No.

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN LOPEZ,

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a criminal defendant is required to prove an ineffective assistance of counsel claim on the face of the record?

Whether review should be granted to maintain public confidence in the judiciary?

PARTIES TO THE PROCEEDING

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

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

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

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeal was entered on May 23, 2022. A Petition for Panel Rehearing was timely filed and denied on June 27, 2022. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

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

U.S. Const. amend. VI.

STATEMENT OF FACTS

Mr. Lopez was convicted by a jury in the State of Florida of two counts of attempted second degree murder with a firearm, battery, attempted first degree murder with a firearm, three counts of aggravated assault with a firearm, and possession of a firearm by a convicted felon, and sentenced to life imprisonment. Mr. Lopez ultimately filed a Petition for Writ of Habeas Corpus in the United States

District Court for the Middle District of Florida, arguing that his trial counsel performed ineffectively by failing to advise him that acceptance of a plea agreement of 25 years imprisonment offered to him at the outset of trial and again at the close of the state's case during trial was in his best interest. Mr. Lopez further argued his state court collateral counsel was ineffective for failing to present the claim to the state court and he was therefore entitled to federal habeas relief. The district court denied relief. However, the Eleventh Circuit Court of Appeal granted a certificate of appealability on the question of "Whether the District Court erred in finding that Mr. Lopez's procedural default of his ineffectiveness claim could not be excused because the claim lacked merit, on the basis that counsel is not obligated to advise a client about whether to accept a plea offer?

By way of background, the evidence against Mr. Lopez was overwhelming, and it has never been disputed that any reasonably competent attorney would have recognized that resolving the case by way of plea agreement was in Mr. Lopez's best interest. At the outset of Mr. Lopez's trial, the following exchange occurred:

> THE COURT: Okay. Mr. Lopez, to make sure we're all on the same page, you're charged by way of information with eight counts. Count 1 is attempted first degree murder with a firearm, 25 to life minimum mandatory, life felony. Count 2 is attempted first degree murder with a firearm, 20 years minimum mandatory, life felony. Count 4 – Count 4 is aggravated battery with a firearm, 25 year minimum mandatory, second degree felony.
>
> Wait. That doesn't make sense.
>
> Aggravated battery with a firearm, 25 minimum mandatory to life because there is no 25-year minimum mandatory. That's a little typo there. Make sure we're all

on the same page. Count 5 and 6 are aggravated assault with a firearm, 25-year minimum mandatories. Count 7 – it was also aggravated assault with a firearm, 20-year minimum mandatory. Count 8 is possession of firearm by convicted felon, three-year minimum mandatory, second degree felony.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Agg. assaults are third-degree felonies, agg. batteries are second-degree felonies. Do you understand all that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And he's PRR on all the offenses except Count 8, correct, State?

THE PROSECUTOR: Yes, Your Honor.

THE COURT: Is he HFO – he's HVFO, correct?

THE PROSECUTOR: No, Your Honor, he doesn't have the requisite number.

THE COURT: Wait. He's got a robbery prior. One prior HVFO. Violent enumerated offense.

THE PROSECUTOR: Correct.

THE COURT: So he's HVFO because I think it's – I have to inform him of all potential enhancements.

Do you understand, Mr. Lopez?

THE DEFENDANT: Yes, sir.

THE COURT: If you are found guilty as charged and I find you PRR, I only have one possible sentence and it is life. It could be multiple consecutive sentences; do you understand, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Does the State have a plea offer? What is the plea offer to Mr. Lopez to resolve this case?

THE PROSECUTOR: Your Honor, the State has offered to allow him to plead guilty to Counts 4 through 8 –

THE COURT: So, like, 4 through 8, so that's aggravated battery with a firearm, three counts of agg. battery with a firearm and possession of a firearm by a convicted felon?

THE PROSECUTOR: Correct.

THE COURT: Do you understand that so far, Mr. Lopez?

THE DEFENDANT: Yes.

THE COURT: What is the State's sentencing recommendation?

THE PROSECUTOR: It would be the 25-year minimum mandatory.

THE COURT: Okay. What my question would be is, State, would you agree to him admitting to the VOP and have a concurrent sentence with the VOP in regard to that offer?

THE PROSECUTOR: The State has made that suggestion. We do not have the VOP. There is another attorney assigned, but we have discussed with Mr. Hayes that we would have no objection to having them all sentenced together.

THE COURT: Mr. Haynes, is that an F1 PBL robbery?

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: And he was under 18 for this offense?

DEFENSE COUNSEL: This is a new law violation.

THE COURT: He could get substantially –

DEFENSE COUNSEL: Way higher.

THE COURT: We know what the law is, how much he could actually get on those type of things.

DEFENSE COUNSEL: Right.

THE COURT: Mr. Lopez, do you understand all of that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. If you're found guilty of any one of these charges, it pretty much automatically violates your VOP and you could get an astronomical sentence in that case too. You can't get life on the VOP, but you can get some term of years that may constitute a life sentence for you.

In this case, State is giving you an offer that you will get out at some point. Have you had a meaningful opportunity to discuss this plea offer with Mr. Haynes?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want me to give you time to do so?

THE DEFENDANT: Sorry?

THE COURT: Do you want any more time to do so?

THE DEFENDANT: No, no.

THE COURT: Sorry?

THE DEFENDANT: No, sir.

