce a person under 18 to engage in sexual activity." CIV D.E. 7-8 at 8. Carver acknowledged his understanding of this

requirement. "[D]eclarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977). A defendant will not ordinarily be heard to refute his testimony given under oath. *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985). The district court accepted his plea of guilty as a knowing and intelligent plea. CIV D.E. 7-8 at 15. "The representations of the defendant [at a plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge*, 431 U.S. at 73–74.

Carver also received a copy of the complaint, the initial indictment and the superseding indictment. CR D.E. 26. These documents put Carver on notice that he was being charged with using computer and the internet to "knowingly persuade, induce, entice and coerce" a minor to engage in illegal sexual activity, and attempting to do so, in violation of § 2422(b). CR D.E. 24. The purpose of an indictment is to give the defendant notice of the charge so that he may prepare a defense and protect against double jeopardy. *United States v. Acosta*, 748 F.2d 577, 579 (11th Cir. 1984). Given the plain language of the charging documents in this case, Carver's claim that he did not know what the government had to prove is not credible.

Even if counsel did not explain the intent and substantial step requirements, Carver cannot show prejudice because the government had more than enough evidence to prove these elements at trial. Carver relies on the Supreme Court's decision in *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) to argue that a court should not consider a defendant's chance of success at trial in determining whether a defendant would have proceeded to trial instead of pleading guilty. CIV D.E. 34 at 3-5. *Lee* is distinguishable, however. In *Lee*, the Supreme Court recognized two types of errors that counsel can make in representing a defendant who is deciding whether to plead guilty. The first– and the one that was at issue in *Lee*—is an error which affects a defendant's

understanding of the consequences of pleading guilty. *Lee*, 137 S.Ct. at 1965. *Lee*, for example, involved counsel's failure to advise the defendant that he faced mandatory deportation if convicted. Similarly, in *Hill v. Lockhart*, the error involved erroneous advice as to the defendant's eligibility for parole. When this type of error is involved, the question is not "how a hypothetical trial would have played out absent the error," but "whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial." *Lee*, 137 S. Ct. at 1965. The second type of error – and the one that is at issue here – affects a defendant's likelihood of success at trial. *Id.* Where the prospect of success at trial is at issue, a defendant must show he would have been better off going to trial. *Id.*

Carver cannot show he would have been better off going to trial because the government's evidence easily proves the requirements of attempt. Regarding proof of intent, Carver initiated contact in a chat room with someone he believed to be the parent of an underage minor.[4] During the ensuing conversation, he asked the person to send him nude photographs of the child. He told the person that he wanted "to find another young[] one to play with…" and stated "maybe I will be willing to pay you or her if we can meet if that's ok with you[.]" *Id.* Carver said he was serious about meeting and sent photos of his penis for the parent to show to the daughter. *Id.* To prove his seriousness, he told the person he had unsuccessfully to pay two other minors for sex. He agreed to meet the person the following day and to pay seventy dollars for sex with the daughter. He contacted the person the next day and traveled to the arranged meeting location. Upon meeting, he reiterated his intent to have sex with the child and said he had seventy dollars for payment and two condoms. *Id.* at 12. He also brought a teddy bear, presumably to influence the child. The government's evidence proves Carver intended to induce the child to have sex, not to merely

[4] This Court relies on the information in the stipulated factual basis because Carver acknowledged at the plea hearing that the government could prove those facts against him if the matter went to trial. CIV D.E. 7-8 at 13.

engage "in fantasy talk" as he now claims. CIV D.E. 34 at 17. *See United States v. Murrell*, 368 F.3d 1283, 1286-87 (11th Cir. 2004) (finding specific intent where defendant negotiated online to pay $300 to an undercover officer posing as a father willing to allow defendant to have sex with his minor daughter); *United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007) (finding specific intent where defendant asked an agent posing as a minor to engage in oral and sexual intercourse, sent pictures of his genitalia, made arrangements to meet, and arrived at the scheduled time and place).

The government's evidence also proves Carver took substantial steps toward completing the crime. A substantial step is shown when the defendant's objective actions mark his conduct as criminal and, as a whole, "strongly corroborate the required culpability." *United States v. Wilkerson*, 702 F. App'x 843, 848 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 719, 199 L. Ed. 2d 541 (2018) (citing *Murrell*, 368 F.3d at 1288). Here, Carver negotiated online to pay seventy dollars to a father in exchange for sex with his eleven year old daughter. He requested pictures and videos of the child, sent a photograph of his genitalia to show the child, arranged to meet, and arrived at the agreed upon location with money, condoms and a teddy bear. These actions are sufficient to prove substantial step. *See Yost*, 479 F.3d at 819; *Murrell*, 368 F.3d at 1286.

Carver also claims counsel rendered ineffective assistance during the plea proceedings by failing to investigate Carver's legal and factual defenses. Specifically, Carver claims his counsel failed to advise him of a possible entrapment defense and if he had known about that defense he would have gone to trial. This argument has no merit. Entrapment is an affirmative defense that requires (1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to commit the crime before the inducement. *United States v. Orisnord*, 483 F.3d 1169, 1178 (11th Cir.2007); *United States v. Ryan*, 289 F.3d 1339, 1343 (11th Cir.2002). Here,

according to the factual basis, it was Carver who initiated contact with the agent and continued to communicate even after the agent attempted to end the conversation. Carver is the one who brought up the idea of sex with the undercover agent's daughter, asked for nude images of the child, asked how much the agent wanted to have sex with her, and showed up at the meeting place with condoms and money for sex. Carver also acknowledged previous attempts to persuade minor girls to have sex with him and described in detail previous sexual abuse of his own daughter at 14 years old. There is no rational basis for believing that Carver would have proceeded to trial if only his lawyer had explained to him the requirements of attempt or the entrapment defense. His claim that he would have gone to trial absent these alleged errors is not credible. He has failed to show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have proceeded to trial.

