APPENDIX A Eleventh Circuit Court Of Appeal Opinion Affirming

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 20-14181

PABLO GUZMAN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:17-cv-20220-CMA

Before JILL PRYOR, NEWSOM, and GRANT, Circuit Judges.

GRANT, Circuit Judge:

The question here is whether Pablo Guzman was prejudiced when his appellate counsel failed to make a particular argument. But there is a catch: while the neglected argument may have succeeded at the time of his appeal—and even during his state court habeas petition—it fails under current Florida law.

Guzman's counsel may have erred in the past, but that error does not prejudice him in the present—at least not according to *Lockhart v. Fretwell*, 506 U.S. 364 (1993). There, the Supreme Court instructed that when the law has changed in a way to render a legal problem obsolete, prejudice is measured against current law. *See id.* at 371–72. That direction decides this case. We do not need to decide whether Guzman's counsel made an error—though by all accounts, he did. But prejudice review in habeas corpus is dedicated to deciding whether a proceeding was truly unfair or unreliable—so much so that to let the result stand would violate the Constitution. Here, the result for Guzman may have been unlucky, but it was neither unfair nor unreliable because under current Florida law, Guzman got the correct result. We affirm the district court's denial of Guzman's petition.

I.

In 2013, Pablo Guzman was tried by a Florida jury. He had been charged with attempted first-degree murder, and the state

court instructed the jury to consider three lesser-included crimes as well: attempted second-degree murder, attempted voluntary manslaughter, and aggravated battery. Ultimately, the jury convicted Guzman of attempted second-degree murder, and he was sentenced to forty years in prison.

Guzman now claims that the jury instructions on attempted voluntary manslaughter were incomplete because they lacked an explanation of "excusable homicide." Under Florida law, a killing qualifies as excusable homicide when it was committed "by accident and misfortune," with "sudden and sufficient provocation," or "upon a sudden combat," without "any dangerous weapon being used." Fla. Stat. § 782.03. When Guzman's counsel asked for an instruction explaining excusable homicide, the prosecution protested that such a theory of the case had not been pursued and could not possibly apply. The court agreed with the prosecution and omitted the instruction.

Here is the problem—the decision should have gone the other way at the time. The Florida Supreme Court had said that a "complete instruction on manslaughter requires an explanation that justifiable and *excusable homicide* are excluded from the crime." *State v. Lucas*, 645 So. 2d 425, 427 (Fla. 1994) (emphasis added). And it did not matter that Guzman was convicted of attempted second-degree murder—not manslaughter. Under *Lucas*, the jury needed to hear the complete instructions on manslaughter, even if the evidence was sufficient for second-degree murder. *See id.* at 426–

27. So at the time of Guzman's trial, Florida law required the missing instruction.

Even so, Guzman's counsel did not raise this missing instruction on direct appeal, and the conviction was affirmed. *Guzman v. State*, 151 So. 3d 1256 (Fla. Dist. Ct. App. 2014) (unpublished table decision). In 2015, Guzman petitioned that same state appellate court for habeas relief based on ineffective assistance of appellate counsel. Among the enumerated errors was failure to appeal the omitted excusable homicide instruction. The appellate court denied the petition without explanation. *Guzman v. State*, 206 So. 3d 712 (Fla. Dist. Ct. App. 2015) (unpublished table decision).

In 2017, Guzman turned to federal court. He filed a habeas petition under 28 U.S.C. § 2254 and raised several grounds for relief, including ineffective assistance of appellate counsel. Before the district court ruled on the petition, Guzman filed another habeas petition in state court—nearly identical to his 2015 petition—which was also denied without explanation. *See Guzman v. State*, 348 So. 3d 505 (Fla. Dist. Ct. App. 2019) (unpublished table decision). That same year, the Florida Supreme Court reaffirmed its *Lucas* line of cases in *State v. Spencer*, 216 So. 3d 481, 485–86 (Fla. 2017).[1]

[1] *Spencer* recognized two exceptions to the rule in *Lucas* that the jury must have complete manslaughter instructions, but neither applies to Guzman's case. *See* 216 So. 3d at 485–86.

But *Lucas* did not last much longer. Two years later—before the district court ruled on Guzman's § 2254 petition—the Florida Supreme Court walked back this line of cases in *Knight v. State*, 286 So. 3d 147 (Fla. 2019). Like Guzman, the defendant in *Knight* was convicted of attempted second-degree murder. *Id.* at 148. He argued that the jury instructions for attempted voluntary manslaughter were incorrect, and thus reversible error. *Id.* at 150–51. But this time the court disagreed. Because "there was no error in the jury instruction on *the offense of conviction*"—attempted second-degree murder—nor any claim that the evidence at trial was insufficient to support that conviction, reversal was not required. *Id.* at 151 (emphasis added).

The district court recognized this change in the law and rejected Guzman's *Lucas*-based arguments. "If *Lucas* remained good law," the court conceded, then his claim for ineffective assistance of counsel would have succeeded. But relying on *Lockhart v. Fretwell*, which held that the prejudice step of such a claim turns on current law, the court analyzed Guzman's claim under *Knight* instead. *See Fretwell*, 506 U.S. at 371–72. And based on *Knight*, the court denied Guzman's petition.

When Guzman appealed, we granted him a certificate of appealability on this issue. As stated by Guzman, "the *determinative fact* for this Court to consider is the applicability of *Lockhart v. Fretwell*" to his claim.

II.

We review a district court's denial of a § 2254 federal habeas petition de novo. *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1332 (11th Cir. 2009).

III.

The Sixth Amendment guarantees criminal defendants the right to counsel at trial and on direct appeal. *See Strickland v. Washington*, 466 U.S. 668, 685–86 (1984); *United States v. Berger*, 375 F.3d 1223, 1226 (11th Cir. 2004). And "the right to counsel is the right to the *effective* assistance of counsel." *Strickland*, 466 U.S. at 686 (quotation omitted and emphasis added). To show that trial counsel or appellate counsel was constitutionally ineffective, a defendant generally must prove two things: deficient performance by counsel, and prejudice to the defendant. *See id.* at 687; *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001).

We take for granted that Guzman's counsel was likely deficient for failing to raise the excusable homicide instruction. But *Strickland* still requires a conclusion that the petitioner was prejudiced by counsel's deficiency. A typical description of the prejudice inquiry is that a defendant must show "a reasonable probability of a different result in the appeal had the claim been presented in an effective manner." *Butts v. GDCP Warden*, 850 F.3d 1201, 1204 (11th Cir. 2017). The logic of Guzman's prejudice argument flows from this typical standard—he says that if his counsel had challenged the omission of the excusable homicide

instruction, there is a "strong probability" that his conviction would have been vacated.

But not every case is typical. In *Lockhart v. Fretwell*, the Supreme Court faced the same atypical issue animating this appeal: a change in the law. There, as here, the petitioner claimed that his counsel was ineffective for failing to make an objection (at trial rather than on appeal). *Fretwell*, 506 U.S. at 367. And there, as here, by the time the district court decided his federal habeas case, the legal basis for the objection no longer existed because the necessary precedent had been overruled. *Id.* at 367–68. Relying on the older law, the district court granted habeas relief (and the appellate court affirmed) because the omitted objection would have succeeded had it been made at the time of trial. *Id.*

The Supreme Court reversed, holding that a *Strickland* prejudice analysis "focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 369. Put another way, even if a defendant can show "a reasonable probability of a different result" without counsel's error, that is not always the end of the matter under *Strickland*. *See id.* at 369–70. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Id.* at 369 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)). Thus, *Strickland* prejudice

also requires that the result of a defendant's proceeding be "unfair or unreliable." *Id.*

In refining the prejudice analysis in this way, the Court emphasized that it was "neither unfair nor unreliable" to evaluate the result of an earlier proceeding through the lens of current law. *Id.* at 371. More specifically, no prejudice exists "if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law *entitles* him"—present tense. *Id.* at 372 (emphasis added). So unless the defendant would be entitled to habeas relief under current state law, there is no prejudice.

That case decides this appeal. Under *Fretwell*, current Florida law is the proper basis for the prejudice inquiry. Guzman does not argue that he can show prejudice under current law, so we conclude that the result of his direct appeal is "neither unfair nor unreliable." *Id.* at 371. He has not been deprived of "any substantive or procedural right to which the law entitles him," and so his conviction does not offend the Constitution's guarantee of effective counsel on direct appeal.[2] *Id.* at 372.

Guzman contends that, in spite of the facial similarity between his case and *Fretwell*, the Supreme Court's holding there

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[2] To be clear, this is no technicality. Guzman was convicted of attempted second-degree murder, and the jury received a correct instruction on second-degree murder.

does not apply to his ineffective assistance claim for three reasons. Each is unpersuasive.

First, he argues that *Fretwell* applies only to claims of ineffective assistance of counsel at the trial level—not on appeal. This misses the thrust of *Fretwell*, which is based on the prejudice analysis, not the procedural posture. *Fretwell* does nothing to limit itself to the trial context—no language cabins its reasoning or holding in that way. To the contrary, the *Fretwell* court frequently refers to *Strickland* writ large, and *Strickland*'s analysis applies to both trials and appeals. *See Fretwell*, 506 U.S. at 369–73; *Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009). *Fretwell* must also apply to both.

We are not alone in reading *Fretwell* this way. Several other circuits have already applied that case when evaluating *Strickland* prejudice for an appellate ineffective assistance claim. *See Bunkley v. Meachum*, 68 F.3d 1518, 1521–22 (2d Cir. 1995); *United States v. Baker*, 719 F.3d 313, 321 (4th Cir. 2013); *Schaetzle v. Cockrell*, 343 F.3d 440, 448 (5th Cir. 2003); *Evans v. Hudson*, 575 F.3d 560, 566 & n.2 (6th Cir. 2009). Others have applied it when considering different parts of the *Strickland* analysis or otherwise considering ineffective assistance of appellate counsel claims. *See Shaw v. Wilson*, 721 F.3d 908, 918 (7th Cir. 2013); *Matthews v. Workman*, 577 F.3d 1175, 1195 (10th Cir. 2009); *Becht v. United States*, 403 F.3d 541, 545–46 (8th Cir. 2005). No circuit has limited *Fretwell* to the trial context, and we see no reason to be the first.

Second, Guzman emphasizes that in *Fretwell* the repudiated objection had been available for only four years and clearly never should have been. Here, he points out, *Lucas* was good law for almost twenty years, and was less obviously a mistake. But *Fretwell*'s basic logic does not turn on how long a case was good law or the degree of its error. And nothing suggests that the case is limited to its facts.

Guzman argues that Justice O'Connor's *Fretwell* concurrence states otherwise. She said, as he points out, that the case was "unusual." *Fretwell*, 506 U.S. at 373 (O'Connor, J., concurring). But she did not stop there. What she termed "unusual" was the defendant's attempt to rely on an argument that was "wholly meritless under current governing law." *Id.* at 373–74 (O'Connor, J., concurring). So too here.

Finally, Guzman tries to persuade us that AEDPA either overruled or modified *Fretwell*. *See generally* Antiterrorism and Effective Death Penalty Act of 1996 § 104(3), 110 Stat. 1214, codified at 28 U.S.C. § 2254(d). AEDPA was enacted in 1996, three years after *Fretwell* was decided, and added a new subsection (d) to the existing § 2254. *Id.*; *see also Fretwell*, 506 U.S. at 364. The new provision tightened a federal court's ability to overturn state convictions:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State

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

28 U.S.C. § 2254(d) (emphasis added). According to Guzman, this past-tense language repudiates *Fretwell* and creates a new federal habeas right. In his view, § 2254(d) requires federal courts reviewing habeas petitions to look to the law at the time of the state decision rather than the law of the present, as *Fretwell* demands. Section 2254(d)'s past-focused language, he says, shifts the inquiry to the time of the state habeas petition.

But AEDPA offers no new habeas power to the federal courts. In fact, it restrains their power. Under § 2254(d)'s text, a writ of habeas corpus "*shall not be granted* with respect to any claim that was adjudicated on the merits in State court proceedings *unless*" it resulted in a decision contrary to clearly established federal law. 28 U.S.C. § 2254(d) (emphasis added). That provision's only affirmative instruction is that federal courts *cannot* grant habeas corpus except in a few limited circumstances. What it does *not* say is that habeas *must* be granted—in any circumstance.

The limits AEDPA sets on federal courts considering habeas corpus petitions from state prisoners do not create a new right to grant those petitions by freezing the law at some point in the past.

This conclusion is consistent with how the Supreme Court has described AEDPA. In general, the "federal habeas scheme leaves primary responsibility with the state courts," and § 2254(d) in particular "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) (quotations omitted). Against the backdrop of this renewed deference to state courts, § 2254(d) "places new constraints on the power of a federal habeas court"—not new avenues for relief. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quotation omitted and alteration adopted); *see also Cullen*, 563 U.S. at 181 (noting that AEDPA "sets several limits on the power of a federal court").

What's more, both the Supreme Court and this Court have reaffirmed *Fretwell* post-AEDPA with no mention of overruling or modification. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 166–67 (2012); *Williams v. Taylor*, 529 U.S. 362, 391–94 (2000); *Allen v. Sec'y, Florida Dep't of Corr.*, 611 F.3d 740, 754 (11th Cir. 2010). We see no reason to change course. AEDPA's restrictions on prisoners' federal habeas rights do not create an end run around *Fretwell*.

* * *

Fretwell establishes that the result of a defendant's proceeding is neither unfair nor unreliable in the present when current law does not provide the right that the defendant seeks to vindicate. To blind ourselves to current Florida law would grant

Guzman "a windfall to which the law does not entitle him." *Fretwell*, 506 U.S. at 370. Because the district court correctly applied *Fretwell* to this case, we **AFFIRM** the court's denial of his § 2254 petition.

APPENDIX B "1"

Supplemental Report of Magistrate Recommendation that habeas corpus be granted

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20220-CIV-ALTONAGA/Reid

PABLO GUZMAN,

Petitioner,

v.

MARK INCH, Secretary,
Florida Department of Corrections,

Respondent.
_____/

ORDER

Petitioner, Pablo Guzman filed a *pro se* Amended Petition Under Title 28 U.S.C. [Section] 2254 for Writ of Habeas Corpus by a Person in State Custody [ECF No. 8] on March 3, 2017. The case was originally referred to Magistrate Judge Patrick A. White for a report and recommendation. (*See* [ECF No. 3]). On April 19, 2018, Judge White filed a Report of Magistrate Judge [ECF No. 29]. The case was reassigned to Judge Lisette M. Reid on January 3, 2019. (*See* [ECF No. 45]).

On January 18, 2019, the Court entered an Order [ECF No. 46] staying the case pending the state appellate court's decision on a then-pending successive petition filed by Petitioner. (*See* Jan. 18, 2019 Order 3). Thereafter, the case was reopened on March 14, 2019. (*See* Mar. 14, 2019 Order [ECF No. 51]). On June 13, 2019, the Court entered an Order [ECF No. 52] accepting in part and denying in part Judge White's Report and returning the case to Judge Reid for a supplemental report and recommendation. (*See* June 13, 2019 Order 25–26).

On November 26, 2019, Judge Reid entered a Supplemental Report of Magistrate Judge [ECF No. 53], recommending the Petition be granted in part and denied in part and no certificate

of appealability issue. This Order addresses that Supplemental Report and the several objections filed by the parties.[1]

For the following reasons, the Supplemental Report is rejected in part and adopted in part.

I. BACKGROUND

The Court assumes the reader's familiarity with the facts and procedural history of this case, which are detailed in the Supplemental Report. Briefly, the Amended Petition attacks the constitutionality of Petitioner's 2013 judgment of conviction in Case F10-004216, filed in the Eleventh Judicial Circuit of Florida in Miami-Dade County. (*See* Suppl. Report 1).[2]

The Amended Petition sets forth four claims: (1) the trial court violated due process by precluding the defense from commenting on the victim's absence at trial; (2) ineffective assistance of appellate counsel; (3) ineffective assistance of trial counsel; and (4) ineffective assistance of trial counsel by virtue of counsel mis-advising Petitioner to reject a 10-year plea offer. (*See* Am. Pet. 5–18). Claim two describes three instances of alleged ineffective assistance of appellate counsel; and claim three includes seven instances of alleged ineffective assistance of trial counsel. (*See id.* 8–15). Each instance constitutes a "sub-claim." Claim one's and claim two's first sub-claims were previously denied by the Court in the June 13, 2019 Order, are not addressed in the Supplemental Report, and are not reviewed again here. (*See* Suppl. Report 1).

[1] Respondent filed Objections ("State's Objs.") [ECF No. 54] on March 6, 2020. Petitioner filed Objections ("Pet'r's Objs.") [ECF No. 55] on March 10, 2020. On March 24, 2020, Petitioner filed a Response to Respondent's Objections ("Pet'r's Resp.") [ECF No. 58]. Respondent filed a Combined Reply to Petitioner's Response and Response to Petitioner's Objections ("State's Reply") [ECF No. 63] on March 11, 2020. On July 2, 2020, Petitioner filed a Response to Respondent's "Combined Reply and Response to Petitioner's Objections" ("Pet'r's Reply") [ECF No. 70].