THE COURT: Do you want to accept or reject the State's 25-year minimum mandatory?

THE DEFENDANT: I reject, sir.

THE COURT: Okay. No problem. We'll get a jury up and get him changed out into his clothing.

(Tr. Vol. I at 6-10).

In his Petition for Writ of Habeas Corpus, Mr. Lopez asserted that, with respect to the state's plea offer, trial counsel, Carlus Haynes, explained the terms of the offer to him, but, despite the fact he knew or should have known that the evidence against Mr. Lopez was overwhelming, failed to offer Mr. Lopez any advice as to whether acceptance of the state's plea offer was in his best interest, or whether he should accept the plea agreement. Mr. Lopez asserted that had trial counsel, on the day of trial, advised Mr. Lopez that the state's case against him was overwhelming, and that acceptance of the state's plea offer was in his best interest, he would have accepted the state's plea offer, and would have forewent trial.

Additionally, after the state rest its case, the following exchange occurred:

> THE COURT: Again, for the parties, I told you a couple days ago, if you want to resolve this case, I will take any resolutions and still will, okay? Just so we're clear, Mr. Lopez, just so we're clear, the last time we talked about this, the State had offered 20 year – no, my recollection – it doesn't mean you still have it on the table. You talked about – I don't want the issue of something not being conveyed, so I want Mr. Lopez to make sure to hear this. I said 25 and done. State said, no, we talked about this before, 20 followed by ten, and Mr. Haynes indicated that my client can't do probation. Is that all correct?
>
> THE PROSECUTOR: Actually, Your Honor. The State offered 25. There was a discussion on the part of Mr. Haynes with asking for a straight 20.
>
> DEFENSE COUNSEL: Yeah.
>
> THE PROSECUTOR: Your Honor asked if the State would consider that, and the State indicated that they would not consider a straight 20 min-man.

THE COURT: No. When we had the last conversation, I said straight 25. You guys were talking about from the State's side 20 followed by ten, and then you said supervisors were not happy with even the 25 offer. That's my last – so we don't have the issue that he was not knowing of an offer.

DEFENSE COUNSEL: Right.

THE COURT: Let's make sure we are clear right now. Before we started his trial, what was the offer?

THE COURT: I want him to make a decision on these lesser knowing what that offer was.

THE PROSECUTOR: The offer is 25 years minimum mandatory.

THE COURT: No probation to follow.

THE PROSECUTOR: No probation to follow.

THE COURT: I thought that's what we talked about, but the State wanted 20 followed by ten at some point also, or did you counteroffer that?

DEFENSE COUNSEL: I wanted a straight 20, and State's position was, if I do the 20, it has to be followed by ten probation.

THE COURT: Now we're all on the same page. Is the State willing to do that still at this point?

THE PROSECUTOR: Twenty-year minimum mandatory followed by ten years of probation.

THE COURT: I believe I said I would – I would resolve the VOP concurrently. Is the State willing to do that? I'm not forcing your hand or anything. I just want to know if you are willing to do that. If you say no, Mr. Busch, I want to deal with these lessers, because any finding could be a life sentence and life is life in Florida.

THE PROSECUTOR: Twenty-five years is the offer, Your Honor. Twenty-five minimum mandatory, no probation to follow.

THE COURT: On what counts?

THE PROSECUTOR: We would go with the –

THE COURT: Count 1, 2, and 3 as charged.

THE PROSECUTOR: That would be fine.

THE COURT: Sorry?

DEFENSE COUNSEL: I'm saying it wouldn't matter.

THE COURT: He can't get 25 year min man on Counts 2 and 3, only – only on Count 1. And it would be a 20-year min man on Count 2, all concurrent. Do you want to ask your client?

DEFENSE COUNSEL: You are hearing the conversation?

THE DEFENDANT: Yeah.

DEFENSE COUNSEL: And taking that offer which is 25, meaning you get out, if they come back up top, actually.

THE COURT: First four.

DEFENSE COUNSEL: First four means that you are gone. You're gone, okay? You're not getting out. Some possibility of getting out on, you know –

THE DEFENDANT: The last two.

DEFENSE COUNSEL: Can't have the bottom two unless you take all these. So if you are taking that, the 25, if they get you on the top four, you know what that means, bottom two, you understand, so you need to decide.

THE COURT: Does he want to accept the offer from the State or does he want me to get the jury.

> DEFENSE COUNSEL: I just passed that. Do you want to take the offer from the State?
>
> THE COURT: Mr. Lopez, State's offering you 25 years on Count 1, 20 years on Count 2, 20 years on Count 3, concurrent, and I would – I would do similar with the VOP, all at the same time. Do you understand that offer?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Do you want to accept the offer or reject the offer?
>
> THE DEFENDANT: Reject it, sir.
>
> THE COURT: Do you want all the category 1s instructed to the jury?
>
> THE DEFENDANT: Yes, sir.

(Tr. Vol. VI at 710-13).

Again, in Mr. Lopez's Petition for Writ of Habeas Corpus he asserted that, with respect to the state's plea offer, trial counsel explained the terms of the offer to him, but, despite the fact counsel knew that the evidence against Mr. Lopez was overwhelming, failed to offer Mr. Lopez any advice as to whether acceptance of the state's plea offer was in his best interest, or whether he should accept the plea agreement. Mr. Lopez further asserted that had trial counsel, during trial, advised him that the state's case against him was overwhelming, and that acceptance of the state's plea offer was in his best interest, he would have accepted the state's plea offer at the close of the state's case.