II. Carver's Guilty Plea to Count One Was Voluntary.

Carver argues that his plea was involuntary. In order for a plea to be knowing and voluntary, the court accepting the plea must ensure that: (1) the guilty plea is voluntary and free from coercion; (2) the defendant understands the nature of the charges; and (3) the defendant knows and understands the consequences of his plea. *United States v. Bell*, 776 F.2d 965, 968 (11th Cir. 1985). Courts apply a "strong presumption" that statements made by a defendant during his plea colloquy are true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994); *Knight v. Sec'y, Fla. Dep't of Corr.*, 2017 WL 5593485, at *5 (11th Cir. Aug. 22, 2017). *See also United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) (explaining "when a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false."). When challenging the knowingness and voluntariness of a plea, the representations of the

defendant at the plea hearing "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge*, 431 U.S. at 74.

In this case, the colloquy between Carver and the district court shows that Carver's plea was voluntary. Carver acknowledged that he received a copy of the superseding indictment and charges against him, which stated that he was charged with an attempted enticement of a minor. CIV D.E. 7-8 at 4. Carver acknowledged that he fully discussed the charges and the case in general with his attorney. *Id.* Carver was fully satisfied the representation and advice provided by his counsel. *Id.* He also confirmed that he understood that he had a right to plead not guilty and proceed to a trial by jury, but that by entering a guilty plea that he would be adjudicated guilty for the charged offense. *Id.* at 5-7. He indicated that no one had made him any promises or assurances of any kind to induce his guilty plea, nor had anyone attempted to force hm to plead guilty. *Id.* at 14. The government provided the factual basis to support Carver's guilty plea, which he acknowledged was correct and all the facts contained therein were true. *Id.* at 8-13. Carver's numerous affirmative representations to the district court that he understood his rights and voluntarily entered his guilty plea do not support his current argument that his plea was involuntary.

Further, the voluntariness of Carver's guilty plea to Count One is not subject to collateral review because the Eleventh Circuit already determined that his plea was voluntary. Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255. *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir.2000). *See Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir.1994) (per curiam) ("[P]rior disposition of a ground of error on direct appeal, in most cases, precludes further review in a subsequent collateral proceeding."). Only if there has been an intervening change in the law can an issue decided on

direct appeal be relitigated in a motion to vacate. *See generally Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298 (1974); *Sampson v. United States*, 2009 WL 3055436, at *10 (S.D. Fla. Sept. 24, 2009). On direct appeal, Carver claimed he did not understand the nature of the charge against him because neither the government nor the district court explained the substantial step and specific intent requirements of an attempt crime. *Carver*, 348 F. App'x at 450. Carver raises the same argument now. The Eleventh Circuit considered this argument and concluded that "the record considered as a whole contained enough information from which the district court could find that Carver was apprised of and understood the nature of a section 2422(b) attempt charge." *Id.* at 451. The voluntariness of Carver's guilty plea to Count One was previously decided during his direct appeal and cannot be re-litigated before this Court.

III. No Evidentiary Hearing Is Required.

Section 2255 does not require that the Court hold an evidentiary hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief...." 28 U.S.C. § 2255(b). "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted in the record." *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989) (citation omitted). As previously discussed, Carver's claims lack merit as a matter of law or are otherwise affirmatively contradicted by the record. A full consideration of these claims reveals that no evidentiary hearing is necessary.

IV. The District Court Should Deny a Certificate of Appealability.

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180 (2009). Courts should issue a

certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000). When the district court rejects a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Upon consideration of the record as a whole, the district court should deny a certificate of appealability. Carver's claims of ineffective assistance of counsel do not raise any debatable legal issues. Moreover, the voluntariness of Carver's guilty plea has already been reviewed and upheld. Notwithstanding, if Carver does not agree, he may bring this argument to the attention of the district judge through an objection to this Report and Recommendation.

CONCLUSION

ACCORDINGLY, this Court recommends to the District Court that the Motion pursuant to 28 U.S.C. § 2255, [D.E. 1], be **DENIED**. The parties shall have fourteen (14) days from the date of this Report and Recommendation within which to file objections, if any, with the Jose E. Martinez, the United States District Judge assigned to this case. Failure to file timely objections shall bar the parties from a *de novo* determination by the District Court of the issues covered in this Report and Recommendation and bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745, 749–50 (11th Cir. 1988).

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this 29th day of August, 2019.

SHANIEK M. MAYNARD
UNITED STATES MAGISTRATE JUDGE

No. 19-14615-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TIMOTHY CARVER,

Petitioner/appellant,

v.

UNITED STATES OF AMERICA,

Respondent/appellee.

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

APPELLANT'S *CORRECTED* MOTION FOR CERTIFICATE OF APPEALABILITY

JACQUELINE E. SHAPIRO, ESQ.
Law Offices of Jacqueline E. Shapiro
Counsel for Timothy Carver
40 N.W. 3rd Street, PH 1
Miami, Florida 33128-1838
Tel. (305) 403-8207
Fax: (305) 403-8209

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Timothy Carver v. United States
Case No. 19-14615-C

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Acosta, R. Alexander

Acosta, Diana

Barrist, Lori E.

Brannon, Dave Lee

Caruso, Michael

Carver, Timothy Wayne

Fajardo Orshan, Ariana

Ferrer, Wifredo A.

Greenberg, Benjamin G.

Klugh, Jr., Richard Carroll

Lynch, Jr., Hon. Frank J.

Martinez, Hon. Jose E.

Maynard, Hon. Shaniek M.