[2] The Court relies on the pagination generated by the Case Management/Electronic Case Files system, which appears as a header on all filings.

Petitioner objects to the Supplemental Report's recommendation that the Court deny claim two, sub-claim three; claim three, sub-claims three, five, and seven; and claim four. (*See generally* Pet'r's Objs.). Respondent objects to the Supplemental Report's recommendation the Court grant claim two, sub-claim two. (*See generally* State's Objs.) There are no objections relating to the recommendations regarding claim three on sub-claims one, two, four, and six. The status of Petitioner's claims and sub-claims are detailed in the following chart for ease of reference:

Claims	Sub-claims	June 13, 2019 Order	Present Suppl. Report's Recommendations	Objections
One: Due Process		Denied		
Two: Ineffective Assistance of Appellate Counsel	One	Denied		
	Two		Grant	Respondent
	Three		Deny	Petitioner
Three: Ineffective Assistance of Trial Counsel	One		Deny	
	Two		Deny	
	Three		Deny	Petitioner
	Four		Deny	
	Five		Deny	Petitioner
	Six		Deny	
	Seven		Deny	Petitioner
Four: Ineffective Assistance of Counsel regarding Plea Offer			Deny	

II. LEGAL STANDARDS

When a magistrate judge's "disposition" has been properly objected to, district courts must review the disposition de novo. Fed. R. Civ. P. 72(b)(3). The Court employs *de novo* review only with respect to the claims and subclaims subject to objections.

Each of Petitioner's claims subject to *de novo* review is predicated on ineffective assistance of counsel. Consequently, *Strickland v. Washington*, 466 U.S. 668 (1984), requires Petitioner to satisfy two prongs: deficient performance, that is, his counsel's representation fell below an objective standard of reasonableness; and prejudice, that but for the deficiency in representation,

there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 669. Review of counsel's performance is highly deferential. *See Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994).

III. ANALYSIS

The Court reviews each of the claims and sub-claims subject to an objection in turn.

A. Claim Two, Sub-claim Two

Petitioner contends "appellate counsel ineffectively failed to argue the trial court committed fundamental error when it omitted a definition for excusable homicide from the jury instruction for the lesser-included offense of attempted voluntary manslaughter." (Suppl. Report 9 (citing Am. Pet. 8)). Judge Reid agreed and recommended the Court grant the Petition as to this claim. (*See id.* 23–24). Respondent objects, arguing the Supplemental Report "misapplied the prejudice prong of *Strickland* . . . [and] fails to take into account the [Supreme] Court's subsequent [decision in] *Lockhart v. Fretwell*, 506 U.S. 364 (1993)[.]" (State's Objs. 1 (alterations added)). After careful consideration, the Court must agree with Respondent.

Governing Law. In finding Petitioner's claim had merit, Judge Reid relied primarily on *State v. Lucas*, 645 So. 2d 425 (Fla. 1994), and correctly summarized the case as follows:

> In *Lucas*, the defendant was convicted of attempted second-degree murder. Although the trial court instructed the jury on the lesser-included offense of attempted manslaughter, "the court failed to explain that [the defendant] could not be found guilty of attempted manslaughter if the evidence showed that the attempted homicide was justifiable or excusable." Defense counsel did not object to the omission. On appeal, the defendant argued that "the court's failure to explain justifiable and excusable homicide as part of the attempted manslaughter instruction was fundamental error, requiring reversal." The district court of appeal agreed and certified the case for review.
>
> The Florida Supreme Court approved the district court's decision. The Court held that "failure to give a complete instruction on manslaughter during the

> original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second-degree murder."

(Suppl. Report 9–10 (alteration in original; citations omitted)).

Lucas is predicated on the "jury pardon doctrine," meaning, the "need for [the] jury to be given a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime." *Haygood v. State*, 109 So. 3d 735, 748 (Fla. 2013) (Canady, J., dissenting) (alteration added; quotation marks omitted; quoting *State v. Montgomery*, 39 So. 3d 252, 259 (Fla. 2010)). Thus, until recently, if a trial court failed to provide a complete instruction on manslaughter, and the defendant was convicted of manslaughter or a greater offense not more than one step removed, the trial court would have committed fundamental, reversible error.

Judge Reid concluded appellate counsel's failure to argue the trial court committed fundamental error when it omitted the definition of excusable homicide in the jury instructions for attempted voluntary manslaughter constituted both deficient and prejudicial assistance under *Strickland*. (*See* Suppl. Report 9–24). If *Lucas* remained good law, the Court would agree, but current law dictates a different outcome.

As noted in the Supplemental Report, in *Knight v. State*, the Florida Supreme Court "recede[d] from . . . precedent where a finding of fundamental error was predicated on Florida's jury pardon doctrine." 286 So. 3d 147, 154 (Fla. 2019) (alterations added). "Properly understood," the *Knight* court found "the fundamental error test for jury instructions cannot be met where . . . there was no error in the jury instruction *for the offense of conviction* and there is no claim that the evidence at trial was insufficient to support that conviction." *Id.* at 151 (alteration and emphasis added). Thus, if applied to Petitioner's case, *Knight* dictates the Court may only find fundamental error if the trial court erred in instructing the jury on attempted second-degree murder (Petitioner's

offense of conviction) and *not* attempted voluntary manslaughter (the lesser included offense of which Petitioner was not convicted).

Judge Reid declined to consider *Knight* because it was not the prevailing law at the time of Petitioner's conviction. (*See* Suppl. Report 16). Judge Reid explained, "*Strickland* requires courts to consider whether there is a reasonable argument that counsel's performance was not deficient. There is no reasonable argument that counsel could have relied on *Knight* in failing to raise the *Lucas* argument on appeal because *Knight* was not in existence in 2014." (*Id.*).

The Court agrees with Respondent (*see* State's Objs. 3–8), that under *Fretwell*, 506 U.S. 364, the foregoing analysis is incorrect. *Fretwell* concerned a habeas petition in a capital case. *See id.* at 366. The district court found the petitioner's[3] counsel was ineffective because at the trial his counsel failed to make an objection which, if made "would have [been] sustained" and "the jury would not have sentenced [the petitioner] to death." *Id.* at 368 (alterations added). The court of appeals affirmed, but the Supreme Court granted a writ of certiorari and reversed. *See id.*

In reversing, the Supreme Court rejected the rule that the law existing at the time of trial should dictate whether the petitioner was prejudiced by counsel's ineffective assistance. *See id.* at 372. The Court explained an analysis of *Strickland* prejudice, "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* (citations omitted). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* Importantly, in situations like those underlying *Fretwell* (and the

[3] In *Fretwell*, the Supreme Court refers to the petitioner as "respondent." To avoid confusion with the parties in this Order, the Court refers to the *Fretwell* petitioner as the "petitioner."

present case) the "substantive or procedural right[s]" to which a petitioner is entitled are those recognized by the *current* rule of law. *Id.* (alteration added)).

To make this point, the Supreme Court distinguished its ruling from an earlier opinion, *Teague v. Lane*, 489 U.S. 288 (1989), which prohibits retroactive application of "new constitutional rules of criminal procedure . . . on collateral review'" to avoid penalizing the *state* "for relying on 'the constitutional standards that prevailed at the time the original proceeding took place.'" *Fretwell*, 506 U.S. at 372 (alteration added; quoting *Teague*, 489 U.S. at 306). The Court explained a federal habeas petitioner, unlike the state,

> has no interest in the finality of the state-court judgment under which he is incarcerated: Indeed, the very purpose of [the petitioner's] habeas petition is to overturn that judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest . . . . *The result of these differences is that the State will benefit from our Teague decision in some federal habeas cases, while the habeas petitioner will not.* This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it.

Id. at 373 (alterations and emphasis added).

Fretwell neither modifies nor adds an additional requirement to *Strickland*'s prejudice analysis. *See Lafler v. Cooper*, 566 U.S. 156, 166 (2012). Yet, *Fretwell* represents an "unusual circumstance[,]" also present here, "where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Lafler*, 566 U.S. at 167 (alteration added; quotation marks omitted). In *Payne v. Brown*, the Seventh Circuit provides a succinct summary:

> The situation in *Fretwell* was unusual: a federal court of appeals reached an erroneous decision, which it soon overruled. [The petitioner] contended that he received ineffective assistance because his lawyer had failed to take advantage of that decision during the window between its announcement and its overruling. The Justices responded that no one suffers a legal injury when the courts apply the

> correct rule of law. That[] [is] what *Fretwell* meant in saying that the defendant had not suffered a fundamentally unfair or unreliable outcome.

662 F.3d 825, 828 (7th Cir. 2011) (alterations added). Although "unusual," the same circumstances are presented here. Like the petitioner in *Fretwell*, Petitioner contends his counsel failed to object to an error the Florida Supreme Court no longer views as fundamental.

Application. Determining *Knight* applies to Petitioner's case does not end the Court's inquiry. In his Response to Respondent's Objections, Petitioner argues he is still entitled to a new trial, notwithstanding the inapplicability of *Lucas*, because the trial court "omitt[ed] [] the definition of excusable homicide from the instructions on all offenses, including attempted second-degree murder — the offense of conviction." (Pet'r's Resp. 8 (alterations added; emphasis omitted)). In an April 23, 2019 Order [ECF No. 59], the Court instructed Respondent to respond to Petitioner's argument[4] and comment specifically on section 7.1 (Introduction to Homicide) of the Florida Standard Jury Instructions and the cases Petitioner cited regarding this point.

Section 7.1 (Introduction to Homicide) of the Florida Standard Jury Instructions instructs the reader to "[*r*]*ead in all murder and manslaughter cases*" the definitions for justifiable and excusable homicide. *Id.* (alteration added; emphasis in original). Thus, the question is whether the trial court's failure to read the definitions for justifiable and excusable homicide contemporaneously with the instructions on second-degree murder was fundamental error.

In this context, it was not. *Knight*, read in conjunction with two earlier cases — *Pena v. State*, 901 So. 2d 781 (Fla. 2005), and *Franco v. State*, 901 So. 2d 901 (Fla. 4th DCA 2005) — guides the Court's conclusion.

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[4] In addition to contending Petitioner's argument lacks merit (*see* State's Reply 6–13), Respondent states the argument is untimely and was not exhausted in the state court (*see id.* 2–6). Because the Court agrees with Respondent on the merits, it does not address timeliness or whether Petitioner procedurally defaulted.

In *Pena*, the Supreme Court of Florida considered whether it was fundamental error for the trial court to omit instructions on excusable and justifiable homicide when instructing the jury on manslaughter where the defendant was convicted of first degree murder and the factual circumstances did not support any jury argument on justifiable or excusable homicide. *See* 901 So. 2d at 782. As noted, *Pena* was decided before *Knight*, which receded from the jury pardon doctrine. The *Pena* court found no fundamental error occurred by virtue of the erroneous instruction, noting: "[w]e agree . . . that in this case the jury would have found nothing useful in these instructions in its determination of whether [the defendant] was guilty of first-degree murder or the next lesser offense of second-degree murder." *Id.* at 787 (alterations added).

Importantly, the court also reasoned the offense of conviction, first degree murder, was more than two steps removed from the offense with the erroneous instruction, manslaughter. *See id.* at 788. Because the offense of conviction was more than two steps removed from manslaughter, the court's decision did not offend the jury pardon doctrine, which, at the time, was embraced by Florida courts. *See id.* at 787–88. Stated otherwise, the trial court's decision did not deprive "the jury . . . [of] a fair opportunity to exercise its inherent pardon power by returning a verdict of guilty as to the next lower crime." *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978) (alterations added; quotation marks omitted).

In *Franco*, the court found no fundamental error where the trial court did not provide the jury with the definitions of justifiable or excusable homicide contemporaneously with the instructions on attempted second degree murder but did find such error in connection with the instruction on manslaughter. *See* 901 So. 2d at 901. The court explained the definitions were necessary to the manslaughter instruction because "manslaughter is a residual offense that can only be fully defined by exclusion of the properly explained defenses of excusable and justifiable

homicide." *Id.* at 903 (quotation marks and citation omitted). *Franco* informs the Court that while a manslaughter instruction is always incomplete without the definition of excusable homicide, the same cannot be said for every attempted second-degree murder instruction.

Taken together, *Pena* and *Franco* demonstrate three principles: (1) a jury must be provided with the definitions of justifiable and excusable homicide to understand the instructions on manslaughter; (2) in contrast, the foregoing definitions are not always necessary to instructions on attempted first[5] or second degree murder; and (3) assuming Florida courts embrace the jury pardon doctrine, a jury convicting a defendant of a higher offense once-removed from attempted manslaughter (as the jury did here), must be provided with the complete instructions on attempted manslaughter, including the foregoing definitions.[6]

Knight, however, rejects the third principle by announcing the Florida Supreme Court recedes from "precedent where a finding of fundamental error was predicated on Florida's jury pardon doctrine." 286 So. 3d at 154. *Knight* leaves the undersigned with the first two principles: the definitions of justifiable and excusable homicide are necessary to instructions on attempted manslaughter, but not always to instructions on attempted second-degree murder. And here, Respondent makes clear "the evidence did not permit a reasonable inference that Petitioner committed the shooting by accident or misfortune." (State's Reply 12 (citing Fla. Stat. § 782.03)).

[5] *Pena* concerned a conviction for first degree murder, not attempted first degree murder, but this distinction does not affect the Court's analysis.

[6] The Court previously recognized that *Pena* and *Franco* are distinguishable from this case (*see* June 13, 2019 Order 17–18), but the points which distinguish these cases relied on the jury pardon doctrine (*see id.*). Because the Florida Supreme Court has receded from the jury pardon doctrine, the distinguishable aspects of *Pena* and *Franco* no longer inform the Court's analysis.

Therefore, the Court does not accept the recommendation it issue a writ of habeas corpus to the Eleventh Judicial Circuit of Florida to vacate Petitioner's conviction for attempted second-degree murder.

B. Claim Three, Sub-claim Seven

In this sub-claim — a variation of claim two, sub-claim two (the preceding claim addressed by this Order) — Petitioner contends *trial* counsel was ineffective in failing to object to the omission of excusable homicide from the jury instructions on attempted voluntary manslaughter. (*See* Am. Pet. 15). Judge Reid disagreed, reasoning "the evidence [at trial] did not permit a reasonable inference [] [P]etitioner committed the shooting by accident or misfortune." (Suppl. Report 26 (alterations added)). Judge Reid rejected the notion her conclusion is inconsistent with the (erroneous) conclusion *appellate* counsel was ineffective by failing to argue the trial court committed fundamental error in connection with the attempted voluntary manslaughter instruction. (*See id.* 26–27).

Petitioner objects,[7] arguing (1) "[t]here is no question the trial court did not instruct the jury on excusable homicide[;]" (2) "the court did not provide a definition of excusable homicide in any other instruction[;]" and (3) under *Arteaga*, 246 So. 3d 533, "a failure to object to an incomplete instruction where the defendant is convicted of manslaughter or a greater offense one step removed — the failure to give such an instruction being fundamental error — is remediable in a rule 3.850 ineffectiveness motion." (Pet'r's Objs. 5–6 (alterations added; emphasis and quotation marks omitted)).

[7] Petitioner also contends he received ineffective assistance of counsel because "no [excusable homicide] instruction [was] given and the evidence at trial would have supported a defense of . . . excusable homicide," (Pet'r's Objs. 5 (alterations added; quoting *Arteaga v. State*, 246 So. 3d 533, 537 (Fla. 2d DCA 2018)), but he does not elaborate on this argument (*see id.*).

As discussed with respect to claim two, sub-claim two, "the failure to give such an instruction" (*id.* 6 (emphasis and quotation marks omitted)) in this case was not fundamental error. Petitioner's claim thus fails.

C. Claim Two, Sub-claim Three; and Claim Three, Sub-claim Three

Petitioner contends (1) "appellate counsel was ineffective by failing to argue the [t]rial [c]ourt committed fundamental error when it instructed the jury on [the] independent forcible felony exception to self-defense" (Am. Pet. 8 (alteration added; emphasis omitted)), and (2) trial counsel was ineffective for failing to object to the same instruction at trial (*see id.* 13).

The Magistrate Judge correctly explained under Florida law the use of deadly force is justifiable only if the defendant "reasonably believes that it is necessary to prevent 'imminent death or great bodily harm to himself or another.'" (Suppl. Report 27 (quotation marks omitted; quoting *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1295 (11th Cir. 2017); other citation omitted)). This rule is subject to the "forcible felony exception" meaning the use of deadly force is *not* justifiable if it is used while the defendant is "attempting to commit, committing, or escaping after the commission of, a forcible felony[.]" *Pinkney*, 876 F.3d at 1295 (alteration added; citation and quotation marks omitted). For the "forcible felony exception" to apply, the "felony" must be *independent* from the one for which the defendant claims self-defense. *Id.* at 1295–96. Stated differently, the forcible felony exception does not apply to a person who uses deadly force when attacked by another, if he is otherwise acting lawfully; whereas the forcible felony exception may apply to a bank robber who uses deadly force when attacked by another while the robber is fleeing from a felony robbery.