Additionally, Mr. Lopez asserted he would have accepted the state's plea offer had he been advised doing so was in his best interest, that the court would not have withdrawn it as evidenced by the court's statement it would take any resolution to

the case, that the prosecutor would not have withdrawn the offer, and he would have received a lighter sentence under the plea agreement than he received by proceeding to trial. Finally, Mr. Lopez asserted he was deprived of his right to the effective assistance of counsel by his trial counsel's failure to advise him that acceptance of the state's plea offer was in his best interest as well as his collateral counsel's failure to present the claim to the state court, and he was therefore entitled to federal habeas relief.

The Eleventh Circuit nonetheless denied relief because Mr. Lopez could point to nothing in the record demonstrating that he had an intent to plead guilty nor that the district court would have accepted a plea agreement.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT A CRIMINAL DEFENDANT RAISING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT REQUIRED TO PROVE HIS CLAIM ON THE FACE OF THE EXISTING RECORD.

The issue presented by this Petition is whether a criminal defendant is required to prove an ineffective assistance of counsel claim on the face of the record, and the answer to that question should be a resounding no.

In its opinion, the Eleventh Circuit faulted Mr. Lopez for failing to point to anything in the record supporting his claims. For instance, the Eleventh Circuit concluded Mr. Lopez (1) "points to nothing in the record that indicated that he had an intent to plead guilty," (2) Mr. Lopez "did not point to anything in the record supported by binding precedent to show that trial counsel was deficient, or that the alleged deficiency prejudiced him," and (3) "Mr. Lopez points to nothing in the record that indicates the trial court would have accepted the negotiated plea to a 25-year sentence when the mandatory minimum sentence was life" (this latter statement is simply false as will be explained in issue II below). *Lopez v. Sec'y, Fla. Dep't of Corr.*, No. 21-11076, 2022 WL 1613546, at *2 (11th Cir. May 23, 2022). Although Mr. Lopez may not have "pointed to anything in the record" as to (1) and (2) he did make assertions in his Habeas Petition, signed under Oath, which if accepted as true would have entitled him to relief, and this Court should establish that that was all that was required of him in the absence of an evidentiary hearing.

The Tenth Circuit has explained: "Most *Strickland* claims are based on evidence gathered after the initial trial, which perforce is not part of the original

record." *Wilson v. Sirmons*, 536 F.3d 1064, 1083 (10th Cir. 2008), *opinion reinstated sub nom. Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009). "A petitioner who has diligently presented such a claim in a timely fashion is entitled to have a court perform a de novo review of his evidence of ineffective assistance." *Id.* Accordingly, "To receive an evidentiary hearing on a *Strickland* claim, a petitioner need show only that the allegations, if true and not contravened by the existing factual record, would entitle him to habeas relief." *Id.* at 1081 (citations and quotations omitted). The Fourth and Ninth Circuits are in agreement with the Tenth. *See*, *Fullwood v. Lee*, 290 F.3d 663, 681 (4th Cir. 2002); *Schell v. Witek*, 218 F.3d 1017, 1027 (9th Cir. 2000). This Court has previously explained that when an ineffective assistance of counsel "claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record that is not developed precisely for, and is therefore often incomplete or inadequate for, the purpose of litigating or preserving the claim." *Massaro v. United States*, 538 U.S. 500, 500–01, 123 S. Ct. 1690, 1691, 155 L. Ed. 2d 714 (2003)

Here, what the Eleventh Circuit has done is required Mr. Lopez to litigate his ineffective assistance of counsel claim within a rubric specifically disavowed by this Court in *Massaro*. The Eleventh Circuit has concluded Mr. Lopez is confined to litigating his ineffective assistance of counsel claim on the basis of the existing trial record and declined to so much as consider, let alone accept as true, the assertions made by Mr. Lopez in his habeas proceeding. By doing so, the Eleventh Circuit has confined itself and the parties to "a trial record that is not developed precisely for,

and is therefore ... incomplete or inadequate for, the purpose of litigating or preserving the claim." *Massaro*, 538 U.S. at 500–01.

In the Eleventh Circuit's opinion, Mr. Lopez apparently was required to notify the court at the time he rejected the state's plea offer that he would have accepted the state's plea offer had he been properly advised to later be entitled to relief on his claim trial counsel performed ineffectively during plea negotiations. *See, Lopez,* No. 21-11076, 2022 WL 1613546, at *2 (Faulting Mr. Lopez because he "points to nothing in the record that indicated that he had an intent to plead guilty.") Such a conclusion is patently absurd and would ultimately lead to the denial of all ineffective assistance of counsel claims. Under such a rubric, the defendant would have to preserve every ineffective assistance counsel claim on the record at the time the error was made to preserve it for later review – which a defendant cannot do because while represented by counsel a defendant is not permitted to raise his own objections (not to mention expecting a criminal defendant who is untrained in the law to recognize his counsel is performing ineffectively and immediately bring it to the court's attention is ludicrous). Accordingly, to ensure that the Sixth Amendment's guarantee to the effective assistance of counsel does not become a hollow one, this Court should accept review, and establish that when a defendant raises an ineffective assistance of counsel claim he is not confined to proving his claim on the face of the existing record, and that the reviewing court must accept his allegations as true unless they are refuted by the record, quash the decision below, and crediting Mr. Lopez's allegations as true, either remand his case

with instructions that his Habeas Corpus Petition be Granted or that an evidentiary hearing be held to resolve his claim.