Certificate of Interested Persons And Corporate Disclosure Statement (cont'd)
Timothy Carver v. United States, Case No. 19-14615-C

Schultz, Anne Ruth

Shapiro, Jacqueline E.

Sloman, Jeffrey

Smachetti, Emily M.

Tribuiani, Rinku Talwar

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 19-14615-C

TIMOTHY CARVER,

Petitioner/appellant,

v.

UNITED STATES OF AMERICA,

Respondent/appellee.
_____/

APPELLANT'S *CORRECTED*[1] MOTION
FOR CERTIFICATE OF APPEALABILITY

Appellant, Timothy Carver, through undersigned counsel, respectfully moves for a certificate of appealability and in support of the motion states:

This is an appeal from denial of 28 U.S.C. § 2255 relief from a guilty plea proceeding and two separate trials of counts in a single indictment charging the defendant with offenses relating to use of the means of interstate commerce in relation to illegal sexual solicitation. Pursuant to 28 U.S.C. § 2253(c)(1), a movant obtain a certificate of appealability to appeal the denial of relief under § 2255. The applicable standard is whether jurists of reason could disagree with the resolution of

[1] Appellant has corrected the word count in the Certificate of Compliance found at page 20 of the motion. No other changes were made to the motion.

this case, such that the issues warrant appellate review. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). The Court should grant a certificate of appealability as to the following issue:

> **Whether this Court should reverse and remand for the conducting of an evidentiary hearing on each of the three grounds raised in Carver's 28 U.S.C. § 2255 motion which assert that (1) Carver received ineffective assistance of trial counsel during the jury trial on Count Two, (2) Carver received ineffective assistance of plea counsel when he entered a plea of guilty to Count One, and (3) Carver's guilty plea was rendered involuntary by plea counsel's misadvice regarding the elements of the offense.**

MEMORANDUM OF LAW

On October 3, 2012, Carver filed a motion under 28 U.S.C. § 2255 to vacate a sentence that resulted from a guilty plea proceeding and two separate trials all stemming from a single indictment charging him with one count of attempting to use a computer and the internet to entice a minor in violation of 18 U.S.C. § 2422(b) ("Count One") and with one count of committing Count One while being required to register as a sex offender in violation of 18 U.S.C. § 2260A ("Count Two"). DE:1, Crim-DE:24. The original § 2255 motion was referred to a magistrate judge who recommended denying Carver's motion, a recommendation that was adopted by the district court. DE:8, 10. Carver appealed the denial of his § 2255 motion, and this

Court vacated the district court's decision and remanded "with instructions to fully address Grounds Two and Three under *Strickland* in the first instance, and to hold an evidentiary hearing unless a full consideration of these claims reveals that no hearing is required." *Carver v. United States*, 772 F. App'x 906, 910 (11th Cir. 2018) ("*Carver* III").

On remand, Carver filed a renewed § 2255 motion. DE:34. His motion was again referred to a magistrate judge who in a Report and Recommendation ("Report") recommended denying Carver's motion without holding an evidentiary hearing. DE:37. Carver objected to the magistrate's Report, DE:38, but the district court adopted the magistrate judge's recommendation, denied Carver's motion, and declined to issue a certificate of appealability. Mr Carver now seeks a certificate of appealability as to: whether this Court should reverse and remand for the conducting of an evidentiary hearing on each of the three grounds raised in Carver's 28 U.S.C. § 2255 motion which assert that (1) Carver received ineffective assistance of trial counsel during the jury trial on Count Two, (2) Carver received ineffective assistance of plea counsel when he entered a plea of guilty to Count One, and (3) that his guilty plea was rendered involuntary by plea counsel's misadvice regarding the elements of the offense.

Introduction

Under 28 U.S.C. § 2253(c)(2), if jurists of reason could disagree with the resolution of this case, such that the issues warrant appellate review, the Court should grant a COA. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Miller-El*, 537 U.S. at 337–38. The COA should issue if "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 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)); s*ee also Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999).

A court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337. Because a COA is always sought in the context in which the petitioner has lost on the merits, the Supreme Court emphasized, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Courts must resolve doubts about whether to grant a COA in favor of the

movant. *See Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (citing *Barefoot*, 463 U.S. at 893); *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997). A COA may be denied only when the court is "'confident that petitioner's claim is squarely foreclosed.'" *Lambright*, 220 F.3d at 1029 (quoting *Barefoot*, 463 U.S. at 894).

This Court should reverse the denial of Carver's § 2255 motion and remand for the conducting of an evidentiary hearing on each of the three grounds raised by Carver.

Title 28, United States Code, Section 2255 states:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

The Rules Governing § 2255 Proceedings make clear that this language is intended to incorporate the standards governing evidentiary hearings in habeas corpus cases that was articulated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963). *See* Advisory Committee Notes to Rule 8, Rules Governing § 2255 Proceedings (incorporating Advisory Committee Notes to Rule 8 of the Rules Governing § 2254 Cases). In *Townsend*, the Supreme Court held that the district court must hold an evidentiary hearing (1) if the prisoner alleges facts that, if true, would entitle her to relief; and (2) the relevant facts have not yet been reliably found after

a full and fair hearing. *Id.* at 312–313. Actual proof of those facts alleged in the motion is not required in order to demonstrate entitlement to a hearing. "The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only *allege*—not prove—reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) (emphasis in original).

Once the movant has alleged facts which, if true, would entitle him to relief, a hearing is required where: (1) the district court previously did not resolve the merits of the factual dispute in a full and fair hearing; (2) the district court previously determined the facts, but that determination is not fairly supported by the record as a whole; (3) the district court previously determined the facts, but the procedure was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed in prior federal proceedings; and (6) if, for any other reason, the district court did not provide the movant with a full and fair hearing on the merits of the factual dispute. *See Townsend*, 372 U.S. at 313. *See also Fontaine v. United States*, 411 U.S. 213, 215 (1973) (relying upon § 2255's language to reverse summary dismissal and remanding for hearing where record did not "'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255"); *Aron*, 219 F.3d

at 715 n.6 ("If the [movant's] allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the [movant] must offer proof"); *Arredondo v. United States*, 178 F.3d 778, 782, 788–89 (6th Cir. 1999) (hearing was required because the movant's allegations were not "'contradicted by the record, inherently incredible, or conclusions rather than statements of fact'").