Petitioner contends the trial court erred in reading the forcible felony instruction because he was not charged with a crime separate from the attempted murder of Nelson Puente, for which

he claimed self-defense. (*See* Am. Pet. 9). Petitioner is correct the forcible felony exception instruction was inapplicable to his case because he was only charged with one crime. Petitioner did not persuade the Magistrate Judge the erroneous instruction was fundamental, or that appellate counsel was ineffective in failing to argue as much on appeal. The Court is similarly unpersuaded.

The forcible felony instruction read at Petitioner's trial *was* confusing. The instruction read:

> [The] use of deadly force is justifiable only if [Petitioner] reasonably believe[d] that force [was] necessary to prevent eminent [sic] death or great bodily harm to himself while resisting [1] another attempt to murder him or [2] [Petitioner] *was attempting to commit, committing or escaping after the commission of attempted first degree murder with a deadly weapon or aggravated battery.*

(Suppl. Report 28 (alterations and emphasis added; quoting Mar. 8, 2013 Trial Tr. [ECF No. 18-7] 786:6–13)).[8] But the instruction did not, as Petitioner contends, "negate[]" Petitioner's defense that he was justified in using deadly force, nor did the instruction deprive Petitioner of a fair trial. (Am. Pet. 9 (alteration added)); *see also Martinez v. State*, 981 So. 2d 449, 454–56 (Fla. 2008) (finding the forcible-felony instruction on self-defense was not warranted, but the reading of the instruction was not fundamental error as it did not deprive the defendant of a fair trial). On the contrary, the instruction seems to be erroneous in a way that would *benefit* Petitioner as it allowed the jury to find the use of force justifiable if Petitioner "*was attempting to commit . . . attempted first degree murder with a deadly weapon or aggravated battery.*" (Suppl. Report 28 (alteration added; emphasis in original; citation omitted)).

Quoting *Reeves v. State,* Petitioner argues "[a] misleading jury instruction constitutes both fundamental and reversible error[.]" (Pet'r's Objs. 3 (alterations added; quoting 647 So. 2d 994, 995 (Fla. 2d DCA 1994); other citation omitted)). In *Reeves*, however, the jury instruction was

[8] Citations to trial transcripts rely on the pagination and line numbering in the original document.

misleading in a manner detrimental to the defendant's case.[9] The same rationale is not applicable here, where the misleading jury instruction could only have helped Petitioner's cause.

At bottom, although the foregoing forcible felony exception instruction was unnecessary and confusing, the Court is not persuaded (1) the outcome of Petitioner's trial would have been different had Petitioner's counsel objected to the instruction, or (2) the result of Petitioner's appeal would have been different had his appellant counsel argued the trial court committed fundamental error by including the instruction. Thus, the Court agrees with Judge Reid — Petitioner's claims fail under *Strickland*'s highly deferential standard.

D. Claim Three, Sub-claim Five

Petitioner contends trial counsel was ineffective where he "failed to object to the imposition of an illegal sentence." (Am. Pet. 13 (emphasis removed)). The Magistrate Judge found Petitioner's argument persuasive, but nonetheless rejected it, finding the court was bound by the state post-conviction court's decision on this point. (*See* Suppl. Report 38–39 (noting the validity of Petitioner's arguments but also stating a habeas court's inability to break from then-existing state court interpretations of state law)).

Two statutes are relevant here. First, under section 775.087(2)(a)3, Florida Statutes, if an individual commits a felony, including attempted second-degree murder, and in the course of doing so discharges a firearm resulting in "death or great bodily harm," then "the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison." *Id.* Under section 775.082(3)(b)1, Florida Statutes, an individual convicted of a first-degree felony shall be sentenced to a "term of imprisonment not

[9] In *Reeves*, the trial court instructed the jury the defendant's knowledge an accident resulted in death or injury was *not* "an essential element of willfully leaving the scene of an accident." *Reeves*, 647 So. 2d at 995 (citation omitted).

exceeding **30 years** or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment." *Id.* (emphasis added).

Although the latter statute appears to prohibit Petitioner's 40-year sentence, the state post-conviction court rejected this argument. (*See* Order Denying [Petitioner]'s Motion for Post-Conviction Relief ("State Post-Conviction Order") [ECF No. 17-4] 20). Citing *Mendenhall v. State*, 48 So. 3d 740, 743 (Fla. 2010), the state post-conviction court concluded "the trial court has discretion, under Florida Statute 775.087(2)(a)(3) to sentence a defendant, who was found guilty of attempted second degree murder with the jury finding of great bodily harm, between twenty-five (25) years to the maximum of life, even though traditionally the statute should have been capped at thirty (30) years state prison." (State Post-Conviction Order 22).

The Court does not find *Mendenhall* particularly instructive. In *Mendenhall*, the jury convicted the defendant of attempted second-degree murder with a firearm. *See* 48 So. 3d at 743. "The jury also found that during the commission of the offense, [the defendant] was in possession of a firearm, discharged a firearm, and inflicted serious bodily injury." *Id.* (alteration added). The defendant was sentenced to a mandatory *minimum* of 35-years' imprisonment pursuant to section 775.087, Florida Statutes. *See id.* at 744.

The question before the Florida Supreme Court was whether "the mandatory minimum terms of twenty-five years to life [under section 775.087, Florida Statutes] provide the trial judge with discretion to impose a mandatory minimum of twenty-five years to life *without regard to the statutory maximum* [of 30 years] for the crime contained in section 775.082, Florida Statutes (2004)." *Id.* at 742 (alterations and emphasis added). The court answered in the affirmative, finding "the Legislature intended for trial courts to have discretion to impose a mandatory *minimum* under section 775.087(2)(a)(3)" ranging from 25 years to life, "notwithstanding the

statutory maximum of thirty years contained in section 775.082[.]" *Id.* at 750 (alteration and emphasis added).

Here, unlike the defendant in *Mendenhall*, Petitioner was sentenced to a mandatory minimum of 25-years' imprisonment under section 775.087, Florida Statutes, a term lower than the statutory maximum of 30 years under section 775.082. Having exercised its discretion in the first instance to sentence Petitioner to a term below the statutory maximum, the court would appear to be prevented from subsequently imposing a sentence exceeding the statutory maximum of 30 years under section 775.082. *See Sheppard v. State*, 113 So. 3d 148, 149 (Fla. 2d DCA 2013). In *Sheppard*, the defendant "argu[ed] [] his . . . overall sentence of thirty-five years' imprisonment exceed[ed] the statutory maximum and [was] illegal." *Id.* at 148–49 (alterations added). Agreeing with the defendant, the court reasoned:

> Although the trial court had the discretion to impose a mandatory minimum of up to life in prison, the court chose to impose a mandatory minimum term that was less than the thirty-year statutory maximum for [the defendant's] offense. ***Having done so, the court had no discretion to exceed the statutory maximum of thirty years.*** The postconviction court's interpretation of *Mendenhall* . . . in denying the claim is incorrect.

Id. at 149 (alterations and emphasis added). The Florida Supreme Court has since adopted the position in *Sheppard* upon facts like those in Petitioner's case. *See Hatten v. State*, 203 So. 3d 142, 145 (Fla. 2016) (remanding for resentencing where the defendant was sentenced to a term of 40 years with a 25-year mandatory minimum, reasoning the sentencing court had no authority to impose an additional term of years beyond a 30-year statutory maximum after imposing a sub-30-year minimum mandatory sentence).

Judge Reid declined to consider *Sheppard*, finding the "trial court's determination that *Mendenhall* authorized [P]etitioner's sentence binds this habeas court[,]" and "there is a reasonable argument that [Petitioner's counsel] could have concluded that this objection would prove futile."

(Suppl. Report 39 (alterations added)). Petitioner objects, arguing his trial counsel could have relied upon the "express interpretation of *Mendenhall* in *Sheppard* . . . to object to Petitioner's illegal sentence." (Pet'r's Objs. 7 (alteration added)). Petitioner further contends "the absence of a Florida Supreme Court or Third District case does not foreclose the possibility that the trial court would have found the Second District's interpretation of *Mendenhall* persuasive." (*Id.* 8).

The Court agrees with Petitioner his counsel could have raised an objection relying on *Sheppard*, but it does not agree counsel's failure to do so constitutes ineffective assistance under *Strickland*. Petitioner correctly recognizes that under *Strickland*, he must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Given the state post-conviction court interpreted *Mendenhall* differently from the court in *Sheppard*, the Court cannot find there was a "reasonable probability" Petitioner's counsel's objection would have been successful.

Indeed, the state post-conviction court's reasoning indicates that, at the time of Petitioner's sentencing, the objection may not have been successful. That the Florida Supreme Court has since adopted the position in *Sheppard* does not mean trial counsel was ineffective so much as it means the state post-conviction court interpreted *Mendenhall* in a way no longer accepted by the Florida Supreme Court. Stated otherwise, Petitioner's counsel's failure to raise an objection based on *Sheppard*, a limited opinion from the Second District Court of Appeals that was not yet embraced by the Florida Supreme Court, does not meet *Strickland*'s highly deferential standard. This is especially so because, in the context of a section 2254 petition:

> *Strickland*-based deference concerning a lawyer's performance is doubled — compounded. A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness

> of the state court's decision. The question, therefore, is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Knight v. Fla. Dep't of Corr., 958 F.3d 1035, 1045 (11th Cir. 2020) (alteration adopted; citations and quotation marks omitted).

Finding fair-minded jurists *could* disagree on the correctness of the state court's decision, the Court thus agrees with the outcome of Judge Reid's analysis on this ground.

E. Claim Four

Petitioner argues trial counsel was ineffective when he advised him to decline the State's alleged 10-year plea offer. (*See* Am. Pet. 16–18). Judge Reid disagreed, noting at an October 1, 2012 pretrial hearing (*see* Oct. 1, 2012 Hr'g Tr. [ECF No. 41] 22–48), the State made Petitioner a 25-year offer and did not consider the Petitioner's 10-year counteroffer to be reasonable. (*See* Suppl. Report 43 (citing Oct. 1, 2012 Hr'g Tr. 3:24–4:7)). Judge Reid also concluded Petitioner fails to establish he would have accepted a 10-year plea offer if given proper advice because Petitioner maintained he was innocent throughout the trial and sentencing proceedings. (*See id.*).

Petitioner objects, arguing his contention he was offered a 10-year deal is not "conclusively refut[ed.]" (Pet'r's Objs. 9 (alteration added)). Petitioner points to the pretrial hearing, where in response to the court's instruction Petitioner "[t]alk to [his] attorney about plea offers[,]" he stated "[t]hey talked to me about ten years. I don't want to accept it." (Oct. 1, 2012 Hr'g Tr. 5:19–22 (alterations added)). According to Petitioner, his statement "they talked to me about ten years . . . proves that a 10-year offer was in fact extended." (Pet'r's Obj.'s 9 (alteration added)).

In the context of a rejected plea offer, the *Strickland* prejudice prong requires a defendant show "that but for counsel's ineffectiveness: (1) the plea offer would have been presented to the court (*i.e.,* that the defendant would have accepted the plea and the prosecution would not have

withdrawn it in light of intervening circumstances); (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014) (citations and quotation marks omitted). The Court agrees with Judge Reid that the record does not support Petitioner's contentions (1) a 10-year plea deal was offered in the first instance, or (2) Petitioner would have accepted the plea deal had it been offered.

First, it is unclear who "they" are in Petitioner's statement "[t]hey talked to me about ten years" (Oct. 1, 2012 Hr'g Tr. 5:21 – 22 (alterations added)), because "they" could refer to his own lawyer. This is especially so in light of the prosecutor's earlier statement, "[Petitioner] came with a counter of ten years. At this point in time, we do not think that is reasonable . . . and so we are rejecting that counteroffer" (*id.* 4:4–7 (alterations added)). Moreover, the record shows that had Petitioner been offered a 10-year deal, he would have declined to accept it. (*See id.* 5:22).

In short, Judge Reid correctly recommended denying habeas relief on this ground.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that the Supplemental Report **[ECF No. 53]** is **ACCEPTED** in part and **REJECTED** in part. Petitioner, Pablo Guzman's Amended Petition Under 28 U.S.C. Section 2254 for Writ of Habeas Corpus by Person in State Custody **[ECF No. 8]** is **DENIED**. A certificate of appealability shall not issue.

DONE AND ORDERED in Miami, Florida, this 4th day of September, 2020.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20220-CIV-ALTONAGA

PABLO GUZMAN,

Petitioner,

v.

MARK INCH, Secretary,
Florida Department of Corrections,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court on Petitioner, Pablo Guzman's Motion to Alter or Amend Judgment [ECF No. 77], filed on September 28, 2020.[1] On September 4, 2020, the Court entered an Order [ECF No. 75], denying Petitioner's remaining habeas claims. Petitioner argues the Court applied the wrong standard to his Claim Two, Subclaim Two, stating the Court engaged in a fundamental error analysis when the Court should have employed an abuse of discretion standard. (*See* Mot. 2).

Petitioner is incorrect. In Claim Two, Subclaim Two, Petitioner asserted his "[a]ppellate counsel, on direct appeal, failed to argue fundamental error on the jury instruction for a lesser included offense by omitting any definition of excusable homicide of Attempted Voluntary Manslaughter by Act[.]" (Am. Pet. [ECF No. 8] 8 (alterations added)). With regard to that Claim, the Court's discussion of fundamental error was limited to whether *Petitioner's appellate*

[1] Under the prison mailbox rule, inmate's court filings are deemed filed as of the date they are placed in the hands of institutional staff for mailing.

counsel's failure to argue fundamental error prejudiced Petitioner. (*See* Sept. 4, 2020 Order 5–8). The Court concluded it did not. (*See id.* 8).

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner, Pablo Guzman's Motion to Alter or Amend Judgment **[ECF No. 77]** is **DENIED.**

DONE AND ORDERED in Miami, Florida, this 6th day of October, 2020.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record; Petitioner, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.17-CIV-20220-ALTONAGA
MAGISTRATE JUDGE P.A. WHITE

PABLO GUZMAN, :

Petitioner, :

v. : REPORT OF MAGISTRATE JUDGE

JULIE L. JONES, :

Respondent. :

Introduction

Pablo Guzman, who is presently confined at South Bay Correctional Facility in South Bay, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence in case number F10-004216, entered in the Eleventh Judicial Circuit Court of Miami-Dade County.

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

The court has before it the amended petition for writ of habeas corpus [DE#8],[1] Respondent's response to an order to show cause and appendix of exhibits [DE#16, 17], Respondent's notice of

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[1]The amended petition is identical in all material respects to the original petition [DE#1], except that Petitioner has changed the order of his sub-claims of ineffective assistance of appellate counsel raised in Ground Two, and abandoned what was originally sub-claim A of that ground("Appellate counsel failed to raise as fundamental error, erroneous jury instructions) of this ground. See Lowery v. Ala. Power Co., 483 F.3d 1184, 1219 (11th Cir. 2007)("an amended complaint supersedes the initial complaint and becomes the operative pleading in the case").

filing transcripts [DE#18], Petitioner's reply [DE#24], and Petitioner's notice of supplemental authority [DE#26].

Claims

Ground One:	The defense should have been able to comment on the absence of the victim's testimony.
Ground Two:	Ineffective assistance of appellate counsel.
Ground Three:	Ineffective assistance of trial counsel.
Ground Four:	Ineffective assistance of trial counsel in misadvising Petitioner not to accept the State's 10-year plea offer.

Procedural History[2]

Petitioner was charged with attempted premeditated first-degree murder with a deadly weapon. The victim was Nelson Puente. Petitioner proceed to trial and was found guilty of the lesser-included offense of attempted second-degree murder. The state court adjudicated Petitioner guilty, and sentenced him to 40 years in prison, with a mandatory minimum term of 25 years.

Petitioner appealed his conviction and sentence, and Florida's Third District Court of Appeal affirmed in a *per curiam* decision without written opinion. Petitioner then unsuccessfully pursued post-conviction relief pursuant to state law. Then on January 10, 2017, Petitioner filed the instant federal petition for writ of habeas corpus,[3] which Respondent concedes is timely filed.[4]

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[2]The relevant procedural history of Petitioner's underlying criminal case is not in dispute. A detailed recitation thereof, with citations to the record, can be found in Respondent's response.

[3]Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison

Standard of Review

A prisoner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001). A state court decision is "contrary to" or an "unreasonable application of" the Supreme Court's clearly established precedent within the meaning of § 2254(d)(1) only if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. Brown v. Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. A federal court must presume the correctness of the state court's factual findings, unless the petitioner overcomes them by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). So long as neither the reasoning nor the result of the state court decision contradicts Supreme Court decisions, the state court's decision will not be disturbed. See Early v. Packer, 537 U.S. 3, 8 (2002). However, where a state court does not adjudicate a claim on the merits under these circumstances, a federal court is not subject to the

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mailbox rule").

[4]Because Petitioner raises the same exact claims in the operative, amended petition as he did in his original filing, the claims in the amended petition relate back to the original filing date. See Davenport v. United States, 217 F.3d 1341, 1344 (11th Cir.2000).

deferential standard that applies pursuant to section 2254(d). Rather, the claim is reviewed de novo. See Conner v. Hall, 645 F.3d 1277, 1292 (11th Cir.2011); Ferrell v. Hall, 640 F.3d 1199, 1224 (11th Cir.2011) (*citing* Cone v. Bell, 556 U.S. 449, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009)).