II. THIS COURT SHOULD GRANT REVIEW TO MAINTAIN PUBLIC CONFIDENCE IN THE JUDICIARY.

While this Court does not generally grant review to correct a case specific error, it should do so here to maintain public confidence in the judiciary. In the Eleventh Circuit's opinion, the Court concluded Mr. Lopez was not entitled to relief in part because "Lopez points to nothing in the record that indicates that the trial court would have accepted the negotiated plea to a 25-year sentence when the mandatory minimum sentence was life." *Lopez,* No. 21-11076, 2022 WL 1613546, at *2. This assertion is at odds with the facts. Below, Mr. Lopez directed the courts' attention to the fact that, in reference to plea negotiations, the trial court stated: "Again, for the parties, I told you a couple days ago, if you want to resolve this case, I will take any resolutions and still will, okay?" (Tr. Vol. VI at 710). Based on this statement alone no reasonable jurist could conclude there was "nothing in the record that indicates that the trial court would have accepted the negotiated plea[.]"*Lopez,* No. 21-11076, 2022 WL 1613546, at *2.

"Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Cianfrani,* 573 F.2d 835, 851 (3d Cir. 1978). In the same vein, public confidence cannot long be maintained if judicial decisions are grounded in blatant misstatements of fact. Accordingly, this Court should grant review to maintain public confidence in the judiciary as an institution guided by fact and reason, quash the decision below, and, crediting Mr. Lopez's allegations as true,

either remand his case with instructions that his Habeas Corpus Petition be Granted or that an evidentiary hearing be held to resolve his claim.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Lopez's Petition for Writ of Certiorari, establish that when a defendant raises an ineffective assistance of counsel claim he is not confined to proving his claim on the face of the existing record, and that the reviewing court must accept his allegations as true unless they are refuted by the record, quash the decision below, and crediting Mr. Lopez's allegations as true, either remand his case with instructions that his Habeas Corpus Petition be Granted or that an evidentiary hearing be held to resolve his claim.

Respectfully Submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JONATHAN LOPEZ,

Petitioner,

v. CASE NO. 6:17-cv-2121-Orl-18GJK

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This cause is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Thereafter, Respondents filed a Response to the Petition ("Response," Doc. 10) in accordance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 13). Petitioner alleges one claim for relief in the Petition. For the following reasons, the Petition is denied.

I. PROCEDURAL HISTORY

Petitioner was charged in the Ninth Judicial Circuit Court in and for Orange County, Florida, with three counts of attempted felony murder with a firearm (Counts One, Two, and Three), aggravated battery with a firearm (Count Four), three counts of aggravated assault with a firearm (Counts Five, Six, and Seven), and

possession of a firearm by a convicted felon (Count Eight). (Doc. 12-2 at 59-65). After a jury trial, Petitioner was convicted of the lesser included offense of attempted second degree murder with a firearm for Counts One and Two, to the offense of battery as to Count Four, and as charged for the remaining counts. (Doc. 12-5 at 3-10). The trial court sentenced Petitioner to a term of life imprisonment for Counts One and Three as a prison releasee reoffender, to a thirty-year term of imprisonment for Count Two with a twenty-year minimum mandatory term, to time served for Count Four, and to 280.95-month terms of imprisonment for Counts Five, Six, Seven, and Eight. (*Id.* at 91-103). Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam*. (Doc. 12-6 at 1028).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (Doc. 16-1 at 65-78). The trial court entered an interim order denying two of Petitioner's claims and setting an evidentiary hearing on the remaining claim. (*Id.* at 114-20). After holding the evidentiary hearing, the court denied relief. (*Id.* at 294-97). Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (Doc. 12-8 at 215).

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with

respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. ' 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies

that principle to the facts of the prisoner's case.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.* Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per curiam*); *cf. Bell v. Cone*, 535 U.S. 685, 697 n. 4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

Finally, under ' 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. ' 2254(e)(1).

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1)

whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[1] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989). In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Supreme Court of the United States held that "the two-part *Strickland* . . . test applies to challenges to guilty pleas based on ineffective assistance of counsel."

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages

[1] In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

> reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

Petitioner alleges that trial counsel was ineffective for advising him to reject the State's twenty-five-year plea offer. (Doc. 1 at 5). Petitioner claims that a twenty-five-year plea offer was made at the outset of trial and once again during the close of the state's case. (Doc. 1-1 at 14). Petitioner argues that counsel should have given him "informed" advice that such a plea was in his best interests and he should therefore accept the plea, and had counsel done so, he would have accepted the plea. (Doc. 2 at 5).