As a result, a hearing is generally required if the motion presents a colorable claim that arises from matters outside the record. *See United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) ("When a colorable . . . claim is presented, and where material facts are in dispute involving inconsistencies beyond the record, a hearing is necessary."); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) ("Where section 2255 motions have been based on alleged occurrences outside the record, we have often held that an evidentiary hearing was required."). As this Court has stated in § 2255 cases, "we generally prefer that a district court simply hold an evidentiary hearing." *Rosin v. United States*, 786 F.3d 873, 879 (11th Cir. 2015).

In this appeal, each of Carver's claims is colorable and based on matters outside the record; reasonable jurists could debate whether the district court erred in summarily denying Carver's motion without holding a hearing.

1. Carver received ineffective assistance of counsel during his jury trial on Count Two.

Carver initially pleaded guilty to Count One of the superseding indictment and proceeded to a bench trial on Count Two. Crim-DE:24, 45–46, 54. He was found guilty of Count Two and sentenced to a total of 360 months; 240 months for Count One and the mandatory minimum of 120 months for Count Two, run consecutively. Crim-DE:66. Carver appealed and this Court confirmed his conviction on Count One, but vacated and remanded on Count Two because Carver had never waived his right to a jury trial. *United States v. Carver*, 348 F. App'x 449, 450–452 (11th Cir. 2009) ("*Carver* I"). Next, Carver proceeded to a jury trial on Count Two. Crim-DE:95–96. His conviction on Count Two at the jury trial was affirmed on direct appeal. *United States v. Carver*, 422 F. App'x 796 (11th Cir. 2011) ("*Carver* II"). In this § 2255 claim, Carver alleges that he received ineffective assistance of counsel at the jury trial.

In *Strickland v. Washington*, the Supreme Court established a two-part test to show ineffective assistance that violates the Sixth Amendment right to counsel: (1) "that counsel's performance was deficient," defined as "representation [that] fell below an objective standard of reasonableness," and (2) "that the deficient performance prejudiced the defense" in that "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 687–88, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

"[I]t is significant that a petitioner must show only a reasonable probability that the outcome would have been different; he 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.'" *Brownlee v. Haley*, 306 F.3d 1043, 1059–60 (11th Cir. 2002) (quoting *Strickland*, 466 U.S. at 693); *see DeLuca v. Lord*, 77 F.3d 578, 590 (2d Cir. 1996) ("The *Strickland* test does not require certainty that the result would have been different."). "When evaluating this probability, 'a court hearing an ineffectiveness claim must consider the totality of the evidence.'" *Brownlee*, 306 F.3d at 1060 (quoting *Strickland*, 466 U.S. at 695).

At the jury trial, Carver's trial counsel stipulated to the fact that Carver had previously pleaded guilty to Count One. This stipulation is shocking not only because committing Count One was one of only two elements the government had to prove at trial, Crim-DE:99 at 6, but also because Carver was still claiming that he had involuntarily entered the guilty plea based on plea counsel's misadvising him regarding the elements of Count One. The magistrate's Report concludes that it was a strategic decision taken by counsel to stipulate to Carver's guilty plea because it may have prevented the government's underlying allegations from being presented

to the jury. However, it is submitted that failing to contest the legitimacy of Carver's guilty plea can never be considered strategic where it was the *only* way to defend Carver on that element of Count Two. *See Rodriguez v. Young*, 906 F.2d 1153, 1161 (7th Cir. 1990) ("Counsel's decision to forego a motion to suppress was not a decision that might be considered sound trial strategy") (citation omitted).

Moreover, in Carver's § 2255 motion, he alleged that trial counsel unilaterally abandoned his claim that his plea to Count One was involuntary and that trial counsel failed to investigate or analyze possible defenses. DE:1 at 5. Thus, while the Report concludes that trial counsel's decision to stipulate was strategic, it is not, in fact, clear that the stipulation was a strategic decision taken after investigating and comparing possible strategies. There were other strategies available besides stipulating. For example, counsel could have sought to suppress the prior guilty plea. *See United States v. Cadet,* 138 F. App'x 272, 273–75 (11th Cir. 2005) (explaining that an involuntary conviction cannot be used to enhance a sentence under federal law); *see also United States v. Jordan*, 870 F.2d 1310, 1316–18 (7th Cir. 1989) (discussing the potential that an involuntary plea be suppressed in a subsequent prosecution); *United States v. Custis*, 988 F.2d 1355, 1363 (4th Cir. 1993) (explaining that an involuntary plea may not be used to enhance a sentence under federal law). Or counsel could have attacked the underlying facts to show the jury that Carver was set up in an unusual

and absurd sting operation by an undercover detective who was officially reprimanded for misconduct committed in the same time period as Carver's arrest.

A hearing is required to determine if trial counsel's decision to stipulate was really a strategic move, or whether it was an objectively unreasonable decision that constitutes ineffective assistance. *See Elmore v. Ozmint*, 661 F.3d 783, 832–71 (4th Cir. 2011) (ineffective assistance where counsel stipulated to chain of custody of evidence without investigation); *Kirkpatrick v. Butler*, 870 F.2d 276, 283 (5th Cir. 1989) (deficient performance where counsel failed to challenge the admissibility of evidence); *Adams v. Wainwright*, 709 F.2d 1443, 1445–46 (11th Cir. 1983) (failure to reasonably investigate plausible options show that counsel's decisions were ineffective and not strategic). Here, reasonable jurists could debate whether trial counsel's failure to investigate and pursue *any defense* whatsoever was ineffective assistance, and whether it was prejudicial because there would be a reasonable probability of a different outcome if trial counsel had presented any defense at all instead of stipulating to his client's guilt.