To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both (1) that his counsel's performance was deficient, and (2) that he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place." Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1356 (11th Cir.2009). To demonstrate prejudice, the defendant must show that "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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. To obtain habeas relief on a claim of ineffective assistance of counsel, the petitioner must show that the state court applied Strickland an objectively unreasonable manner." Bell v. Cone, 535 U.S. 685, 699 (2002).

Procedural Bar

Federal courts will not review questions of federal law presented in a habeas petition when a state court decision rests upon a state-law ground that is "independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). The independent and adequate state law doctrine thus applies to bar habeas review when a state court rejects a prisoner's federal claims on state procedural grounds. Id. at 729-30. The doctrine is grounded in

the same principles of comity and federalism as the exhaustion requirement. Id. at 731-32. "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petition who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." Id.

A three-part test enables the Court to determine when a state court's procedural ruling constitutes an independent and adequate state rule of decision. First, the last state court rendering judgment must have clearly and expressly stated that its judgment rested on a procedural bar. Ward v. Hall, 592 F.3d 1144, 1156 (11th Cir. 2010).[5] Second, the state court's decision must rest entirely on state law grounds and not be intertwined with an interpretation of federal law. Ward, 592 F.3d at 1157. Third, the state procedural rule must be adequate, i.e., firmly established and regularly followed and not applied in an "arbitrary or unprecedented fashion." Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001); Ward, 592 F.3d at 1157.

Discussion

In Ground One, Petitioner claims that the defense should have been able to comment on the absence of the victim's testimony. In support of this claim, Petitioner alleges that the State had Puente on its witness list but then decided not to call Puente at trial, and that the trial court precluded the defense from commenting on Puente's absence. According to Petitioner, this precluded Petitioner from being able to impeach and cross examine Puente on the fact that he was overstating his injuries in a civil suit that he filed against the bar where the incident occurred, the fact that

[5]In Florida, a District Court of Appeal's *per curiam* affirmance of a circuit court's ruling explicitly based on procedural default "is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts." Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir. 1990).

he had been arrested for domestic battery and aggravated assault, and the fact that he was receiving payments from the victims' compensation fund.

"[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." Graves v. United States, 150 U.S. 118, 121 (1893). "When a witness is peculiarly within the control of one party, and that witness' testimony would elucidate facts in issue, an instruction is appropriate regarding the permissible inference which the jury may draw from the party's failure to call the witness." United States v. Nahoom, 791 F.2d 841, 846 (11th Cir.1986).

To receive a missing witness instruction, a defendant must demonstrate (1) the potential witness' unavailability in a physical or practical sense; and (2) that the witness' testimony would be relevant and not merely cumulative. Jones v. Otis Elevator Co., 861 F.2d 655, 659 (11th Cir.1988); United States v. Valles, 41 F.3d 355, 360 (7th Cir.1994). An inference from a party's failure to call a witness equally available to both parties is impermissible. United States v. Chapman, 435 F.2d 1245, 1247 (5th Cir.1971). An inference from a party's failure to call a witness equally available to both parties is impermissible. United States v. Chapman, 435 F.2d 1245, 1247 (5th Cir.1971).[6] The rule is essentially the same in Florida. See Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990)("In the instant case, the witness was equally available to both parties. We hold that the trial judge did not err in limiting further comment.").

[6]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions that the former Fifth Circuit had handed down before the close of business on September 30, 1981. Id. at 1209.

Here, the record reflects that the state trial judge denied the missing witness instruction in response to the State's argument that the witness was equally available to both sides, and told the defense that it could call Mr. Puente itself. (T., pp.617-18). The defense argued there, as Petitioner asserts here, that there existed a "special relationship" between Mr. Puente and the State by virtue of the fact that Mr. Puente was receiving payments from the victim's compensation fund (Id. at 706-09), but the trial court rejected this contention as well. (Id. at 620, 712).

As set forth above, one of the things that a defendant must demonstrate in order to receive a missing witness instruction is that the witness was unavailable to it. Here, Petitioner never made any such showing. Rather, Petitioner merely argued that there was a "special relationship" between the State and Mr. Puente because he was receiving victims' compensation payments. Petitioner made no showing, however, that this rendered Mr. Puente unavailable. There is no dispute that Petitioner knew Mr. Puente's identify based on discovery, and Petitioner admits that the defense knew about Mr. Puente's civil lawsuit. Indeed, in Ground Three, B, Petitioner claims that trial counsel was ineffective in failing to secure Mr. Puente's testimony for trial, thereby effectively admitting that Mr. Puente was equally available to the defense.

The state court's factual determination that Mr. Puente was equally available to the defense, and that the defense could have called him at trial, is of course entitled to substantial deference. See Maharaj v. Sec'y for Dep't of Corr., 432 F.3d 1292, 1315 (11th Cir. 2005)(*citing* 28 U.S.C. §2254(e)(1)(noting that "a determination of a factual issue made by a State court shall be presumed to be correct" and that an "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence")). And Petitioner fails to make any allegations that would rebut the presumption of correctness afforded to the state court's finding regarding this issue.

In Ground Two, Petitioner claims ineffective assistance of appellate counsel. In support of this claim, Petitioner alleges that appellate counsel failed to argue that the trial court committed fundamental error by omitting any definition of "excusable homicide" in connection with its instruction on the lesser-included offense of attempted voluntary manslaughter (subclaim B), and that appellate counsel failed to argue fundamental error by instructing the jury on the "forcible felony exception" to self defense (subclaim C).[7]

The Sixth Amendment does not require attorneys to press every non-frivolous issue that might be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. Jones v. Barnes, 463 U.S. 745, 753-54 (1983). The Supreme Court has recognized that "a brief that raises every colorable issue runs the risk of burying good arguments - those that . . . 'go for the jugular.'" Id. at 753. To be effective, therefore, appellate counsel may select among competing non-frivolous arguments in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756, 781-82 (2000). Indeed, the practice of "winnowing out" weaker arguments on appeal, so to focus on those that are more likely to prevail, is the "hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986). In considering the reasonableness of an appellate attorney's decision not to raise a particular claim, therefore, this Court must consider "all the circumstances, applying a heavy measure of deference to counsel's judgments." Eagle v. Linahan, 279 F.3d 926, 940 (11th Cir. 2001), quoting, Strickland, 466 U.S. at 691. In the context of an

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[7]Sublclaim A asserts that *trial* counsel was ineffective in failing to objet to factors considered by the trial court at sentencing. (Ground Two, A). Therefore, this claim will be addressed in connection with Ground Three, D, which effectively raises the same claim.

ineffective assistance of appellate counsel claim, "prejudice" refers to the reasonable probability that the outcome of the appeal would have been different. Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001); Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990); see also Robbins, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere v. Sec'y Fla. Dep't of Corr., 537 F.3d 1304, 1310 (11th Cir. 2008)(same). Thus, in determining whether the failure to raise a claim on appeal resulted in prejudice, the courts must review the merits of the omitted claim and, only if it is concluded that it would have had a reasonable probability of success, then can counsel's performance be deemed necessarily prejudicial because it affected the outcome of the appeal. Eagle, 279 F.3d at 943; see, also, Card v. Dugger, 911 F.2d 1494, 1520 (11 Cir. 1990)(holding that appellate counsel is not required to raise meritless issues).

Petitioner first asserts that appellate counsel failed to argue that the trial court committed fundamental error by omitting any definition of "excusable homicide" in connection with its instruction on the lesser-included offense of attempted voluntary manslaughter (subclaim B). The record reflects that, although counsel initially requested the instruction, counsel did not object when the trial court decided to omit the instruction. (T., pp.719-20). Appellate counsel's only option under Florida law thus would have been to raise this as fundamental error. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994). However, review of the record reveals that there was nothing about the facts of Petitioner's case suggested that the shooting was excusable. Nor did Petitioner's defense argue at trial that the shooting was accidental. Indeed, the evidence established that the victim was shot at least five times. And Petitioner himself testified at trial that he

intentionally "discharged the clip" as he shot the victim in self-defense. (T. pp.672-75, 681-683). There was simply no evidence upon which the jury could have found that the shooting was accidental and, hence, excusable. Indeed, in a similar case under Florida law, Florida's Fourth District Court of Appeal held that the failure to administer a jury instruction on justifiable and excusable homicide was not error. See Franco v. Delva, 901 So.2d 901 (Fla. 4th DCA 2005). Therefore, under these circumstances, appellate counsel cannot be deemed ineffective in failing to raise the failure to give an "excusable homicide" instruction as fundamental error. See Jones, 463 U.S. 745, 753-54 (appellate counsel need not raise every non-frivolous issue); see also Eagle, 279 F.3d at 943 ("prejudice" for ineffective assistance of appellate counsel refers to a reasonable probability that the outcome of the appeal would have been different); Cross, 893 F.2d at 1290 (same).

Petitioner also asserts that appellate counsel failed to argue fundamental error by instructing the jury on the "forcible felony exception" to self defense (subclaim C). However, review of the record reveals that the jury was not instructed on the forcible felony exception to the defense of self-defense. (T., pp.785-788). Specifically, the jury was not instructed that self-defense was not available as a justification if the Petitioner was attempting to commit, committing, or escaping after the commission of a forcible felony. (T. 785-788). Therefore, appellate counsel cannot be deemed ineffective for having failed to raise this error, whether as fundamental error, or any other kind of error. See Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues).

In Ground Three, Petitioner claims ineffective assistance of trial counsel. In support of this claim, Petitioner alleges that A) trial counsel presented detrimental opening statements, B) trial counsel failed to secure Puente for trial, C) trial counsel failed

to object to the independent forcible felony to self-defense, D) trial counsel failed to object when the Court considered Petitioner's continual claim of innocence at sentencing, E) trial counsel failed to object to the imposition of an illegal sentence, F) trial counsel failed to file a pre-trial motion for a competency hearing, and G) trial counsel failed to object to the trial court omitting the definition of excusable homicide for the lesser included offense of attempted manslaughter.

A) Detrimental opening statements - Petitioner alleges that, in opening statement, trial counsel told the jury that Puente would testify that Petitioner told Puente he would shoot him, and that Puente would further testify that he didn't know Petitioner. According to Petitioner, this negated the theory of self-defense that was presented at trial. However, as set forth above, it is undisputed that Puente was on the State's witness list, and that the State did not decide until after the trial had commenced that it would not be calling Puente.

Opening statements are of course the lawyers' opportunity state what they *anticipate* the evidence will show. Indeed, defense lawyers routinely state what they anticipate the State's evidence will be as a matter of strategy (i.e. "to take the wind out the their sails"). And it is well-settled that reasonable strategic choices by counsel regarding the various plausible options in a given case are "virtually unchallengeable." Strickland, 466 U.S. at 690. Here, the record conclusively establishes that counsel could not have anticipated that the State would make an eleventh-hour decision to not call Puente. And regardless, even assuming Petitioner could establish that counsel was deficient in this regard (which he cannot), Petitioner still cannot establish prejudice. Specifically, the record reflects that the jury was properly instructed that the statements of counsel are not evidence and that they were to render their decision only on the testimony and the exhibits (T., p.63, 733, 797-98), and juries are of course

presumed to follow the law. See Francis v. Franklin, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n. 9, 85 L.Ed.2d 344 (1985)("[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.").

B) Failure to secure Puente for trial - Petitioner alleges that counsel failed to call the victim, Nelson Puente, and that Puente's testimony would have been exculpatory, and would have allowed the defense to present evidence of Puente's reputation for violence.

"Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." Buckelew v. United States, 575 F.2d 515, 521 (5th Cir. 1978). Indeed, "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision and it is one that [the courts] will seldom, if ever, second guess." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995).

Here, the primary purpose for which Petitioner claims counsel should have called the victim was to impeach him with his prior deposition testimony. However, in Florida, as in most jurisdictions, it is improper to call a witness for the primary purpose of impeaching him. See Morton v. State, 689 So.2d 831 (Fla. 1997), *receded from on other grounds*, Rodriguez v. State, 753 So.2d 29 (Fla. 2000). Moreover, Puente could not have been called to testify about his own reputation for violence. While evidence relating to a victim's violent character is admissible under § 90.404(1)(b), Fla. Stat., the only method of proof permitted by § 90.405(1) to prove this character trait is by calling witnesses who will testify to their knowledge of the victim's reputation for the trait. See Ehrhardt, Florida Evidence § 404.6 (2015 Ed.). Furthermore, Petitioner has failed to allege how calling Puente as a defense witness could serve to establish the proper foundation

necessary for presenting evidence of his alleged reputation for violence. Without such foundation, the reputation evidence would be inadmissible. See Munoz v. State, 45 So. 3d 954, 956 (Fla. 3d DCA 2010). Thus, to the extent that Petitioner claims that counsel should have called Puente with the primary purpose of impeaching him, Petitioner has failed to establish that counsel had any good faith basis to do so. And "it is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance." Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994).

Finally, with regard to Petitioner's allegation that Puente's testimony would have somehow been exculpatory, this claim is wholly conclusory. However, it is well settled that conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); see also Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992)(§ 2255 context). Moreover, for claims of ineffectiveness predicated upon the failure to call witnesses, "evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." United States v. Ashimi, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted). In other words, to successfully assert that trial counsel should have called a witness, a petitioner must first make a sufficient factual showing substantiating the proposed witness testimony. United States v. Schaflander, 743 F.2d 714, 721 (9th Cir. 1984). Petitioner's conclusory allegations fail to meet this exacting standard.

C) Failure to object to the independent forcible felony to self-defense - Petitioner alleges that this instruction was improper, because he was not charged with an independent forcible

felony.[8] However, the record factually refutes Petitioner's claim. Specifically, the record reflects that the state trial court instructed the jury that Petitioner's defense was self defense, and instructed the jury under what circumstances Petitioner would be justified in using force in self defense, including deadly force. (T. pp.785-788). The court never instructed the jury on the forcible felony exception, or that self defense was not available if Petitioner was attempting to commit, committing, or escaping after committing a forcible felony. (Id.).[9] Therefore, counsel had no basis to object to the instruction, since it was not given. As such, counsel cannot be deemed ineffective in failing to do so. See Chandler v. Moore, 240 F.3d 907, 917 (11 Cir. 2001)(counsel is not ineffective for failing to raise a non-meritorious objection); see also United States v. Hart, 933 F.2d 80, 83 (1st Cir.

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[8]Respondent argues, as the state trial court concluded on post-conviction review, that this claim is procedurally barred, because Petitioner's claims concerning jury instructions can and should be raised on direct appeal. Here, however, Petitioner's claim here and in state court is that *counsel was ineffective in failing to object* to the instruction at trial. It is well-settled that "claims of ineffective assistance of counsel are [generally] not cognizable on direct appeal. Eaglin v. State, 19 So. 3d 935, 945 (Fla. 2009), as revised on denial of reh'g (Oct. 8, 2009) (*citing* Bruno v. State, 807 So.2d 55, 63 (Fla.2001); see also Massaro v. United States, 538 U.S. 500, 504-05, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) (noting that an appellate court generally cannot adequately decide an ineffective-assistance-of-counsel claim raised for the first time on appeal because the focus at trial was not on whether defense counsel's actions were prejudicial or supported by reasonable strategy); Martinez v. State, 761 So.2d 1074, 1078 n.2 (Fla.2000) ("With rare exception, ineffective assistance of counsel claims are not cognizable on direct appeal."); McKinney v. State, 579 So.2d 80, 82 (Fla.1991) ("Claims of ineffective assistance of counsel are generally not reviewable on direct appeal but are more properly raised in a motion for postconviction relief."); Kelley v. State, 486 So.2d 578, 585 (Fla.1986) (same); State v. Barber, 301 So.2d 7, 9 (Fla.1974) (holding that claims of ineffective assistance of counsel "cannot properly be raised for the first time on direct appeal" because the trial court has not previously ruled on the issue). Indeed, in State v. Barber, supra, the Florida Supreme Court held that where trial counsel "had failed to preserve for [direct] review the question of sufficiency of the evidence by making appropriate motions," the defendants were "entitled to review upon the point they raise on adequacy of counsel in appropriate post-conviction proceedings under Cr.P.R. 3.850." 301 So.2d at 8, 10.

[9]Petitioner points to excerpts from voir dire that have nothing to do with jury instructions (DE#24, p.11 (*citing* T., p.213), and portions from the charge conference which are not entirely clearly what was being agreed upon (Id. (*citing* T. at 713, 724-728). But what matters is what they jury was actually instructed.

1991) (counsel is not required to waste the court's time with futile or frivolous motions).

D) Failure to object when the Court considered Petitioner's continual claim of innocence at sentencing - Petitioner alleges that the trial court considered Petitioner's continued proclamations of innocence, as well as his previous arrests, in determining Petitioner's sentence.