Petitioner argued in his Rule 3.850 motion that trial counsel was ineffective for advising him to reject the State's twenty-year plea offer. (Doc. 16-1 at 74-75). The trial court denied relief, finding that the record reflected that the State had offered Petitioner a twenty-five-year plea deal which he rejected, stating he did not want to do any more prison time. (*Id.* at 118). The trial court noted that

Petitioner was aware of the evidence against him, including the fact that his co-defendant was going to testify against him, and that he faced a term of life in prison, and despite this knowledge, Petitioner rejected the plea. (*Id.* at 119). The trial court concluded that Petitioner failed to demonstrate that counsel acted deficiently or that prejudice resulted. (*Id.*). Petitioner did not appeal the denial of this claim. Instead, Petitioner raises the slightly new claim regarding the rejection of the twenty-five-year plea deal, as noted above.

Respondents assert that this claim is unexhausted. (Doc. 10 at 10-11). Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–44 (1999). In order to satisfy the exhaustion requirement a "petitioner must 'fairly present[ ]' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Isaac v. Augusta SMP Warden*, 470 F. App'x 816, 818 (11th Cir. 2012) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). A petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

As previously noted, Petitioner did not raise the same factual basis for this claim in the state court, therefore, it remains unexhausted. *See Snowden*, 135 F.3d at 735. Additionally, the Court is precluded from considering this claim because it would be procedurally defaulted if Petitioner returned to state court. *Id.* at 736 (noting that if it is obvious that an unexhausted claim would be procedurally defaulted if a petitioner returned to the state court, a federal court may treat the claim as barred). Petitioner could not return to the state court to raise this claim because a second Rule 3.850 motion would be untimely and successful. Thus, Petitioner's claim is procedurally defaulted.

Procedural default may be excused only in two narrow circumstances: if a petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). It appears that Petitioner relies on *Martinez v. Ryan*, 560 U.S. 1 (2012), to demonstrate cause for his procedural default. In *Martinez*, the Supreme Court held a prisoner may establish cause for the procedural default of an ineffective assistance counsel claim that was not raised in an initial post-conviction motion if: (1) the state court did not appoint counsel in the initial-review collateral proceeding or (2) if counsel was appointed in the initial-review proceeding but failed to raise the claim. *Id.* at 13-16.

Petitioner had counsel in this Rule 3.850 proceedings; however, this particular claim was not raised. It is arguable that the procedural default of this claim is due to post-conviction counsel's failure to raise the claim in the state court. In order to excuse that procedural default, Petitioner must also demonstrate that the "underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that . . . the claim has some merit." *Id.* at 13. Therefore, the Court will address whether this claim is substantial.

On July 20, 2011, the trial court held a hearing on several pretrial matters, during which the State announced it had offered Petitioner a twenty-five-year sentence if he entered a guilty plea. (Doc. 12-5 at 161). The prosecutor noted that Petitioner was a prison releasee reoffender and was facing a life sentence if convicted at trial. (*Id.* at 160). The trial court stated that because Petitioner had filed a notice of expiration speedy trial, he had until July 25, 2011 to accept the plea or proceed to trial. (*Id.* at 164).

On July 25, 2011, the State again noted that it had offered to resolve the case via a guilty plea to Count One and in exchange, the State would forego seeking a prison releasee reoffender sentenced. (*Id.* at 210). Petitioner informed the Court that he understood the plea offer and that if he rejected the plea and was later found guilty, the trial court had no discretion and would be required to sentence

him to life in prison. (*Id.* at 211). Petitioner rejected the plea. (*Id.*). At the conclusion of the hearing, the prosecutor noted that the plea offer had been withdrawn or revoked. (*Id.* at 221).

On the morning before the trial began, the State noted that it had offered a plea wherein he would forego the mandatory life sentence and receive a twenty-five-year sentence. (Doc. 12-6 at 86-87). Petitioner stated that he understood the sentences he faced if convicted and that he had an opportunity to meaningfully discuss the offer with counsel. (*Id.* at 87-89). Petitioner rejected the plea offer. (*Id.* at 89). Toward the conclusion of trial, after the State's evidence had been presented, the parties again discussed the twenty-five-year plea offer. (*Id.* at 789-91). Petitioner stated that he understood the sentences he could receive and rejected the plea. (*Id.* at 791).

The law is well settled that defense counsel has an affirmative duty, under the Sixth Amendment, to provide competent advice, and to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to an accused. *See Missouri v. Frye*, 566 U.S. 134, 140-141 (2012); *Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012)(citations omitted). The *Strickland* framework applies to advice regarding whether to plead guilty or proceed to trial. *See Lafler*, 566 U.S. at 162-63 (quoting *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985)).

In the instant case, Petitioner does not argue that counsel misadvised him regarding the terms of the plea or that he failed to communicate the State's offer. Instead he asserts that counsel failed to advise him that accepting the State's plea offer was in his best interests. In other words, Petitioner states that counsel should have told him to accept the plea. However, Petitioner cannot demonstrate deficient performance or prejudice.

First, there is no indication that counsel was obligated to advise Petitioner to accept the plea offer. *See Boyers v. Sec'y, Dep't of Corr.*, No. 8:15-CV-260-T-36MAP, 2017 WL 2506420, at *6 (M.D. Fla. June 9, 2017). Petitioner was aware that he faced a life sentence if convicted at trial because the trial court advised him that it was required to impose a life sentence on Count One. Petitioner informed the Court that he understood the sentence he faced. Petitioner's representations to the trial court are presumed true, and he has not shown that the Court should overlook his statements. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (stating that the "representations of the defendant . . . [at a plea proceeding] constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity.").