Further, trial counsel's decision not to contest whether Carver was guilty of Count One effectively deprived Carver of his right to testify by contradicting everything to which Carver could have testified. *See United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) ("a criminal defendant has a *fundamental*

constitutional right to testify in his or her own behalf at trial") (emphasis in original). "It is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense." *Id*. at 1533. Here, trial counsel's decision to stipulate made it impossible for Carver to testify—he would have had to contradict the stipulation to truly explain to the jury the underlying facts and why he had been led to enter an involuntary guilty plea. *See Gallego v. United States*, 174 F.3d 1196, 1197 (11th Cir. 1999) (a defendant receives ineffective assistance when his trial counsel prevents him from testifying in his own defense). It is debatable among jurists of reason whether Carver was functionally denied the right to testify in his own defense when his trial counsel made an uninformed decision to stipulate to Carver's guilt on Count One.

2. Carver received ineffective assistance from plea counsel who erroneously led Carver to believe he was guilty.

In May 2008, Carver entered a plea of guilty to Count One of the indictment on the advice of his counsel. Crim-DE:45. Carver alleges that had he been properly advised by plea counsel, he would have proceeded to trial on Count One. Notably, his decision to proceed to trial on Count Two lends credence to his claim that he would have proceeded to trial on Count One if plea counsel had properly advised him.

Specifically, Carver alleges that his plea counsel misadvised him by not

explaining to him the elements of an attempt offense, specifically the intent requirement, under 18 U.S.C. § 2422(b). He also alleges that plea counsel did not consult with him regarding his defenses to the attempt charge. Had plea counsel properly advised Carver of the elements of Count One, Carver would not have believed himself to be guilty—he would have proceeded to trial in order to prove that he never had the specific intent to entice a minor, and that he was simply engaging in fantasy talk with an undercover agent who was setting up a sting operation. Plea counsel's failure to properly advise Carver on the elements of Count One were compounded by the fact that the superseding indictment did not expressly state the elements of an attempt offense, and the government's summary of the elements of the offense during the plea colloquy failed to adequately describe an attempt offense. *See Carver* I, 348 F. App'x at 450–452 (recognizing the errors in the plea colloquy and superseding indictment but holding that it did not violate Rule 11).

"The Sixth Amendment guarantees a defendant the effective assistance of counsel at 'critical stages of a criminal proceeding,' including when he enters a guilty plea." *Lee v. United States*, 137 S.Ct. 1958, 1964 (2017) (quoting *Lafler v. Cooper*, 566 U.S. 156, 165 (2012)); *see also Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). A defendant must establish that the advice he received from counsel was not within the range of professional advice expected of criminal defense attorneys; advising a

defendant on the elements of a crime and investigating possible defenses is expected of a criminal defense attorney even where a client expresses a desire to plead guilty. *See Burt v. Uchtman*, 422 F.3d 557, 566–67 (7th Cir. 2005); *Savino v. Murray*, 82 F.3d 593, 598–99 (4th Cir. 1996); *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984).

The magistrate's Report concludes that Carver understood the charge he pleaded guilty to on the basis of his responses during the plea colloquy and that he had received documents including the complaint, the initial indictment, and the superseding indictment. DE:37, at 9–10. This line of reasoning ignores the fact that this Court has already found that the elements of the offense were not expressly stated in the superseding indictment or during the plea colloquy. There is simply no way that the plea colloquy could have been a "panacea for [Carver's] attorney's deficient performance," when the some of the same errors were made by the district court as by Carver's plea counsel. *Moore v. Bryant*, 348 F.3d 238, 243 (7th Cir. 2003) (granting habeas relief to defendant who pleaded guilty due to misadvice of his counsel). Moreover, without knowing what prior advice Carver received from plea counsel, it is impossible to know how he understood the copy of the superseding indictment that he acknowledged receiving. Reasonable jurists could debate whether an evidentiary hearing is necessary to determine whether plea counsel was deficient

by affirmatively misadvising Carver and whether the flawed plea colloquy and flawed superseding indictment could possibly have alleviated the misadvice given to Carver by plea counsel. *See United States v. Weeks*, 653 F.3d 1188, 1205 (10th Cir. 2011) (remanding to the district court for an evidentiary hearing where defendant alleged that he believed himself to be innocent and only entered a guilty plea based on his counsel's failure to advise him regarding the elements of the crime).

The Report also misinterprets the Supreme Court's recent decision in *Lee v. United States*, 137 S.Ct. 1958 (2017), in its prejudice analysis. It interprets *Lee* to create two categories of ineffective assistance of counsel, each with a separate prejudice analysis under *Strickland*: one where counsel misadvises a defendant regarding the consequences of pleading guilty, and another where counsel's error "affects a defendant's likelihood of success at trial." Crim-DE:37, at 11. The Report erroneously concludes that the error which Carver alleges—that plea counsel misadvised him regarding the elements of the offense—falls into this second category and that Carver was not prejudiced because he cannot show that he would have been better off going to trial. *Id*.