Under federal as well as Florida law, a sentencing court has wide discretion regarding the factors it may consider when imposing a sentence. See United States v. Roe, 670 F.2d 956, 973 (11th Cir. 1982) (*citing* Roberts v. United States, 445 U.S. 552, 556, 100 S.Ct. 1358, 1362, 63 L.Ed.2d 622 (1980); Bracero v. State, 10 So.3d 664, 665 (Fla. 2d DCA 2009); see also Howard v. State, 820 So.2d 337, 340 (Fla. 4th DCA 2002) ("The sentencing court ... must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed.") (*quoting* Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)). But "it is constitutionally impermissible for it to consider the fact that a defendant continues to maintain his innocence and is unwilling to admit guilt." Ritter v. State, 885 So.2d 413, 414 (Fla. 1st DCA 2004) (finding ineffective assistance based on appellate counsel's failure to raise due process violation when court had considered criminal defendant's assertion of innocence at sentencing). "A trial court violates due process by using a protestation of innocence against a defendant." Holton v. State, 573 So.2d 284, 292 (Fla.1990). "The fact that a defendant has pled not guilty cannot be *666 used against him or her during any stage of the proceedings because due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt." Id. However, in order to determine whether a criminal defendant was prejudiced or denied due process by a court's comments, the

comments must be viewed in context. See Ross v. State, 386 So. 2d 1191, 1195 (Fla. 1980).

Here, review of the record reveals that, in the context of addressing Petitioner's allegation that he had been the victim of prior home invasion robberies, as well as Petitioner's prior arrests for disorderly conduct, disorderly intoxication and resisting an officer without violence, the court then stated, "I think, Mr. Guzman, it's time that you take responsibility for your actions and stop claiming to be the victim because you are not. You had decisions and you made the wrong ones." (ST. at 27). This demonstrates, at best, the court's personal opinion on that matter. However, when articulating the factors to be considered as the basis for Petitioner's sentence, the court stated that it "need[ed] to consider the community as a whole and whether or not Mr. Guzman being out in the community is a safe decision to make." (ST. at 27-28). Thereafter, court mentioned "responsibility" only in connection with Petitioner's drinking in excess and choosing to drive, as well as Petitioner's decision to shoot into a crowd of people and to subsequently flee the country. (ST. at 28-29). These comments thus reflect that court properly considered the actions taken by Petitioner, not the fact that Petitioner was still proclaiming his innocence. (ST. at 13-14, 28-29). Therefore, even if there was some arguable basis to for a good-faith objection to these comments, Petitioner cannot establish that counsel did not act in the exercise of reasonable professional judgment in declining to do so. See Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). As such, Petitioner cannot establish that counsel was ineffective in failing to do so. See Knowles v. Mirzayance, 129 S.Ct. 1411, 1422 (2009)(the law does not require counsel to raise every available non-frivolous defense).

E) Failure to object to the imposition of an illegal sentence - Petitioner alleges that the statutory maximum for his offense was 30 years in prison. However, the record reflects that the jury made the special finding on the verdict form that Petitioner possessed a firearm, discharged a firearm, and caused great bodily harm due to discharge of the firearm. (DE#17, Ex. C). The trial court therefore had discretion, under § 775.087(2)(a)(3), Fla. Stat. (2009), to sentence Petitioner, who was found guilty of attempted second-degree murder with the jury finding of great bodily harm, to between 25 years to the maximum of life in prison, even though traditionally the statute was capped at 30 years in prison. See Mendenhall v. State, 48 So. 3d 740, 750-51 (Fla. 2010). Therefore, trial counsel had no good-faith basis to object to the sentence as illegal in excess of the statutory maximum. As such, counsel cannot be deemed ineffective in failing to do so. See Bolender, 16 F.3d at 1573 (11th Cir. 1994)(failure to raise non-meritorious issues does not constitute ineffective assistance).

F) Failure to file a pre-trial motion for a competency hearing - Petitioner alleges that he informed counsel of his prior mental illness, and that the trial court was required to conduct a competency hearing.

The Due Process Clause of the Fifth Amendment prohibits the government from trying or sentencing a defendant who is legally incompetent. Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); United States v. Rahim, 431 F.3d 753, 759 (11th Cir.2005). Competency issues can involve either substantive competency claims or procedural competency claims, or both. Battle v. United States, 419 F.3d 1292, 1298 (11th Cir.2005). A petitioner who asserts a substantive claim that he was not competent to proceed at the trial level raises what is referred to as a Dusky claim (after Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)), while a claim that

the trial court committed error by not ordering a competency hearing is often referred to as a Pate claim. Lawrence v. Sec'y, Florida Dept. of Corr., 700 F.3d 464, 481 n. 5 (11th Cir.2012).

To be competent to stand trial or plead guilty, a defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Dusky, 362 U.S. at 402; Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); Rahim, 431 F.3d at 759. To show entitlement to a hearing on a substantive incompetency claim, petitioner must show clear and convincing evidence creating a real, substantial and legitimate doubt about his competence to plead guilty. Lawrence, 700 F.3d at 481 (citations omitted); Battle, 419 F.3d at 1298-99. This standard of proof is high, and the facts must positively, unequivocally, and clearly generate the legitimate doubt. Battle, 419 F.3d at 1299. In advancing a substantive competency claim, a petitioner "is entitled to no presumption of incompetency and must demonstrate his ... incompetency by a preponderance of the evidence." James v. Singletary, 957 F.2d 1562, 1571 (11th Cir.1992); Battle, 419 F.3d at 1298.

As a procedural matter, a court has a due process obligation to conduct a competency hearing, even if not requested to do so, if there is reasonable cause to believe a defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Pate, 383 U.S. at 385. Thus, a trial judge must conduct a *sua sponte* competency hearing if there is evidence which raises a "bona fide doubt" regarding the defendant's competence to stand trial. Pardo v. Sec'y, Florida Dept. of Corr., 587 F.3d 1093, 1099-1100 (11th Cir.2009); Rahim, 431 F.3d at 759. Relevant information bearing on the court's obligation to conduct

a competency hearing includes evidence of defendant's irrational behavior, the defendant's demeanor at trial or in hearings, and prior medical opinions regarding the defendant's competence. Tiller v. Esposito, 911 F.2d 575, 576 (11th Cir.1990). The failure of a defendant or his counsel to raise the competency issue is "persuasive evidence that no Pate violation occurred." Reese v. Wainwright, 600 F.2d 1085, 1092 (5th Cir.1979)[10]

The burden imposed upon a habeas petitioner to demonstrate incompetency in fact at the time of trial is extremely heavy. Thompson v. Johnson, 7 F. Supp. 2d 848 (S.D. Tex. 1998). A petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence. Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995).

Here, Petitioner provides no record citation to any instances where his behavior gave cause to question his competency, nor does Petitioner provide any support that he was incompetent while standing trial or that he was actually adjudicated incompetent at any point. Petitioner does not even contend that, if a competency hearing had been requested, he would have been deemed incompetent to stand trial. But even if he had, any such conclusory assertion is insufficient to warrant relief. Card v. Singletary, 981 F.2d 481, 485-86 (11th Cir. 1992) (habeas petitioner's history of emotional disturbances and alleged inadequacies of initial psychiatric evaluations did not generate substantial doubt as to petitioner's competence to stand trial and, thus, petitioner was not entitled to competency hearing).

Other than Petitioner's self-serving statements contained in the instant petition, Petitioner has not shown any indicia of incompetence during trial, nor has he pointed to anywhere in the

[10]Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

record where his behavior would have instilled doubt in as to his competency to stand trial. Indeed, review of the record reveals multiple instances wherein the trial court communicated directly with Petitioner and observed his behavior, and there was no indication that Petitioner's competency might have been an issue. By way of example, concerning Petitioner's decision to testify at trial, the court specifically asked Petitioner, "Do you have any mental illness or have you ever been treated for mental illness?" Petitioner replied, "No." (T. 635-636). Additionally, as the trial court noted in a written order and the trial transcript reflects, "Defendant showed no signs of being incompetent during the actual trial. The Petitioner answered questions in an appropriate manner, participated in plea negotiations and had meaningful discussions with his defense counsel." (DE#17, Ex. Q, p.3).

Thus, because Petitioner cannot establish that there was any substantive competency issue or any indication to the trial court that his competency might be an issue, he is not entitled to relief on any substantive or procedural due process claim. See Dusky, 362 U.S. at 402 (setting forth substantive standard); Pate, 383 U.S. at 378 (setting forth procedural standard) see also Miles v. Crosby, 2005 WL 1459395, at *11 (M.D. Fla. 2005) (*citing* Branscomb v. Norris, 47 F.3d 258, 261 (8th Cir.)) (noting that, absent some contrary indication, state and federal trial judges may presume defendants are competent), cert. denied, 515 U.S. 1109 (1995)). As such, Petitioner cannot show that counsel was ineffective in failing to raise this issue. See Bolender, 16 F.3d at 1573 (11th Cir. 1994)(failure to raise non-meritorious issues does not constitute ineffective assistance).

G) Failure to object to the trial court omitting the definition of excusable homicide for the lesser included offense of attempted manslaughter - Petitioner alleges that, although counsel requested the instruction, counsel did not object when the court

failed to give it, and thereby failed to preserve the issue for appellate review.[11]

This claim is simply a variation on Petitioner's claim of ineffective assistance of appellate counsel, asserted in Ground Two, D, above. And as set forth in the discussion of that ground, albeit in the context of ineffective assistance of appellate counsel, the evidence in this case refuted any claim that the shooting with which Petitioner was charged was an accident. Thus, not only can Petitioner not overcome the strong presumption that trial counsel made the decision not to press this issue in the exercise of reasonable professional judgment, see Strickland, 466 U.S. at 690, Petitioner cannot show that he was prejudiced in any way by counsel's failure. See Davis v. Sec'y for Dep't of Corr., 341 F.3d 1310, 1316 (11th Cir. 2003)"[W]hen a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved.").

In Ground Four, Petitioner claims ineffective assistance of trial counsel in misadvising Petitioner not to accept the State's 10-year plea offer. In support of this claim, Petitioner alleges that counsel advised Petitioner he would prevail at trial because the victim, Mr. Puente, had a bad record with multiple convictions, and that he had previous arrests on drug charges, aggravated battery, and domestic violence.

The Sixth Amendment guarantees a defendant the right to counsel present at all "critical" stages of the criminal proceedings. Missouri v. Frye, ---U.S. ----, 132 S.Ct. 1399, 1405,

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[11]As with Ground Three, C), above, Respondent asserts that this claim is also procedurally barred, because Petitioner could have but did not raise it on direct appeal. However, as with subclaim C), Petitioner's claim here is one of ineffective assistance of counsel, and such claims are generally not cognizable on direct appeal.

182 L.Ed.2d 379 (2012)(internal citations and quotations omitted). Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea. Id. The Sixth Amendment right to effective assistance of counsel also extends to the plea negotiation context. Id. at 1405-09; Lafler v. Cooper, --- U.S. ----, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012)(internal citations omitted). The Strickland framework thus applies to advice regarding whether to plead guilty. Hill v. Lockhart 474 U.S. 52, 58-59, 106 S.Ct. 366, 370-71, 88 L.Ed.2d 203 (1985). In this context, the analysis of the performance prong is the same, but the prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process," and not on the fairness of the trial. Hill, 474 U.S. at 59; see also LaFler 132 S.Ct. at 1381 (where a plea offer has been rejected, "the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance").

It is well-settled that the first part of the Strickland test asks whether "counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. Of course, an attorney has a duty to advise a defendant, who is considering a guilty plea, of the available options and possible sentencing consequences. Brady v. United States, 397 U.S. 742, 756 (1970). The law requires counsel to research the relevant law, and facts and to make informed decisions regarding the fruitfulness of various avenues. United States v. Grammas, 376 F.3d 433, 436 (5th Cir. 2004); see also Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948)("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining

whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman ...."). Beyond that, however, it is exceedingly difficult to define counsel's duties and responsibilities in the plea-bargaining context. Frye, 132 S.Ct. at 1408. "The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision." Premo v. Moore, 562 U.S. ----, ----, 13 S.Ct. 733, 741, 178 L.Ed.2d 649 (2011). "Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." Frye, 132 S.Ct. at 1408.

In order to establish prejudice in the context of a rejected plea offer,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S.Ct. at 1385.[12]

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[12]In Frye, the Supreme Court articulated the standard similarly, as follows:

> Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under [applicable] law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Here, the record refutes any contention that Petitioner was ever offered a 10-year plea deal. Specifically, just prior to the start of trial, the following exchange occurred:

> THE COURT: State, have there been any offers?
>
> MS. PRIOVOLOS (Prosecutor): No judge, there hasn't been any offers. The only thing that I am allowed to convey is he plead guilty and receive twenty years state prison. That's the only thing we will be entertaining.

(T., pp.4-5). Petitioner then advised the court that he was not interested in accepting the 20-year offer, and that his counter-offer was credit for time served (37 months). (Id.). As such, Petitioner cannot establish entitlement to relief on this claim.

Certificate of Appealability

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

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petitioner's constitutional claims have been adjudicated and denied on the merits by the

---

Frye, 132 S.Ct. at 1409.

district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petitioner's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Petitioner is not entitled to relief on the merits, the court considers whether Petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant petition. After reviewing the claims presented in light of the applicable standard, the court finds reasonable jurists would not find the court's treatment of any of petitioner's claims debatable or wrong and none of the issue are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be DENIED, and that no certificate of appealbility be issued.

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

SIGNED this 19th day of April, 2018.

UNITED STATES MAGISTRATE JUDGE

cc: Pablo Guzman
M85632
South Bay Correctional Facility
Inmate Mail/Parcels
600 U S Highway 27 South
South Bay, FL 33493-2233
PRO SE

Douglas James Glaid
Attorney General Office
Department of Legal Affairs
444 Brickell Avenue
Suite 650
Miami, FL 33131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20220-CV-ALTONAGA
MAGISTRATE JUDGE REID

PABLO GUZMAN,

Petitioner,

v.

MARK INCH,

Respondent.
_____/

SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE

This Cause comes before the Court upon the Petitioner's amended *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254. [ECF No. 8]. The amended petition attacks the constitutionality of Petitioner's 2013 judgment of conviction in Case No. F10-004216, Eleventh Judicial Circuit of Florida, Miami-Dade County. A prior magistrate judge had issued an initial Report recommending that the petition be denied on the merits. [ECF No. 29]. Having reviewed the Petitioner's objections to the Report, the State's Response to the Objections, and Petitioner's Reply, and conducted an independent review of the case, the District Judge denied claim one and the first subclaim of claim two and referred the

remaining claims raised in the amended petition for a supplemental Report [ECF No. 52]. This Supplemental Report follows.

I. Background

A. State Court Proceedings

The state charged petitioner with the attempted premediated first-degree murder of Nelson Puente with a deadly weapon. [ECF No. 17-1 at 3].[1] A jury found petitioner guilty of the lesser-included offense of attempted second-degree murder with a deadly weapon. [*Id.* at 47]. The trial court sentenced petitioner to 40 years' imprisonment with a 25-year minimum mandatory sentence. [*Id.* at 53-54].

Petitioner appealed, filing his initial brief on April 10, 2014. [*Id.* at 57, 76]. The Third District Court of Appeal ("Third District") affirmed without comment. *Guzman v. State*, 151 So. 3d 1256 (Fla. 3d DCA 2014) (table); *see* [ECF No. 17-2 at 43].

Petitioner then filed a petition in the Third District alleging ineffective assistance of *appellate* counsel. [ECF No. 17-2 at 45]. The Third District denied the petition without comment. [ECF No. 17-3 at 53].

[1] All page citations for ECF entries refer to the page-stamp number at the top, right-hand corner of the page.

Meanwhile, petitioner filed a motion for postconviction relief under Fla. R. Crim. P. 3.850 in the trial court [*id.* at 57], which he supplemented. [ECF No. 17-4 at 4]. The trial court denied the motion in a written order. [*Id.* at 20].

Petitioner appealed. [*Id.* at 39]. The Third District affirmed without comment. *Guzman v. State*, 203 So. 3d 167 (Fla. 3d DCA 2016) (table).

B. This § 2254 Case

Petitioner timely filed his § 2254 petition [ECF No. 1], which he amended [ECF No. 8]. The amended petition set forth these claims: (1) the trial court violated due process by precluding the defense from commenting on the victim's absence at trial; (2) ineffective assistance of appellate counsel (three instances); (3) ineffective assistance of trial counsel (seven instances); and (4) trial counsel ineffectively advised petitioner to reject a 10-year plea offer. [*Id.* at 5-18].

The state filed a response and supporting documentation. [ECF Nos. 16-18]. Petitioner filed a reply [ECF No. 24], and a notice of supplemental authority [ECF No. 26].

A prior magistrate judge report recommended that the amended petition be denied on the merits. [ECF No. 29].

Petitioner filed objections [ECF No. 32], to which the state responded [ECF No. 37]. Petitioner replied. [ECF No. 41].

The district court issued an order accepting in part the report and denying in part the amended petition. [ECF No. 52]. The district court denied claim one and the first subclaim of claim two. [*Id.* at 26]. The district court returned the remaining claims to the undersigned for report and recommendation. [*Id.*]

II. Legal Standard Under 28 U.S.C. § 2254

Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas corpus relief:

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

Under § 2254(d)(1)'s "contrary to" clause, courts may grant the writ if the state court: (1) reaches a conclusion on a question of law opposite to that reached by the Supreme Court; or (2) decides a case differently than the Supreme Court has on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Under its "unreasonable application" clause, courts may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's

decisions but unreasonably applies that principle to the facts of the case. *Id.* at 413. "[C]learly established Federal law" consists of Supreme Court "precedents as of the time the state court renders its decision." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citation and emphasis omitted).