Moreover, Petitioner knew that his co-defendant had entered a plea and was listed as a State witness with the intent of testifying against him. At the

conclusion of the State's case, Petitioner had heard all of the evidence presented against him. Despite Petitioner's knowledge of the evidence and the sentence he faced, he rejected the plea. The decision regarding whether to accept or reject a plea offer is a defendant's, not his attorney's. *See Padilla v. Kentucky*, 599 U.S. 356, 369-79 (2010) (noting that counsel is obligated to discuss the advantages and disadvantages of a plea offer so that the defendant can then decide whether to accept or reject the offer); *Brady v. United States*, 397 U.S. 742, 756 (1970) (noting that an attorney has a duty to advise a defendant of the available options surrounding a plea and the possible sentencing consequences).

Additionally, there is no indication that counsel did anything other than give Petitioner competent advice regarding the plea; there are no allegations that counsel failed to confer with Petitioner regarding the advantages and disadvantages surrounding the plea or that he misinformed him regarding the plea in some way. Petitioner cannot demonstrate that but for counsel's actions, he would have foregone trial and entered the plea. Therefore, Petitioner has not shown that this claim is substantial, and consequently, it is procedurally barred.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner "makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a Petitioner shows "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.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The Court concludes that Petitioner has not made the requisite showing in these circumstances. Petitioner has not demonstrated that jurists of reason would find the Court's rulings debatable. Therefore, Petitioner is not entitled to a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

2. Petitioner is **DENIED** a certificate of appealability.

3. The Clerk of the Court is directed to enter judgment and close the case.

DONE AND ORDERED in Orlando, Florida, on March 3, 2021.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
OrlP-3 3/2
Counsel of Record

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11076-J

JONATHAN LOPEZ,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Jonathan Lopez is serving a life sentence for attempted second-degree murder with a firearm, attempted first-degree murder with a firearm, aggravated assault with a firearm, and battery. He now moves to proceed in forma pauperis ("IFP") and for a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 petition.

I

Mr. Lopez was charged in a multi-count information in connection with the attempted murder of Harold Savignano. Mr. Savignano testified at trial that a man wearing a blue bandana over his face and carrying a gun fired five shots at him. Certain witnesses, including one also arrested in connection with the shooting who later cooperated with the prosecution, identified Mr. Lopez as the shooter. But one witness testified to provide an alibi for Mr. Lopez and explained Lopez was elsewhere at the time of the shooting.

The prosecution extended plea offers both before trial and at the close of the prosecution's case. Mr. Lopez rejected those offers, which would have secured him a 20- to 25-year sentence. Notably, at the close of the prosecution's case, the trial transcript shows the parties discussing again the possibility of a plea agreement, but the transcript does not show Mr. Lopez's counsel actually advised him on the relative merits of accepting or rejecting the renewed offer. Mr. Lopez ended up rejecting the offer. The jury later returned a guilty verdict and the trial court sentenced him to life imprisonment without the possibility of parole.

With new post-conviction counsel, Mr. Lopez filed a § 2254 petition arguing trial counsel performed deficiently by failing to advise him that the state's case against him was overwhelming and that acceptance of the state's plea offer of 25 years' imprisonment, at the outset of trial or after the close of the state's case during

trial, was in his best interest. He argued he was prejudiced by this deficient performance and would have accepted the plea offer if he had been so advised. The District Court denied the § 2254 petition and denied Mr. Lopez's request to proceed IFP and for a COA.

II

This Court may grant a petitioner leave to proceed IFP if he "show[s] inability to pay or give security for fees and costs." 16AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3970.1 (4th ed. Apr. 2020 update); see 28 U.S.C. § 1915(a)(1). Mr. Lopez's affidavit of indigency satisfies this requirement. As a result, he need not prepay fees and costs associated with this appeal. See also Martinez v. Kristi Kleaners, Inc., 364 F.3d 1305, 1307 (11th Cir. 2004) (per curiam) ("When considering a motion filed pursuant to § 1915(a), '[t]he only determination to be made by the court . . . is whether the statements in the affidavit satisfy the requirement of poverty.'").

Therefore, Mr. Lopez's motion to proceed IFP is GRANTED.

III

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the District Court denied a habeas petition on procedural grounds, the movant must show reasonable jurists would debate whether (1) the motion states a valid claim of the denial of a

constitutional right, and (2) the District Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603–04 (2000).

Where a prisoner claims he rejected a plea offer as a result of counsel's deficient performance, he must demonstrate a reasonable probability that: (1) absent the deficient performance, he would have accepted the plea offer; (2) the prosecution would not have cancelled or withdrawn the offer; (3) the court would have accepted the plea offer; and (4) the conviction or sentence, or both, would have been less severe than what he actually received. See Missouri v. Frye, 566 U.S. 134, 147, 132 S. Ct. 1399, 1409 (2012) (requiring the first three); Lafler v. Cooper, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387 (2012) (adding the fourth).

In his § 2254 petition, Mr. Lopez argued trial counsel failed to offer any advice as to whether acceptance of the plea offer was in his best interest. He argued if counsel had advised him that the state's case was overwhelming and accepting the plea offer was in his best interest, he would have accepted the offer. Mr. Lopez acknowledged his claim was procedurally defaulted because he did not raise it in his Fla. R. Crim. P. 3.850 motion and could not do so now. However, he argued the procedural default should be excused because the failure to raise the claim was due to his former counsel's ineffectiveness during his Rule 3.850 proceedings, and because his current claim was a substantial one, the District Court could review his claim on the merits.