However, the error which Carver alleges does not neatly fall into one or the other category described in *Lee*. Carver alleges that counsel misadvised him regarding the elements of the attempt offense, and that had he been properly advised, Carver would not have believed himself to be guilty. Thus, regardless of his chance of

success at trial, Carver would have proceeded to trial because he could not, and should not, enter a guilty plea when he did not believe himself to be guilty. It is submitted that where plea counsel is ineffective by misadvising a defendant about the elements of an offense and what the government would have to prove, such misadvice is more akin to misadvice regarding the consequences of a plea than to ineffectiveness affecting success at trial. Thus, the proper test for prejudice under *Lee* for circumstances like Carver's is whether there is a "'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial'" *Lee*, 137 S.Ct. at 1965 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). At the very least, jurists of reason could debate how *Lee* should apply to the type of counsel error that Carver alleges, and this Court should grant a certificate of appealability to determine this issue.

Here, Carver was prejudiced by counsel's misadvising him about the elements of the attempt offense. Had he known the elements, he would have believed himself to be innocent and would have proceeded to trial. He was prejudiced "by the denial of the entire judicial proceeding . . . to which he had a right" *Lee*, 137 S.Ct. at 1965 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). Carver's decision to go to trial on Count Two shows that he was not averse to going to trial even where there would be substantial difficulties proving his innocence. It is necessary to ascertain the advice given to Carver by plea counsel because it is the only way to know whether

plea counsel's errors caused Carver to believe he was guilty. Plea counsel's misadvice to Carver cannot be determined without an evidentiary hearing, and the record does not otherwise show that he is not entitled to relief. *See United States v. Tolliver*, 800 F.3d 138, 141–42 (3d Cir. 2015) (requiring an evidentiary hearing where record does not conclusively show that defendant was not entitled to relief).

3. Carver's guilty plea was rendered involuntary due to the ineffective assistance he received from plea counsel.

On Carver's direct appeal from his guilty plea, this Court found that "that the district court fulfilled its Rule 11 obligations," and rejected Carver's challenge to the guilty plea on the basis of the colloquy. *Carver* I, 348 F. App'x at 451. However, "[A] plea, even one that complies with Rule 11, cannot be 'knowing and voluntary' if it resulted from ineffective assistance of counsel." *Hurlow v. United States*, 726 F.3d 958, 967 (7th Cir. 2013); *see also United States v. Goodman*, 590 F.2d 705, 710 (8th Cir. 1979) ("[I]t is well established that compliance with Rule 11 does not act as an absolute bar to subsequent collateral attack upon the voluntariness of a guilty plea."). Here, the magistrate's Report, after remand, commits the same error as the previous report and recommendation that was already rejected by this Court when it wrote that "contrary to statements in the R&R, a guilty plea does not bar Carver's claims that he received ineffective assistance of counsel in deciding whether to plead guilty or go

to trial."[2] *Carver* III, 722 F. App'x at 910; *see* Crim-DE:37, at 14. Review of Carver's claims on this § 2255 motion entails review of different issues under a different standard than the claims raised on direct appeal.

On direct appeal, this Court could only consider whether Carver's guilty plea was involuntary based on errors of the district court. Now, on collateral review, Carver's claims of plea counsel's ineffectiveness can be considered in determining whether Carver's plea was voluntary. However, without knowing the advice or misadvice given to Carver by plea counsel, his claim that his plea was involuntary due to his erroneous belief that he had committed the attempt crime and had no defense cannot fully determined. *See, e.g.*, *Tovar Mendoza v. Hatch*, 620 F.3d 1261, 1269 (10th Cir. 2010) (finding a defendant's guilty plea involuntary on collateral review with the assistance of an evidentiary hearing); *Starns v. Franklin*, No. 5:07-CV-00925 DE 14, 2007 WL 3232190, at *2 (W.D. Okla. Oct. 31, 2007) (ordering an evidentiary hearing to determine defendant's claims that he was given misadvice before his decision to plead guilty). This Court should grant a certificate of

[2] The district court again violated *Clisby v. Jones*, 960 F.2d 925, 935 (11th Cir. 1992) (en banc), by incorrectly finding that Carver is procedurally barred from claiming that his plea was involuntary due to the ineffective assistance of counsel on collateral review. In *Clisby*, this Court issued a directive to district courts to resolve all the claims presented in a habeas petition. *Id*. at 937. The district court has still failed to address whether Carver's plea was involuntary because of plea counsel's ineffectiveness.

appealability because reasonable jurists could debate whether an evidentiary hearing is necessary to determine whether plea counsel's misadvice, in conjunction with the errors in the superseding indictment and at the plea colloquy, rendered Carver's plea to Count One involuntary.

CONCLUSION

A certificate of appealability is warranted because Carver has made a substantial showing of the deprivation of a constitutional right in three distinct contexts: ineffective assistance of trial counsel, ineffective assistance of plea counsel, and an involuntary guilty plea due to misadvice of counsel. It is debatable among jurists of reason whether Carver is entitled to an evidentiary hearing on all three grounds raised in his § 2255 motion.

WHEREFORE, the appellant, Timothy Carver, moves for a certificate of appealability.

Respectfully submitted,

s/ Jacqueline E. Shapiro
JACQUELINE E. SHAPIRO, ESQ.
Attorney for Appellant
40 N.W. 3rd Street, PH 1
Miami, Florida 33128
Tel. (305) 403-8207
Fax: (305) 403-8209

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this motion contain 4,486 words. This document complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document has been prepared using WordPerfect in a proportionally spaced typeface with Times New Roman 14-point font.

s/ Jacqueline E. Shapiro
Jacqueline E. Shapiro, Esq.

No. 19-14615-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TIMOTHY CARVER,

Petitioner/appellant,

v.

UNITED STATES OF AMERICA,

Respondent/appellee.

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

APPELLANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING CERTIFICATE OF APPEALABILITY

JACQUELINE E. SHAPIRO, ESQ.
Law Offices of Jacqueline E. Shapiro
Counsel for Timothy Carver
40 N.W. 3rd Street, PH 1
Miami, Florida 33128-1838
Tel. (305) 403-8207
Fax: (305) 403-8209

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Timothy Carver v. United States
Case No. 19-14615-C

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Acosta, R. Alexander

Acosta, Diana

Barrist, Lori E.