An unreasonable application of federal law differs from an incorrect application of federal law. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted). Under this standard, "a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Courts "apply this same standard when evaluating the reasonableness of a state court's decision under § 2254(d)(2)." *Landers v. Warden*, 776 F.3d 1288, 1294 (11th Cir. 2015). That is, "[a] state court's . . . determination of facts is unreasonable only if no 'fairminded jurist' could agree with the state court's determination." *Id.* (citation omitted).

Under § 2254(d), where the decision of the last state court to decide a prisoner's federal claim contains no reasoning, federal courts must "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). "It should then presume that the unexplained decision adopted the same reasoning." *Id.*

A contrastable situation occurs when the decision of the last state court to decide a federal claim contains no reasoning and there is "no lower court opinion to look to." *Id.* at 1195. In this case, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99 (citation omitted). Thus, in this scenario, "[s]ection 2254(d) applies even [though] there has been a summary denial." *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011) (citation omitted). Because § 2254(d) applies, and because the last state court decision is unreasoned and there is no lower court decision to look through to, "a habeas court must determine what arguments or theories . . . could have supported[] the state court's decision[] and ... ask whether [they] are inconsistent with [Supreme Court precedent]." *See Richter*, 562 U.S. at 102.

III. Ineffective Assistance of Counsel Principles

To establish a claim of ineffective assistance of counsel, petitioner must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficiency, he must show that his attorney's performance "fell below an objective standard of reasonableness" as measured by prevailing professional norms. *Id.* at 688. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To prove prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

It is "all the more difficult" to prevail on a *Strickland* claim under § 2254(d). *Richter*, 562 U.S. at 105. As the standards that *Strickland* and § 2254(d) create are both "highly deferential," review is "doubly" so when the two apply in tandem. *Id.* (citation omitted). Thus, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable." *Id.* Rather, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Petitioner has the burden of proof on his ineffectiveness claims, *Holsey v. Warden*, 694 F.3d 1230, 1256 (11th Cir. 2012), as well as the burden of proof under § 2254(d), *Pinholster*, 563 U.S. at 181.

IV. Ineffective Assistance of Appellate Counsel Principles

Strickland "governs a claim of ineffective assistance of appellate counsel." *Overstreet v. Warden*, 811 F.3d 1283, 1287 (11th Cir. 2016) (citation omitted). "Under *Strickland*, a petitioner must show (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced the petitioner's defense." *Id.* (citing *Strickland*, 466 U.S. at 687).

"A petitioner satisfies the prejudice prong upon showing that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [appeal] would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694); *see also Ferrell v. Hall*, 640 F.3d 1199, 1236 (11th Cir. 2011) (to prove prejudice, petitioner alleging appellate ineffectiveness must show that "the outcome of the appeal would have been different" (citations omitted)).

Consideration of ineffective assistance of appellate counsel requires the reviewing § 2254 court to "consider all the circumstances ... from counsel's perspective at the time." *Dell v. United States*, 710 F.3d 1267, 1273 (11th Cir. 2013) (quoting *Strickland,* 466 U.S. at 689).

"Appellate counsel has no duty to raise every non-frivolous issue and may reasonably weed out weaker (albeit meritorious) arguments." *Id.* (citation omitted). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)); *see also Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("Declining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." (citation omitted)). Under § 2254(d), double deference applies to this determination. *Overstreet*, 811 F.3d at 1287 (citing *Richter*, 562 U.S. at 105).

V. Legal Analysis

A. Claim Two (Subclaim Two)

1. *Petitioner's Argument*

Florida law requires trial courts to instruct the jury on "category one lesser included offenses." *State v. Montgomery*, 39 So.3d 252, 259 (Fla. 2010). A necessarily lesser included offense is one whose elements are always included in the major offense. *Id.* Here, the parties do not dispute that the necessarily lesser included offense for attempted second degree murder, is attempted voluntary manslaughter. At the time Petitioner was tried, it was fundamental error for the trial court to fail to properly instruct the jury on the necessarily lesser included offense. *Id.*

Petitioner contends that appellate counsel ineffectively failed to argue that the trial court committed fundamental error when it omitted a definition for excusable homicide from the jury instruction for the lesser-included offense of attempted voluntary manslaughter. [ECF No. 8 at 8].

Petitioner principally relies on *State v. Lucas*, 645 So. 2d 425 (Fla. 1994) (per curiam). [ECF No. 32 at 6-7]. In *Lucas*, the defendant was convicted of attempted second-degree murder. 645 So. 2d at 426. Although the trial court instructed the jury on the lesser-included offense of attempted manslaughter, "the court failed to explain that [the defendant] could not be found guilty of attempted manslaughter if the evidence showed that the attempted homicide was justifiable or excusable." *Id.* Defense counsel did not object to the omission. *Id.* On appeal, the defendant argued

that "the court's failure to explain justifiable and excusable homicide as part of the attempted manslaughter instruction was fundamental error, requiring reversal." *Id.* The district court of appeal agreed and certified the case for review. *Id.*

The Florida Supreme Court approved the district court's decision. *Id.* at 427. The Court held that "failure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second-degree murder." *Id.* Further, the Court noted that the "only exception [it had] recognized is where defense counsel affirmatively agree[s] to or request[s] the incomplete instruction." *Id.* (citation omitted).

Petitioner also relies on *State v. Spencer*, 216 So. 3d 481 (Fla. 2017). [ECF No. 26]. There, the Court "reaffirm[ed] [its] holding in *Lucas* that the failure to instruct on justifiable or excusable homicide as a part of the instruction on manslaughter constitutes fundamental error where the conviction is for manslaughter or a greater offense not more than one step removed, regardless of whether the evidence could support either." *Id.* at 486. Further, the Court "conclude[d] that a second exception to its fundamental error rule is warranted where a defendant expressly concedes that a homicide or an attempted homicide is not justified or excusable." *Id.* While *Spencer* was decided after Petitioner's appeal, the case shows

the continuing validity of the Lucas decision, at least until 2017 when *Spencer* was decided.

2. *Factual Background*

The standard jury instruction permits the jury to return a verdict of attempted manslaughter by act if it found either justifiable homicide or excusable homicide. Fla. Std. Jury Instr. (Crim.) 6.6 (2010). At trial, when instructing the jury on attempted voluntary manslaughter, although the court instructed the jury on justifiable homicide, it did not instruct the jury on excusable homicide. [*Id.* at 157-60, 162-63]. Defense counsel asked for an instruction on excusable homicide. [ECF No. 18-7 at 91]. The prosecutor stated that such an instruction was improper because the evidence showed that petitioner did not accidently shoot the victim. [*Id.* at 91-92]. The court declined to give the instruction, simply stating that it "agree[d]" with the prosecutor. [*Id.* at 92]. Counsel did not object. [*Id.*] Furthermore, the court did not provide a definition for excusable homicide in any other instruction. [*Id.* at 151-66].

3. *Respondent's Argument*

The state contends that there "was no evidence upon which the jury could have found that the shooting was accidental and, hence, excusable." [ECF No. 16 at 20]. Therefore, the state concludes that "appellate counsel could not be found

ineffective for failing to raise this issue as fundamental error on appeal." [*Id.* (citations omitted)]. The state also cites a handful of Florida cases--including *Lucas*--without clearly explaining their applicability. *See id.*; *see also* [ECF No. 37 at 6]. The state raised the same argument in its response to petitioner's petition alleging ineffective assistance of appellate counsel filed in the Third District. [ECF No. 17-3 at 7-9].

4. *The First Report*

The prior magistrate judge found that, because trial counsel failed to object to the court's omission of the excusable homicide instruction, "[a]ppellate counsel's only option under Florida law [] would have been to raise this as fundamental error." [ECF No. 29 at 9]. But the magistrate judge found that "nothing about the facts of Petitioner's case suggested that the shooting was excusable." [*Id.*] Without explaining its applicability, the report cited in support *Franco v. Delva*, 901 So. 2d 901 (Fla. 4th DCA 2005).

5. *Discussion*

Here, subclaim two presented a clearly meritorious issue for appeal. This case is materially indistinguishable from *Lucas*. Petitioner was convicted of attempted second-degree murder, which is one step removed from attempted voluntary manslaughter. *See Lucas*, 645 So. 2d at 427; *see also Ware v. State*, 112 So. 3d 532, 533 (Fla. 3d DCA 2013). Furthermore, the court failed to instruct the jury on

excusable homicide as a part of the instruction on attempted voluntary manslaughter. Under *Lucas*, this failure was fundamental error even if the evidence did not warrant an instruction on excusable homicide.

The exceptions to this rule enunciated in *Lucas* and *Spencer* are not present here. The state does not argue, and the record does not reflect, that defense counsel affirmatively agreed to or requested the incomplete instruction. Likewise, the state does not argue, and the record does not reflect, that petitioner conceded that the attempted homicide was not excusable. Rather, counsel requested the instruction and the court declined to give it. Such conduct does not implicate these exceptions. *Spencer*, 216 So. 3d at 486 ("[These] exception[s] [do] not apply where defense counsel merely acquiesce[s] to jury instructions that [do] not provide a full instruction on justifiable or excusable homicide." (collecting cases)).

The state's sole counterargument is faulty. The state contends that the trial court's failure to give this instruction was not fundamental error because the evidence did not warrant a finding that the shooting was accidental, and hence, excusable. This is a variant of the argument that the prosecutor raised at trial when defense counsel sought the instruction, as well as the same argument that the state raised in its response to the petition alleging appellate ineffectiveness. This argument is irreconcilable with *Lucas* and its progeny. As a result, the Third District could not have reasonably relied on this theory in silently denying this claim. *See generally*

Richter, 562 U.S. at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories . . . could have supported[] the state court's decision[] and . . . ask whether [they] are inconsistent with [Supreme Court precedent]."); *see also Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2557, 2559-60 (2018) (per curiam) (suggesting that, under *Richter*'s "could have supported" directive, habeas courts must consider "*reasonable grounds* that could have supported the state court's summary decision" (emphasis added)).

The cases cited by the state and the prior magistrate judge are easily distinguishable. *See generally Byrd v. State*, 216 So. 3d 39 (Fla. 3d DCA 2017); *Franco*, 901 So. 2d 901; *State v. Delva*, 575 So. 2d 643 (Fla. 1991). *Byrd* and *Franco* are inapposite for the reasons in the district court's order returning the remaining claims for report and recommendation. [ECF No. 52 at 17-18]. Furthermore, even if they were on point, *Byrd* and *Franco* are district court of appeals opinions that cannot overrule *Lucas*, a Florida Supreme Court opinion. *See State v. Washington*, 114 So. 3d 182, 185 (Fla. 3d DCA 2012) ("The District Courts of Appeal are required to follow Supreme Court decisions." (citing *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992))). Additionally, appellate counsel could not have relied on *Byrd* in not raising the *Lucas* issue because the Third District decided *Byrd* nearly three years after counsel filed the initial brief.

The state cites the Florida Supreme Court's 1991 decision in *Delva* for the proposition that "fundamental error occurs in an instruction 'only when the omission is pertinent or material to what the jury must consider to convict.'" [ECF No. 16 at 20 (quoting 575 So. 2d at 645)]. However, *Lucas* was decided after *Delva* and enunciated the *per se* rule that a trial court commits fundamental error if it fails to instruct the jury on justifiable or excusable homicide as part of a manslaughter instruction and the defendant is convicted of an offense not more than one step removed, irrespective of whether the evidence could support a finding of justifiable or excusable homicide. *See* 645 So. 2d at 426-27. The Third District, likewise, has consistently found fundamental error and reversed and remanded for a new trial in these circumstances. *Jimenez v. State*, 994 So. 2d 1141, 1143 (Fla. 3d DCA 2008); *Richardson v. State*, 818 So. 2d 679, 680 (Fla. 3d DCA 2002); *Perez v. State*, 610 So. 2d 648, 648 (Fla. 3d DCA 1992).

Notably, the Florida Supreme Court appears to have recently receded from *Lucas*'s *per se* rule. *See generally Knight v. State*, No. SC18-309, 2019 WL 6904690 (Fla. Dec. 19, 2019). Without expressly addressing *Lucas*, *Knight* "recede[d] from [Florida Supreme Court] precedent where a finding of fundamental error was predicated on Florida's jury pardon doctrine." *Id.* at *6. Further, *Knight* "recede[d] from [Florida Supreme Court] precedent applying [] fundamental error analysis . . . outside the context of erroneous jury instructions on the offense of conviction." *Id.*

However, *Knight* is inapplicable here because of its recent vintage. Petitioner filed his appeal in 2014 and the Third District decided it that very year. Under § 2254(d), *Strickland* requires courts to consider whether there is a reasonable argument that counsel's performance was not deficient. There is no reasonable argument that counsel could have relied on *Knight* in failing to raise the *Lucas* argument on appeal because *Knight* was not in existence in 2014. *See Strickland*, 466 U.S. at 690 ("[A] court deciding an [] 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.*" (emphasis added)); *see also Overstreet*, 811 F.3d at 1285-87 (appellate counsel deficiently failed to raise clearly meritorious argument, partly because controlling cases underlying argument were "all decided . . . before [the defendant's] direct appeal"). No "competent [appellate] counsel . . . [] would have failed" to raise an argument based on law that "had been [] controlling for many years on the precise issue" and would have resulted in a new trial for petitioner. *See Bellizia v. Fla. Dep't of Corr.*, 614 F.3d 1326, 1330 (11th Cir. 2010) (per curiam).

Furthermore, it is unreasonable to conclude that the Third District could have relied on *Knight* to decide that appellate counsel's failure to raise the *Lucas* argument did not prejudice petitioner. The prejudice prong asks whether petitioner has shown a reasonable probability that, had counsel raised the *Lucas* argument, the outcome

of the appeal would have been different. *Knight* was decided five years after the Third District denied petitioner's direct appeal. There is no reasonable basis to infer that the Third District would have rejected a *Lucas* argument based on a nonexistent case. *Lucas* and its progeny would have bound the Third District. *See Washington*, 114 So. 3d at 185; *see also Levy v. Ben-Shmuel*, 255 So. 3d 493, 494 n.1 (Fla. 3d DCA 2018) (en banc) ("[A] three-judge panel of a district court should not overrule or recede from a prior panel's ruling on an identical point of the law." (citing *In re Rule 9.331*, 416 So. 2d 1127, 1128 (Fla. 1982))). Indeed, *Knight*, a 2019 case, had yet to be decided when the Third District denied petitioner's appellate ineffectiveness claim in 2014. [ECF No. 17-3 at 3].

True, it is theoretically possible that, even had counsel raised the *Lucas* argument, the Third District would have disregarded *Lucas* and its progeny and denied petitioner's direct appeal on a rationale like the one enunciated in *Knight* (or some other rationale). However, as applied here, the prejudice prong asks only whether there is a "reasonable probability" that the Third District would have reversed and remanded for a new trial had appellate counsel raised *Lucas*. The theoretical possibility that the Third District would have disregarded binding precedent and denied relief obviously does not mean that there was no reasonable probability that it would have granted relief. For, "[i]n making the determination whether the specified errors resulted in the required prejudice, a court should

presume . . . that the [Third District] . . . acted according to law." *See Strickland*, 466 U.S. at 694; *see also Overstreet*, 811 F.3d at 1288 (finding prejudice where, as here, "had . . . appellate counsel raised [a controlling state-law argument], *absent a departure from precedent*, [the defendant's] . . . conviction[] would have been reversed." (emphasis added)); *Bellizia*, 614 F.3d at 1330 (trial counsel ineffective because failed to raise argument based on law that "had been [] controlling for many years on the precise issue" and would have resulted in substantially lower sentence for client).

Having established that appellate counsel failed to raise the clearly meritorious *Lucas* argument, the question is whether it is clearly stronger than the argument that appellate counsel raised on appeal. It is.

Appellate counsel's sole argument was that the trial court committed prejudicial and reversible error by disallowing trial counsel from commenting on the state's failure to call the victim as a witness. *See* [ECF No. 17-1 at 69-74]. Such commenting would have included arguing to the jury that the state did not call the victim because it had concerns about his credibility. [*Id.* at 74]. This, in turn, could have bolstered petitioner's self-defense case. [*Id.*]

In support, appellate counsel contended that the victim had a "special relationship" with the state because he: (1) was the alleged victim; (2) received money from Florida's victim compensation fund; (3) allegedly needed petitioner's

self-defense claim to fail to ensure a victory in his then-pending civil lawsuit against the nightclub for negligence; and (4) was facing criminal charges, which allegedly made him more accessible to the state and beholden to the prosecution. [*Id.* at 69]. To buttress this argument, appellate counsel relied heavily on *Martinez v. State*, 478 So. 2d 871 (Fla. 3d DCA 1985).