The District Court rejected these arguments and denied the § 2254 petition. The court found Mr. Lopez had not raised the same factual basis for his claim as he did in his Rule 3.850 motion and thus his claim was unexhausted. The District Court further found that the claim was procedurally defaulted because Mr. Lopez could not return to state court to raise it, since any subsequent Rule 3.850 motion would be untimely and successive. The court found the procedural default could not be excused by counsel's failure to raise the claim in state court because the underlying claim of ineffective assistance of counsel was meritless. It found there was no indication that counsel was obligated to advise Mr. Lopez to accept the plea offer, and Lopez could not demonstrate that, but for counsel's actions, he would have forgone trial and entered the plea. Accordingly, the District Court found that his claim was not substantial, and thus, it was procedurally barred.

However, reasonable jurists would debate whether (1) Mr. Lopez's motion states a valid claim of the denial of a constitutional right, and (2) the District Court was correct in its procedural ruling. Slack, 529 U.S. at 484, 120 S. Ct. at 1603–04. The ineffectiveness claim is procedurally defaulted, as Mr. Lopez failed to raise it in his Rule 3.850 motion, and he cannot now raise it in state court. See Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001). But the procedural default can be excused if the underlying ineffectiveness claim has some merit. In Martinez v. Ryan, the Supreme Court held the ineffective assistance of counsel during collateral

proceedings providing the first occasion to raise a claim of ineffective assistance at trial may establish cause for a procedural default in a federal habeas proceeding of a claim of ineffective assistance of trial counsel. 566 U.S. 1, 9, 13, 132 S. Ct. 1309, 1316, 1318 (2012). In such a situation, the petitioner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." Id. at 14, 132 S. Ct. at 1318. Mr. Lopez has arguably made such a showing.

Here, the District Court found Mr. Lopez's ineffectiveness claim lacked merit because it believed Mr. Lopez could not establish deficient performance or prejudice under Strickland, reasoning that under this circuit's precedent, "there is no indication that counsel was obligated to advise Petitioner to accept the plea offer." R. Doc. 17 at 11. Having found that Mr. Lopez was unable to meet the first of the four factors to establish prejudice, the District Court did not reach the second, third, and fourth prongs set forth under Frye and Lafler—that (2) the prosecution would not have cancelled or withdrawn the offer; (3) the court would have accepted the plea offer; and (4) the conviction or sentence, or both, would have been less severe than what he actually received. See Frye, 566 U.S. at 147, 132 S. Ct. at 1409; Lafler, 566 U.S. at 168, 132 S. Ct. at 1387.[1]

[1] Of course, to prevail Mr. Lopez must ultimately meet the remainder of the factors under Frye and Lafler, but those factors were not the basis for the District Court's decision. Nonetheless, Mr. Lopez shows in his motion for a COA that the second, third, and fourth prongs

Reasonable jurists could debate whether the District Court erred in its holding that the Sixth Amendment's guarantee to counsel does not require counsel to provide advice on a proffered plea agreement. As this circuit has previously explained, "the Strickland test applies with equal force to challenges against guilty pleas based on the ineffective assistance of counsel." Agan v. Singletary, 12 F.3d 1012, 1017 (1994) (citing Hill v. Lockart, 474 U.S. 52, 58, 106 S. Ct. 366, 370 (1985)). Specifically, for a client who pleads guilty, "counsel must still make an independent examination of the facts and circumstances and offer an informed opinion to the accused as to the best course to follow." Id. at 1018 (citing Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984) (per curiam)). More broadly, this Court has explained that to render effective assistance, counsel must "provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." Wofford, 748 F.2d at 1508. Arguably, Mr. Lopez's trial counsel did not render such advice and Lopez was prejudiced. Reasonable jurists could thereby debate whether Mr. Lopez's ineffectiveness claim has "some merit," Martinez, 560 U.S. at 14, 132 S. Ct. at 1318, and whether the District Court was correct in its procedural ruling.

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are arguably met because he excerpted trial transcripts revealing the prosecution's reiteration of a plea offer; the trial court's indication that it would accept a plea agreement; and the proffered sentences being less severe than the one Lopez actually received.

Accordingly, a COA is **GRANTED** on the following issue:

Whether the District Court erred in finding that Mr. Lopez's procedural default of his ineffectiveness claim could not be excused because the claim lacked merit, on the basis that counsel is not obligated to advise a client about whether to accept a plea offer?

* * *

The motions for a COA and to proceed IFP are GRANTED.

Barkley B. Martin

UNITED STATES CIRCUIT JUDGE

APPENDIX C

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-11076

Non-Argument Calendar

JONATHAN LOPEZ,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:17-cv-02121-GKS-GJK

Before LAGOA, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

Jonathan Lopez, a Florida prisoner serving a life sentence for two counts of attempted second degree murder with a firearm, battery, attempted first degree murder with a firearm, three counts of aggravated assault with a firearm, and possession of a firearm by a convicted felon, appeals the denial of his 18 U.S.C. § 2254 petition, which was based on ineffective assistance of trial counsel.