Brannon, Dave Lee

Caruso, Michael

Carver, Timothy Wayne

Fajardo Orshan, Ariana

Ferrer, Wifredo A.

Greenberg, Benjamin G.

Klugh, Jr., Richard Carroll

Lynch, Jr., Hon. Frank J.

Martinez, Hon. Jose E.

Maynard, Hon. Shaniek M.

Certificate of Interested Persons and Corporate Disclosure Statement (cont'd)
Timothy Carver v. United States, Case No. 19-14615-C

Schultz, Anne Ruth

Shapiro, Jacqueline E.

Sloman, Jeffrey

Smachetti, Emily M.

Tribuiani, Rinku Talwar

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 19-14615-C

TIMOTHY CARVER,

Petitioner/appellant,

v.

UNITED STATES OF AMERICA,

Respondent/appellee.
_____/

APPELLANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING CERTIFICATE OF APPEALABILITY

Appellant, Timothy Carver, through undersigned counsel, respectfully moves for reconsideration of this Court's Order of June 17, 2020 (Appendix A, attached), denying Appellant's motion for a certificate of appealability. Appellant moved for a certificate of appealability as to the following issue:

> **Whether this Court should reverse and remand for the conducting of an evidentiary hearing on each of the three grounds raised in Carver's 28 U.S.C. § 2255 motion, which assert that (1) Carver received ineffective assistance of trial counsel during the jury trial on Count Two, (2) Carver received ineffective assistance of plea**

counsel when he entered a plea of guilty to Count One, and (3) Carver's guilty plea was rendered involuntary by plea counsel's misadvice regarding the elements of the offense.

See Corrected Motion for Certificate of Appealability (Appendix B, attached) at 1–20 (setting forth factual background, standards of review of COA motions, and grounds for COA). This Court should reconsider its initial decision for the reasons stated in this motion and the corrected COA motion.

I. THIS COURT SHOULD RECONSIDER WHETHER REASONABLE JURISTS COULD DEBATE WHETHER THE DISTRICT COURT COMMITTED *CLISBY* ERROR BY FAILING TO CONSIDER CARVER'S CLAIM THAT HIS GUILTY PLEA WAS RENDERED INVOLUNTARY BY THE INEFFECTIVE ASSISTANCE OF PLEA COUNSEL.

In *Clisby v. Jones*, this Court directed district courts to consider and resolve each and every claim raised in a habeas petition. 960 F.2d 925, 935–36 (11th Cir. 1992) (*en banc*). This Court held that it would "vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims whenever the district court has not resolved all such claims" in a habeas petition. *Id.* at 938; *see also Rhode v. United States*, 583 F.3d 1289, 1291 (11th Cir. 2009) (per curiam) (applying *Clisby* to § 2255 motions).

In Carver's first appeal from the denial of his § 2255 motion, this Court vacated

the district court's decision and remanded "with instructions to fully address Grounds Two and Three under Strickland in the first instance, and to hold an evidentiary hearing unless a full consideration of these claims reveals that no hearing is required." *Carver v. United States*, 772 F. App'x 906, 910 (11th Cir. 2018) ("Carver III"). However, on remand, the district court again failed to consider Ground Three of Carver's renewed § 2255 motion, which asserts that his guilty plea was involuntary because of the ineffective assistance of plea counsel whose misadvice led Carver to erroneously believe that he was guilty of Count One. DE:34 at 18–20.

The Report and Recommendation adopted by the district court disposes of Ground Three by analyzing the plea colloquy and concluding that "voluntariness of Carver's guilty plea to Count One was previously decided during his direct appeal and cannot be re-litigated before this Court." DE:37 at 13–15. The district court's refusal to consider Carver's claim that his guilty plea was rendered involuntary due to ineffective assistance of counsel is *Clisby* error because this claim is distinct from the issue decided on direct appeal, which was whether the district court committed Rule 11 error. *See United States v. Carver*, 348 F. App'x 449, 450 (11th Cir. 2009) ("Carver I"). It has been recognized by this Court and others that "[t]he fact that the trial court complied with Fed. R. Crim. P. 11 does not guarantee that the guilty plea is constitutionally valid." *Downs-Morgan v. United States*, 765 F.2d 1534, 1538 n.9

(11th Cir. 1985). "An accused who has not received reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by his plea because a plea of guilty is valid only if made intelligently and voluntarily." *Id.* (internal quotation marks and citations omitted); *see also United States v. Broce*, 488 U.S. 563, 574 (1989) (holding that "[a] failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel" even where there is Rule 11 compliance); *Hurlow v. United States*, 726 F.3d 958, 967 (7th Cir. 2013) ("a plea, even one that complies with Rule 11, cannot be 'knowing and voluntary' if it resulted from ineffective assistance of counsel"); *United States v. Yates*, 324 F. App'x 277, 278 (4th Cir. 2009) (recognizing that a claim of ineffective assistance of counsel as it relates to a guilty plea is different than a claim related to Rule 11 compliance); *United States v. Sanderson*, 595 F.2d 1021, 1021 (5th Cir. 1979) ("It is axiomatic that a guilty plea lacks the required voluntariness and understanding if entered on advice of counsel that fails to meet the minimum standards of effectiveness derived from the Sixth Amendment") (internal quotation marks and citations omitted).