This argument was substantially weaker than the *Lucas* argument that appellate counsel failed to raise. The trial court rejected defense counsel's request to comment on the victim's failure to testify based partially on the ground that the victim was "equally accessible to the Defense" and the record supported this finding. *See* [ECF No. 18-6 at 152-52; ECF No. 18-7 at 82]; *see also Haliburton v. State*, 561 So. 2d 248, 250 (Fla. 1990) (per curiam) ("In the instant case, the witness was equally available to both parties. We hold that the trial judge did not err in limiting further comment.").

The trial court also rejected the argument that the victim's receipt of money from the compensation fund constituted a special relationship [ECF No. 18-7 at 83], and *Martinez* does not suggest otherwise. Indeed, in denying claim one in petitioner's amended § 2254 petition, the district court found that the victim "belong[ed] in none of the [*Martinez*] categories" and that he was not unavailable just because he "was the only victim[] with an interest in a victim compensation fund." [ECF No. 52 at 8]. Appellate counsel did not identify any cases, much less

controlling ones, dictating a contrary conclusion, *see generally* [ECF No. 17-1 at 69-74; ECF No. 17-2 at 33-35], and the undersigned's research did not reveal any. In short, the *Lucas* argument is significantly stronger than the raised argument, which does not appear to be meritorious.

Another factor indicates that appellate counsel deficiently failed to raise the *Lucas* argument. As relief, appellate counsel sought a new trial [ECF No. 17-1 at 75], which is the same relief that prevailing on the *Lucas* argument would have afforded petitioner. Thus, appellate counsel's (ostensibly nonmeritorious) *Martinez* argument was both substantially weaker than the (clearly meritorious) *Lucas* argument and sought no greater relief. Thus, even under double deference, appellate counsel's decision to raise only that argument did not fall within the wide range of reasonable professional assistance. *See Overstreet*, 811 F.3d at 1287 (appellate counsel ineffective when failed to raise clearly meritorious argument and none of the raised arguments, though seeking greater relief, was "particularly likely to succeed").

As discussed above, *see supra* pp. 15-16, the Third District could not have reasonably determined that counsel's failure to raise the *Lucas* argument was not prejudicial. "But for appellate counsel's failure to raise [*Lucas*], the [Third District] would almost certainly have reversed [petitioner's] . . . conviction[] [and remanded for a new trial]." *See Overstreet*, 811 F.3d at 1287; *see also id.* at 1285 (had counsel

raised clearly meritorious issue, the defendant's "kidnapping convictions were likely to be reversed on appeal"); *Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001) ("Where . . . appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so.").

The district court instructed the undersigned to consider the applicability of *Pinkney v. Sec'y, DOC*, 876 F.3d 1290 (11th Cir. 2017). There, the defendant filed a petition in the Florida Second District Court of Appeal ("Second District") alleging that appellate counsel ineffectively failed to argue that the trial court committed fundamental error "in instructing the jury on the forcible felony exception to self-defense." *Id.* at 1294. The Second District denied without comment. *Id.* The federal district court denied this claim. *Id. Pinkney* held that the Second District's silent decision implicitly determined that the erroneous instruction was not fundamental error. *Id.* at 1295-97, 1299.

Pinkney is distinguishable. The Second District could have based its decision on the theory that the forcible felony exception instruction error was not fundamental because there was a reasonable argument under Florida law that the error was not fundamental. *Cf. id.* at 1299-1302 (holding in the alternative that the error was not fundamental). Here, by contrast, there is no reasonable argument that the excusable homicide instruction error was not fundamental. Again, *Lucas* enunciated the *per se*

rule that a trial court commits fundamental error if it fails to give the jury a complete manslaughter instruction and the defendant is convicted of an offense not more than one step removed, irrespective of whether the evidence could support a finding of justifiable or excusable homicide. Therefore, there is no reasonable argument that the theory that the excusable homicide instruction error was not fundamental "could have supported" the Third District's decision. *See generally Richter*, 562 U.S. at 102; *see also* [ECF No. 52 at 24 ("Read more narrowly, *Pinkney* can be confined to its facts.")].

True, the district court stated in its order that "[r]ead broadly, *Pinkney* suggests that an [appellate ineffectiveness] claim, based on . . . [a dispositive] issue of state law, must necessarily fail because a [habeas court] should always assume the [] state law [issue] was correctly decided [by the court that silently affirmed, even if that implicit determination certainly contravened controlling state law]." *See* [ECF No. 52 at 24].

As discussed above, the undersigned does not read *Pinkney* this broadly. However, assuming *Pinkney* so held, this holding would conflict with *Overstreet*. There, similar to *Pinkney*, the state court's denial of the appellate ineffectiveness claim was "unaccompanied by an explanation." *See* 811 F.3d at 1286-88 & n.5. Yet, unlike *Pinkney* broadly suggests, *Overstreet* did not assume that the state courts correctly decided the state-law issue underlying the appellate ineffectiveness claim.

Rather, *Overstreet* held that there was no reasonable argument that appellate counsel was not ineffective because counsel failed to raise a clearly meritorious state issue that would have resulted in the reversal of the defendant's kidnapping convictions and none of the arguments counsel raised was particularly likely to succeed. *See* 811 F.3d at 1287. *Overstreet* binds this habeas court. *Compare United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by [the Eleventh Circuit] court sitting *en banc*." (citations omitted)), *with Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (per curiam) ("[A] district court in [the Eleventh] [C]ircuit is bound by [the Eleventh Circuit's] decisions.").

In sum, there is no reasonable argument that appellate counsel's failure to raise the *Lucas* issue was not deficient. Furthermore, the Third District could not reasonably have concluded that this failure did not prejudice petitioner. Therefore, the Third District's rejection of subclaim two was contrary to, and/or an unreasonable application of, clearly established federal law.

It may well be that because of the unique facts of this case a new trial may have the same outcome as the original trial, however, because the failure to properly instruct the jury on excusable homicide was fundamental error at the time of petitioner's appeal, and that error was not raised on appeal, petitioner's amended

petition should be granted as to subclaim two of claim two. The district court should issue a writ of habeas corpus instructing the Eleventh Judicial Circuit of Florida to vacate petitioner's conviction for attempted second-degree murder in Case No. F10-004216.

B. Claim Three (Subclaim Seven)

This subclaim is a variant of the preceding subclaim. In this related subclaim, petitioner contends that *trial counsel* ineffectively failed to object to the omission of a definition for excusable homicide from the jury instruction for attempted voluntary manslaughter. Petitioner contends that there "is a reasonable probability that[,] had the jury been instructed on excusable homicide, [it] would have returned a verdict of a [] lesser offense or found [him] not guilty." [ECF No. 8 at 15].

Even though petitioner raised this subclaim as an ineffectiveness claim in his Rule 3.850 motion [ECF No. 17-3 at 75-81], the trial court rejected it on the procedural ground that it could have been raised on direct appeal [ECF No. 17-4 at 23 (citing, *inter alia*, *Teffeteller v. Dugger*, 734 So. 2d 1009, 1016 (Fla. 1999))]. In relevant part, *Dugger* concluded that two ineffectiveness claims based on counsel's failure to challenge jury instructions were procedurally barred because they "could have been raised on direct appeal" and Rule 3.850 motions were "not to be used as a second appeal[.]" *See id.* at 1015-16 & n.8.

In this § 2254 case, the magistrate judge rejected the state's argument that this subclaim is procedurally barred, reasoning that it "is one of ineffective assistance of counsel, and such claims are generally not cognizable on direct appeal." [ECF No. 29 at 21 n.11]; *see also* [*id.* at 14 n.8]. The district court approved the magistrate judge's determination that the subclaim was "procedurally proper." [ECF No. 52 at 4 n.4]. Accordingly, because the state courts did not address this subclaim on the merits, the undersigned reviews it *de novo*. *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012) (citation omitted).

Even under *de novo* review, petitioner has not met his burden of showing prejudice on this subclaim. In rejecting it, the magistrate judge found that "the evidence in this case refuted any claim that the shooting with which Petitioner was charged was an accident." [ECF No. 29 at 21]. The undersigned agrees. Again, the evidence that petitioner did not act in self-defense was overwhelming. It included: (1) eyewitness testimony and surveillance video showing that petitioner walked away from the victim, retrieved a gun from his car, shot the victim five times from distance, left the scene, and later fled the county; and (2) testimony that the victim was unarmed and did not attack petitioner. [ECF No. 17-2 at 6-12 (citing trial transcript)]; *see also* [ECF No. 18-7 at 44, 47 (petitioner's testimony that he emptied his clip while shooting at the victim)].

Thus, the evidence did not permit a reasonable inference that petitioner committed the shooting by accident or misfortune. *See generally* Fla. Stat. § 782.03 ("Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner."). Furthermore, the trial court had already denied counsel's request for the excusable homicide instruction.

For these reasons, petitioner cannot show prejudice on this subclaim. Assuming counsel's failure to object was deficient, petitioner has not shown a reasonable probability that the court would have changed its mind and given the instruction. Also, even had counsel convinced the court to give the instruction, the instruction did not fit the facts of the case. Consequently, petitioner has not shown a reasonable probability that the instruction would have resulted in a more favorable outcome. Or, put differently, there is no reasonable probability that the instruction would have bolstered his self-defense claim.

Petitioner may contend that this conclusion is inconsistent with the conclusion that appellate counsel's failure to raise the related subclaim prejudiced him. This contention would be specious. As noted, the prejudice prong of appellate ineffectiveness claims considers whether there is a reasonable probability of a more

favorable outcome on appeal. *Overstreet*, 811 F.3d at 1287; *Hall*, 640 F.3d at 1236. By contrast, the prejudice prong of trial ineffectiveness claims considers "prejudice in terms of impact on the result of the trial instead of on the result of the appeal[.]" *Purvis v. Crosby*, 451 F.3d 734, 740 (11th Cir. 2006); *see also Kormondy v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1244, 1274 (11th Cir. 2012) ("The prejudice prong requires the petitioner to establish a reasonable probability that, but for counsel's errors, the *outcome at trial* would have been different." (emphasis added) (citation omitted)).

In sum, this subclaim lacks merit.

C. Claim Two (Subclaim Three)

1. *Statutory Background*

"Under Florida law a person is justified in using deadly force if he reasonably believes that it is necessary to prevent 'imminent death or great bodily harm to himself' or another." *Pinkney*, 876 F.3d at 1295 (quoting Fla. Stat. § 776.012(2)). "But that defense is subject to exceptions, one of which is known as the forcible felony exception, which provides that the 'justification [defense] is not available to a person who . . . [i]s attempting to commit, committing, or escaping after the commission of, a forcible felony . . . . " *Id.* (alterations in original) (quoting Fla. Stat. § 776.041(1)). "Florida courts have held that the forcible felony exception applies only when the defendant is committing an independent forcible felony separate from

the one for which he is claiming self-defense." *Id.* at 1295-96 (citing, *inter alia*, *Martinez v. State*, 981 So. 2d 449, 454 (Fla. 2008)).

2. *Relevant Background*

Regarding self-defense, the trial court instructed the jury that the

> use of deadly force is justifiable only if the defendant reasonably believe[s] that force is necessary to prevent eminent [sic] death or great bodily harm to himself while resisting [1] another attempt to murder him or [2] Pablo Guzman [i.e., petitioner] *was attempting to commit, committing or escaping after the commission of attempted first degree murder with a deadly weapon or aggravated battery.*

[ECF No. 18-7 at 158 (emphasis added)].

3. *Petitioner's Argument*

Petitioner argues that appellate counsel ineffectively failed to ague that the trial court committed fundamental error by instructing "the jury on the [] forcible felony exception to self-defense." [ECF No. 8 at 8]. In support, he contends that the italicized language "reveals that the jury was [] instructed on the forcible felony exception to self defense." [ECF No. 32 at 9]. Further, he contends that the purported forcible felony instruction was improper because he was not charged with committing an independent forcible felony. *See* [*id.* at 10 (citing *Martinez*, 981 So. 2d at 457)]. Petitioner adds that this alleged error was fundamental. [*Id.* at 10-11].

4. *Discussion*

Here, there is a reasonable argument that appellate counsel did not deficiently fail to raise subclaim three. *Martinez* "holds[s] that it is error for a trial court to read

the forcible-felony instruction to the jury where the defendant is not charged with an independent forcible felony." 981 So. 2d at 457. In so holding, *Martinez* determined that the forcible felony instruction informed "the jury that although it might conclude that [the defendant] acted in self-defense when he committed [the charged crime] against [the victim], [self-defense was not available] if the jury found that [the defendant] committed [the charged crime]." *Id.* at 453. Hence, "the forcible-felony instruction precluded the jury from finding that [the defendant] acted in self-defense." *Id.*

Here, in relevant part, the trial court instructed the jury that it could find that petitioner acted in self-defense only if he committed the charged crime. Plausibly, this instruction informed the jury that, to find that petitioner acted in self-defense, the jury had to conclude that he committed the charged crime. This instruction, though perhaps confusing, did not necessarily preclude the jury from finding that petitioner acted in self-defense. Arguably, the jury could have found that petitioner committed the charged crime but that he acted in self-defense. This possibility is not entirely inconsistent with a claim of self-defense. *Cf. id.* ("[W]hen a defendant asserts a claim of self-defense, he admits the commission of the criminal act with which he was charged but contends that the act was justifiable."). Moreover, the trial court instructed the jury that the state had to prove beyond a reasonable doubt that petitioner did not act in self-defense. *See* [ECF No. 18-7 at 159-60]; *see also*

Williams v. State, 261 So. 3d 1248, 1252 (Fla. 2019) (plurality opinion) ("In a case where a defendant alleges self-defense, the State must prove that the defendant did not act in self-defense beyond a reasonable doubt." (citation omitted)).

In short, there is a reasonable argument that the trial court's ostensible forcible felony instruction was not erroneous under *Martinez*. Petitioner has not identified any case commanding a contrary conclusion. *See, e.g.*, [ECF No. 41 at 8-9].

Furthermore, even if the instruction were improper under *Martinez*, there is a reasonable argument "that fundamental error [did not] occur[] in the [underlying] case [] because [petitioner's] claim of self-defense was extremely weak." *See* 981 So. 2d at 456. Petitioner bases his contrary contention primarily on his own testimony [ECF No. 32 at 11], which the state's evidence and corroborative eyewitness testimony contradicted and whose credibility the jury evidently rejected in convicting him, *see, e.g.*, [ECF No. 17-2 at 6-12 (citing trial transcript); ECF No. 18-7 at 68-70, 148 (prosecutor's arguing that evidence of petitioner's subsequent "escape to Panama" undermined his claim of self-defense)].

Because there is a reasonable argument that the purported forcible felony instruction was not erroneous, and even if it were, there is a reasonable argument that the error was not fundamental, petitioner cannot show deficiency or prejudice on subclaim three. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014) (failure to raise meritless claim is not prejudicial under *Strickland*); *Freeman*

v. Att'y Gen., 536 F.3d 1225, 1233 (11th Cir. 2008) ("A lawyer cannot be deficient for failing to raise a meritless claim." (citation omitted)).

In sum, the Third District's rejection of this subclaim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

D. Claim Three (Subclaim Three)

This subclaim is a variant of the preceding subclaim. Petitioner contends that trial counsel ineffectively failed to object to the trial court's alleged forcible felony instruction. [ECF No. 8 at 12-13].

Petitioner raised this subclaim in his Rule 3.850 motion. The trial court rejected it, concluding that "[t]he forcible felony jury instructions were not given in this case." [ECF No. 17-4 at 22].

This subclaim fails for the reasons in Part V(C)(4), *supra*. There is a reasonable argument that trial counsel did not deficiently fail to object to the alleged forcible felony instruction because it did not necessarily negate petitioner's self-defense claim. Even if counsel originally objected to the instruction as petitioner suggests [ECF No. 24 at 12], counsel reasonably could have concluded later that any objection would have been futile.

Likewise, the trial court reasonably could have concluded that the instruction did not prejudice petitioner. The instruction did not necessarily negate petitioner's self-defense claim and petitioner otherwise presented a self-defense case.

In sum, the state courts' rejection of this subclaim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

E. Claim Three (Subclaim One)

During his opening statement, defense counsel stated that the jury would hear from the alleged victim that petitioner threatened to shoot him four times. [ECF No. 18-4 at 20].

Petitioner contends that this statement "negated the theory of self-defense that was to be presented to the jury at trial." [ECF No. 8 at 10].

Petitioner raised this subclaim in his Rule 3.850 motion. The trial court rejected it because: (1) the record showed that petitioner presented a self-defense case; and (2) the court instructed the jury that it had to decide the case on the evidence and the prosecutor's statements could not be considered in its deliberations. [ECF No. 17-4 at 20-21].

The trial court reasonably rejected this subclaim. Before opening statements, the court instructed the jury that it must base its verdict solely on the evidence (or lack thereof) and law and that the attorney's statements were not evidence and must

not be considered as such. [ECF No. 18-4 at 11-12]. Before both closing argument and deliberations, the court similarly instructed the jury. [ECF No. 18-7 at 105, 169-70]. The jury presumably followed these instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and petitioner has not shown otherwise. Furthermore, it is undisputed that petitioner presented a self-defense case. Therefore, the trial court reasonably concluded that petitioner could not show prejudice on this subclaim.