Lopez filed the § 2254 petition at issue in this appeal, which raised one ground for relief based on ineffective assistance of his trial counsel. In the petition, he argued that his trial counsel was ineffective for advising him to reject the state's plea offer of 25 years' imprisonment on the day of trial. He acknowledged that his claim was procedurally barred from being raised in state court because it was not raised in his original motion for post-conviction relief. However, he asserted that because his failure to present the claim in his state post-conviction proceedings was due to his post-conviction counsel's ineffective performance and his claim for relief was substantial, the district court could review it on the merits.

On appeal, Lopez argues that the district court erred when it found that he procedurally defaulted his ineffective assistance of counsel claim and determined that the default could not be excused because his claim lacked merit.

When reviewing the district court's denial of a habeas petition, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error. *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000). We may affirm the denial of habeas relief for any ground supported by the record. *Trotter v. Sec'y, Dep't of Corrs.*, 535 F.3d 1286, 1291 (11th Cir. 2008). The burden is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. *Putman v. Head*, 268 F.3d 1223, 1243 (11th Cir. 2001).

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is presumed to be reasonable, and the movant must demonstrate that no competent counsel would have taken the action that counsel took. *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*). Prejudice occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Where a prisoner claims that he rejected a plea offer as a result of counsel's deficient performance, he must demonstrate a reasonable probability that: (1) absent the deficient performance, he would have accepted the plea offer; (2) the prosecution would not have cancelled or withdrawn the offer; (3) the court would have accepted the plea offer; and (4) the conviction or sentence, or both, would have been less severe than what he actually received. *See*

Missouri v. Frye, 566 U.S. 134, 147 (2012) (requiring the first three); *Lafler*, 566 U.S. at 168 (adding the fourth). In the context of a defendant who ultimately takes a guilty plea, we have held that, although counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial, counsel must still make an independent examination of the facts and circumstances and offer an informed opinion to the accused as to the best course to follow. *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994).

Under the procedural-default doctrine, if the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief. *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001). To properly exhaust a claim, the petitioner must fairly present every issue in his federal petition to the state's highest court, either on direct appeal or on collateral review. *Id.*

Pursuant to *Martinez v Ryan*, 566 U.S. 1 (2012), a prisoner may establish cause for default of a claim of ineffective assistance of trial counsel by showing both that post-conviction counsel was ineffective under the two-prong standard of *Strickland*, and that the defaulted claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Martinez*, 566 U.S. at 14. A defaulted claim is substantial when resolution of the merits of the claim would be debatable among jurists of reason. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2010).

As an initial matter, Lopez concedes that his claim is procedurally defaulted, as he failed to raise it in his Rule 3.850 motion,

and he cannot now raise it in state court. *See Smith*, 256 F.3d at 1138. The district court properly found that his assertion—that counsel was ineffective during his collateral proceedings by failing to raise this claim in his Rule 3.850 motion—does not excuse this procedural default because his underlying claim of ineffective assistance of counsel is meritless. *Id.*

Here, we conclude that the district court did not err when it determined that Lopez failed to satisfy the standard set forth in *Martinez*, and accordingly dismissed his petition as procedurally defaulted. 566 U.S. at 14. As to the first prong of *Martinez*, Lopez did not show that his post-conviction counsel was ineffective under *Strickland* for failing to raise the issue of trial counsel's ineffectiveness in his first Rule 3.850 motion because trial counsel was not ineffective. *See id.* First, Lopez alleged that he would have accepted the plea offer if he had known more information, but points to nothing in the record that indicated that he had an intent to plead guilty. *See Lafler*, 566 U.S. at 164; *Putman*, 268 F.3d at 1243. Further, the state offered the identical plea agreement to Lopez on three occasions—at a July 2011 hearing, on the morning of trial, and after the state rested at trial. Lopez refused to accept the offer each time. Second, even if the state had maintained its offer, Lopez points to nothing in the record that indicates that the trial court would have accepted the negotiated plea to a 25-year sentence when the mandatory minimum sentence was life. *See Lafler*, 566 U.S. at 164; *Putman*, 268 F.3d at 1243. As stated in *Putnam*, Lopez bears the burden to make this showing, and despite what he argues

in his initial brief, he fails to cite to binding case law that alleviates him of this burden. *See Putman*, 268 F.3d at 1243.

As to the second prong of *Martinez*, even if Lopez's allegations are sufficient to demonstrate deficient performance on the part of post-conviction counsel, Lopez failed to demonstrate that his underlying claim of ineffective assistance of trial counsel is substantial, *i.e.*, that it has any merit, for the reasons explained above. *See Martinez*, 566 U.S. at 14; *Miller-El*, 537 U.S. at 336. He did not point to anything in the record supported by binding precedent to show that trial counsel was deficient, or that the alleged deficiency prejudiced him. *See Strickland*, 466 U.S. at 687–90; *Putman*, 268 F.3d at 1243. Thus, we conclude that he did not meet his burden, and did not meet the standard articulated in *Martinez* to excuse the procedural default. *See Putman*, 268 F.3d at 1243; *Martinez*, 566 U.S. at 14.

Accordingly, we conclude that the district court did not err in denying Lopez's § 2254 petition because his claim had been procedurally defaulted in the state court, and Lopez did not make the requisite showing to overcome the procedural bar. *See Martinez*, 566 U.S. at 14.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11076-JJ

JONATHAN LOPEZ,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

BEFORE: LAGOA, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ORD-41