Carver's claim that his guilty plea was not knowing and voluntary because of plea counsel's ineffectiveness has not yet been addressed by the district court. The district court's conclusion that Carver's guilty plea to Count One was voluntary is *Clisby* error because the district court did not consider the substance of Carver's actual

claim. Further, because Carver's claim of ineffective assistance of counsel necessarily rests on matters outside the record, this Court should reconsider whether to grant a certificate of appealability because reasonable jurists could debate whether an evidentiary hearing is necessary to determine if the ineffective assistance of plea counsel rendered Carver's plea to Count One involuntary.[1]

II. GIVEN ITS RECENT DECISION IN *BUHS v. SEC'Y, FLA. DEP'T OF CORR.*, THIS COURT SHOULD RECONSIDER WHETHER REASONABLE JURISTS COULD DEBATE WHETHER THE DISTRICT COURT PROPERLY APPLIED LEE v. UNITED STATES WHEN IT DETERMINED WHICH PREJUDICE STANDARD TO USE IN ANALYZING APPELLANT'S SECOND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

This Court should reconsider its denial of a certificate of appealability because reasonable jurists could debate whether the district court's application of the Supreme Court's decision in *Lee v. United States*, 137 S. Ct. 1958 (2017), is flawed and whether it is at odds with this Court's recent decision in *Buhs v. Sec'y, Fla. Dep't of Corr.*, 809 F. App'x 619 (11th Cir. 2020). In the adopted Report and

[1] A COA is required when "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 (2000) (internal quotation omitted). And an evidentiary hearing is generally required if a habeas motion presents a colorable claim that arises from matters outside the record. *See* Advisory Committee Notes to Rule 8, Rules Governing § 2255 Proceedings; *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963); *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002).

Recommendation, the district court wrote:

> In *Lee*, the Supreme Court recognized two types of errors that counsel can make in representing a defendant who is deciding whether to plead guilty. The first—and the one that was at issue in *Lee*—is an error which affects a defendant's understanding of the consequences of pleading guilty. *Lee*, 137 S.Ct. at 1965. *Lee*, for example, involved counsel's failure to advise the defendant that he faced mandatory deportation if convicted. Similarly, in *Hill v. Lockhart*, [474 U.S. 52 (1985),] the error involved erroneous advice as to the defendant's eligibility for parole. When this type of error is involved, the question is not "how a hypothetical trial would have played out absent the error," but "whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial." *Lee*, 137 S. Ct. at 1965. The second type of error—and the one that is at issue here—affects a defendant's likelihood of success at trial. *Id.* Where the prospect of success at trial is at issue, a defendant must show he would have been better off going to trial. *Id.*

DE:37 at 10–11. The district court denied Carver's habeas petition on Ground Two because it concluded that he could not have shown that he would have been better off going to trial. However, the district court erred in viewing Carver's claim of ineffective assistance as one where he was misadvised about his likelihood of success at trial and thus erred in its choice of a standard for analyzing prejudice. Instead, Carver alleges that plea counsel failed to consult with him about the elements of Count One of the superseding indictment and that, had he understood the elements of

the attempt offense, he would have believed that he was actually innocent.[2] DE:34 at 15–18.

The impact of counsel's advice on a defendant's belief about their guilt or innocence does not neatly fit into the two categories created by the district court in its analysis of Lee. Instead, *Buhs v. Sec'y, Fla. Dep't of Corr.*, a decision handed down by this Court on April 15, 2020 (after the filing of Carver's Corrected Motion for a Certificate of Appealability on April 9, 2020), shows how a claim such as Carver's should be handled. *Buhs* involved a defendant who alleged that he received ineffective assistance from counsel who failed to advise him about a possible affirmative defense. This Court analyzed the prejudice under *Lee* by asking if defendant Buhs would have opted to go to trial but for his counsel's deficient advice. 809 F. App'x at 634. Considering contemporaneous evidence that showed that Buhs would have gone to trial but for the deficient advice, this Court concluded that "Mr. Buhs has sufficiently alleged *Strickland* prejudice, as elucidated by *Hill* and *Lee*, and should be able to develop the record further at an evidentiary hearing" and remanded the case for an evidentiary hearing. *Id.* at 634–35.

---

[2] Plea counsel's failure to properly advise Carver on the elements of Count One was compounded by the fact that the superseding indictment did not expressly state the elements of an attempt offense, and the government's summary of the elements of the offense during the plea colloquy failed to adequately describe an attempt offense. *See Carver I*, 348 F. App'x at 450–52 (recognizing the errors in the plea colloquy and superseding indictment).

Carver's claim is identical to that in *Buhs* in that the alleged deficient advice given by counsel influenced his understanding of whether he was innocent or not. As in *Buhs*, it is submitted that the correct prejudice analysis is whether there is a "'reasonable probability that, but for counsel's errors,'" Carver "'would not have pleaded guilty and would have insisted on going to trial'" *Lee*, 137 S.Ct. at 1965 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). And there is contemporaneous evidence that Carver would have chosen to go to trial: his decision to go to trial on Count Two of the superseding indictment shows that he was not averse to going to trial even where there would be substantial difficulties proving his innocence.

In light of its recent decision in *Buhs*, this Court should reconsider whether reasonable jurists could debate whether the district court properly interpreted and applied the Supreme Court's decision in *Lee* to the facts of Carver's habeas petition and whether Carver should be granted an evidentiary hearing.

WHEREFORE, Appellant Timothy Carver moves for reconsideration of the order denying a certificate of appealability.

Respectfully submitted,

s/ Jacqueline E. Shapiro
JACQUELINE E. SHAPIRO, ESQ.
Attorney for Appellant
40 N.W. 3rd Street, PH 1
Miami, Florida 33128
Tel. (305) 403-8207
Fax: (305) 403-8209

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this motion contain 1,865 words. This document complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document has been prepared using WordPerfect in a proportionally spaced typeface with Times New Roman 14-point font.

s/ Jacqueline E. Shapiro
Jacqueline E. Shapiro, Esq.