In sum, the state courts' rejection of this subclaim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

F. Claim Three (Subclaim Two)

Petitioner contends that trial counsel ineffectively failed to call the victim as a witness. [ECF No. 8 at 11-12]. Petitioner's supporting allegations are not fully clear. Petitioner appears to allege that, had counsel called the victim, counsel would have been able to: (1) impeach him with prior inconsistent statements; (2) introduce evidence of his pending domestic violence, aggravated assault, and narcotics charges to show that he had a reputation for violence; (3) comment on the state's failure to call the victim as a witness during closing argument; (4) attack his credibility with prior *consistent* statements; (5) elicit testimony showing that the victim was the aggressor; and (6) show that the victim had "imposing size in relation to" petitioner. *See* [ECF No. 8 at 11; ECF No. 24 at 9-10; ECF No. 32 at 14; ECF No. 41 at 10].

Petitioner raised this subclaim in his Rule 3.850 motion. The trial court denied it, reasoning that the "victim would not be called for the sole issue to impeach him, and the victim could not be called to introduce his own reputation evidence." [ECF No. 17-4 at 21 (citing Fla. Stat. §§ 90.404 & 90.608)].

The trial court reasonably denied this subclaim. The trial court's rejection of supporting allegations (1) and (2) turned on its construction of the Florida evidentiary rules, which this habeas court cannot disturb. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." (citation omitted)). In any event, petitioner's conclusory and meandering arguments fail to show that this determination was unreasonable or insupportable.

Another flaw in this subclaim is that, although the victim was deposed before trial [ECF No. 18-3 at 113-25], petitioner has not clearly stated the content of his deposition, much less shown that he would have testified consistently with it. Therefore, petitioner's allegations that counsel would have been able to impeach the victim and elicit favorable testimony are unsupported and speculative. *See Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988) ("[The petitioner] has not demonstrated prejudice from counsel's failure to call [a particular] defense witness, as [the petitioner] proffers no evidence to suggest that [the witness] would have testified favorably had his attorney questioned him." (citations omitted)); *cf. Aldrich*

v. Wainwright, 777 F.2d 630, 636 (11th Cir. 1985) ("Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.").

Similarly, allegations (3) and (4) are conclusory. Petitioner has not clearly explained how calling the victim would have allowed counsel to comment on the state's failure to call him and attack his credibility with prior *consistent* statements.

Allegation (6) is immaterial because there was testimony from which the jury could have inferred that the victim was much larger than petitioner. [ECF No. 18-4 at 81; ECF No. 18-7 at 22]. And, to reiterate, petitioner presented a self-defense case.

On this record, the trial court reasonably could have concluded that counsel's failure to call the victim did not prejudice petitioner. Thus, the state courts' rejection of this subclaim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.[2]

G. Claim Three (Subclaim Four)

This subclaim is a variant of subclaim one of claim two, which the district court denied. [ECF No. 52 at 9-11].

[2] This subclaim would fail even under *de novo* review. "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [the Eleventh Circuit] will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). "If the record is not complete regarding counsel's actions, then the courts should presume that . . . what witnesses [defense counsel] presented or did not present[] [was an] act[] that some reasonable lawyer might do." *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006) (citation omitted). The record does not reveal why counsel did not call the victim. Thus, this subclaim lacks merit.

Petitioner contends that counsel ineffectively failed to object to the trial court's consideration of improper factors at sentencing. [ECF No. 8 at 13; ECF No. 24 at 13-14]. The trial court rejected this subclaim on the merits. [ECF No. 17-4 at 22]. Likewise, the district court found that "the trial court's references to Petitioner's 'responsibility' were directed at Petitioner's criminal conduct, for which he was being sentenced, and not Petitioner's proclamation of his innocence." [ECF No. 52 at 10]. Trial counsel did not deficiently fail to raise this "frivolous" objection. *See* [*id.*]

In sum, the state courts' rejection of this subclaim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

H. Claim Three (Subclaim Five)

Petitioner contends: "[T]rial counsel was ineffective for failing to object when the sentencing court imposed an illegal sentence . . . where the statutory maximum for attempted second degree murder was 30 years and the trial court sentenced Petitioner to 40 years with a mandatory minimum of 25 years." [ECF No. 41 at 13]. The trial court denied this subclaim, reasoning:

> [T]he trial court has discretion, under [Fla. Stat. § 775.087(2)(a)3. to sentence a defendant, who was found guilty of attempted second degree murder with the jury finding of great bodily harm, between twenty-five (25) years to the maximum of life, even though traditionally the statute should have been capped at thirty (30) years['] state prison.

[ECF No. 17-4 at 22 (citing *Mendenhall v. State*, 48 So. 3d 740, 750-51 (Fla. 2010))].

In *Mendenhall*, the jury convicted the defendant of attempted second-degree murder with a firearm. 48 So. 3d at 743 (citations omitted). "The jury also found that during the commission of the offense, [the defendant] was in possession of a firearm, discharged a firearm, and inflicted serious bodily injury." *Id.* The defendant received a sentence of thirty-five years' imprisonment with a 35-year mandatory minimum sentence. *Id.* at 743-44. This sentence, which was pursuant to Fla. Stat. § 775.087(2)(a)3., exceeded the otherwise applicable statutory maximum of thirty years under Fla. Stat. § 775.082(3)(b). *Id.* at 744-45. *Mendenhall* held that "under section 775.087(2)(a)3., the trial court has discretion to impose a mandatory minimum within the range of twenty-five years to life." *Id.* at 750. "Consequently, [the defendant] was properly sentenced to thirty-five years with a thirty-five-year mandatory minimum, notwithstanding the statutory maximum of thirty years contained in section 775.082." *Id.*

The trial court's determination that petitioner's sentence of forty years with a 25-year mandatory minimum was proper under *Mendenhall* binds this habeas court. *See Richey*, 546 U.S. at 76. The rule that a state court's interpretation of state law binds a habeas court applies to decisions of a state trial or postconviction court. *See Chamblee v. Florida*, 905 F.3d 1192, 1196-98 (11th Cir. 2018); *Branan v. Booth*,

861 F.2d 1507, 1508 & n.1 (11th Cir. 1988) (per curiam); *Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013).

Furthermore, the trial court's reading of *Mendenhall* was not unreasonable. Like the defendant there, petitioner committed attempted second-degree murder and possessed and discharged a firearm, causing great bodily harm. [ECF No. 17-1 at 47]. Also, his sentence of forty years with a 25-year mandatory minimum arguably falls within § 775.087(2)(a)3.'s range of twenty-five years to life.

True, as petitioner notes, the Florida Supreme Court later clarified that, while Fla. Stat. § 775.087(2)(a)3. "prevails over the general sentencing maximums," "[t]here is no statutory authority for the additional term of years beyond the selected mandatory minimum under [§ 775.087(2)(a)3.]." *Hatten v. State*, 203 So. 3d 142, 146 (Fla. 2016). Thus, § 775.087(2)(a)3. does not empower a court to sentence a defendant convicted of attempted second-degree murder with a firearm that he possessed and discharged, causing great bodily harm, to a 40-year term with a 25-year mandatory minimum. *See id.*

However, where *Hatten* was decided in August of 2016, petitioner was sentenced in June of 2013. [ECF No. 18-8 at 1]; *see also Geter v. United States*, 534 F. App'x 831, 836 (11th Cir. 2013) (per curiam) ("It is well-settled that an attorney's failure to anticipate a change in the law will not support a claim of ineffective assistance of appellate counsel." (citing cases)).

Petitioner contends that, before sentencing, the Second District had distinguished *Mendenhall* and held that, once a trial court imposes a mandatory 25-year term under § 775.087(2)(a)3., it cannot "exceed the thirty[-]year maximum penalty for a first[-]degree felony under section 775.082(3)(b)." *Sheppard v. State*, 113 So. 3d 148, 149 (Fla. 2d DCA 2013) (alterations in original) (citing *McLeod v. State*, 52 So. 3d 784, 786 (Fla. 5th DCA 2010)). *But see Hatten v. State*, 152 So. 3d 849, 850 (Fla. 1st DCA 2014) (noting conflict among the district courts of appeal post-*Mendenhall* regarding the reach of § 775.087(2)(a)3.), *decision quashed*, 203 So. 3d 142 (Fla. 2016). However, the undersigned did not find any Florida Supreme Court or Third District opinion so holding before petitioner's sentencing and, in any event, the trial court's determination that *Mendenhall* authorized petitioner's sentence binds this habeas court.

Therefore, there is a reasonable argument that counsel could have concluded that this objection would prove futile. Likewise, the trial court reasonably could have concluded that counsel's failure to raise this objection did not prejudice petitioner. *See Hittson*, 759 F.3d at 1262.

In sum, the state courts' rejection of this subclaim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

I. Claim Three (Subclaim Six)

Petitioner contends that "trial counsel was ineffective for failing to request a pre-trial competency hearing," which he allegedly asked counsel to do. [ECF No. 41 at 15]. To support this subclaim, petitioner alleges that a psychological evaluation "attached to his motion for downward departure" "indicated that he suffered from a range of serious mental illnesses, such as: Bipolar I Disorder; Posttraumatic Stress Disorder; Generalized Anxiety Disorder; Panic Disorder; Paranoid Personality Disorder; and Personality Disorder." [ECF No. 32 at 23]. This evaluation also indicated that petitioner "had been experiencing nightmares on a daily basis consisting of people shooting at [him] from flying saucers and fighting with a large lizard that never dies." [*Id.* at 24 (alteration in original) (internal quotation marks omitted)]. Further, petitioner contends that a pretrial hearing held on October 1, 2012 shows that he has "mental health problems." [ECF No. 24 at 17].

The trial court rejected this subclaim, holding that petitioner failed to show "a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial." [ECF No. 17-4 at 22 (citations omitted)]. The court reasoned:

> Based on the Trial Transcripts in their entirety, the record supports that [petitioner] showed no signs of being incompetent during the actual trial. [Petitioner] answered questions in an appropriate manner, participated in plea negotiations and had meaningful discussions with defense counsel.

[*Id.*]

"A criminal defendant may not be tried unless he is competent . . . ." *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (citation omitted). "[T]he standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Id.* (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)); *accord Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

Here, the trial court reasonably rejected this subclaim. The record supports the trial court's finding that petitioner showed no signs of being incompetent during trial, including stating on the record before testifying that he had never been treated for mental illness. [ECF No. 29 at 20 (citing trial transcript and record)]; *see also Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity.").

Likewise, contrary to petitioner's contention, the transcript of the October 1 hearing undercuts this subclaim. There, counsel stated that, while petitioner "was evaluated by one of [counsel's] experts," "his mental health problems do not give rise to any type of insanity defense" and that he was "very competent." [ECF No. 41

at 27-28]; *see also Watts v. Singletary*, 87 F.3d 1282, 1288 (11th Cir. 1996) ("Because legal competency is primarily a function of [the] defendant's role in assisting counsel in conducting the defense, the defendant's attorney is in the best position to determine whether the defendant's competency is suspect.").

True, as petitioner alleges, the record does reflect that the psychological evaluation attached to petitioner's motion for downward departure found that he suffered from a variety of mental health disorders. *See* [ECF No. 18-8 at 4]. However, "not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Card v. Singletary*, 981 F.2d 481, 487 (11th Cir. 1992). Here, petitioner has not made this showing.

For these reasons, the trial court reasonably found that petitioner did not show signs of incompetency during trial and reasonably concluded that he could not show prejudice on this subclaim.

In sum, the state courts' rejection of this subclaim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

J. Claim Four

Petitioner contends that trial counsel ineffectively advised him to decline the state's alleged 10-year plea offer, incorrectly telling him that he "would be able to

win at trial" because the victim had a criminal record and an alleged motive to testify against him. [ECF No. 8 at 16 -17]. Petitioner adds that, had counsel advised him to accept the alleged 10-year offer and the "likelihood of losing at trial, the outcome of these proceedings would have been different" because he "would have accepted the [alleged] 10-year offer." [*Id.*]

The trial court rejected this claim, finding that the state never made petitioner a 10-year plea offer. [ECF No. 17-4 at 22-23].

This finding was reasonable. On March 4, 2013, at the start of trial, the prosecutor stated that "there [haven't] been any offers" and that she was "allowed to convey" only a 20-year offer. [ECF No. 18-1 at 4]. Petitioner made a counteroffer of time served, which the prosecutor rejected. [*Id.* at 5].

Petitioner contends that the trial court's finding is unreasonable because the transcript of a pretrial hearing on October 1, 2012 shows that the state conveyed a 10-year offer. However, the transcript undercuts his contention. The prosecutor stated that there had been plea negotiations and that the state had made a 25-year offer, but that she did not consider "the defense's [10-year] counter [to be] reasonable." [ECF No. 41 at 24-25].

Petitioner contends that his unadorned statement that "[t]hey talked to me about ten years" shows that the state conveyed a 10-year offer. [*Id.* at 26]. The undersigned disagrees. In the context of the hearing, this statement was a reference

to the defense's 10-year counteroffer, which the prosecutor refused. *See id.* at [24-26].

Furthermore, the transcript reflects that, even had the state made a 10-year offer, petitioner had no interest in accepting it. Defense counsel stated at the hearing that "the only plea [petitioner] would accept [would be] time served" [*id.* at 25], and petitioner expressed the same sentiments [*id.* at 26, 38]. Indeed, right after petitioner stated "[t]hey talked to me about ten years," he added that he "[didn't] want to accept it." [*Id.* at 26].

Furthermore, even had counsel misadvised petitioner to reject a 10-year plea offer, petitioner could not show prejudice on this claim, even under *de novo* review. Where, as allegedly here, misadvice leads to the rejection of a plea offer, "a defendant must show that but for [the misadvice] there is a reasonable probability that . . . the defendant would have accepted the plea." *Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012). Petitioner cannot so show given his stated willingness to accept only an offer for time served and his "repeated claims of innocence." *Osley v. United States*, 751 F.3d 1214, 1224 (11th Cir. 2014) ("[The defendant's] claim that he would have pled guilty had he been properly informed is also undermined by his repeated claims of innocence."). As the state correctly notes, petitioner "maintained his innocence throughout the trial and sentencing proceedings." [ECF No. 37 at 16];

see also, e.g., [ECF No. 18-8 at 29 (petitioner's protestation of innocence at sentencing)].

In sum, claim four lacks merit.

VI. Evidentiary Hearing

"[B]efore a habeas petitioner may be entitled to a federal evidentiary hearing on a claim that has been adjudicated [on the merits] by the state court, he must demonstrate a clearly established federal-law error or an unreasonable determination of fact on the part of the state court, based solely on the state court record." *Landers*, 776 F.3d at 1295.

Here, petitioner's claims were adjudicated on the merits in state court and, apart from the appellate ineffectiveness claim that should be granted, he has not demonstrated such an error. Thus, an evidentiary hearing is improper.

VII. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Cases. "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." *Id.* "If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." *Id.* "A

timely notice of appeal must be filed even if the district court issues a certificate of appealability." Rule 11(b), Rules Governing § 2254 Cases.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a petitioner's constitutional claims on the merits, "a petitioner must show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Here, in view of the entire record, the undersigned denies a certificate of appealability. If petitioner disagrees, he may so argue in any objections filed with the district court. *See* Rule 11(a), Rules Governing § 2254 Cases ("Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.").

VIII. Recommendations

As discussed above, it is recommended that petitioner's amended § 2254 petition [ECF No. 8] be GRANTED IN PART AND DENIED IN PART, with the following results:

- The amended petition should be GRANTED as to claim two (subclaim two). As a result, the district court should issue a writ of habeas corpus instructing the

Eleventh Judicial Circuit of Florida to vacate petitioner's conviction for attempted second-degree murder in Case No. F10-004216.

- The amended petition should be DENIED as to claim two (subclaim three), claim three (all subclaims), and claim four.

It is further recommended that no certificate of appealability issue; that final judgment be entered; and that this case be closed.

Objections to this report may be filed with the district court within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar petitioner from a *de novo* determination by the district court of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985).

SIGNED this 21st day of February, 2020.

UNITED STATES MAGISTRATE JUDGE

APPENDIX B "2" District Court judge opinion upon de novo review.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20220-CIV-ALTONAGA/Reid

PABLO GUZMAN,

Petitioner,

v.

MARK INCH,

Respondent.
_____/

ORDER

On March 2, 2017, Petitioner, Pablo Guzman, filed a *pro se* Amended Petition Under 28 U.S.C. [Section] 2254 for Writ of Habeas Corpus by Person in State Custody [ECF No. 8] (the "Petition"). The case was referred to Magistrate Judge Patrick A. White for a report and recommendation. (*See* [ECF No. 3]).[1] The State filed a Response [ECF No. 16] (the "Response") on April 25, 2017. Petitioner filed a Reply [ECF No. 24] (the "Reply") on June 6, 2017.

On April 19, 2018, Judge White entered a Report of Magistrate Judge [ECF No. 29] (the "Report"), recommending the Court deny the Petition. On May 15, 2018, Petitioner entered his Objections [ECF No. 32] to the Report (the "Objections"), to which the State filed a Response [ECF No. 37] (the "Response to Objections") on May 31, 2018. On June 22, 2018, Petitioner filed a Reply to the Respondent's Response to Objections [ECF No. 41] (the "Reply to Response to Objections"). The Court has carefully reviewed the parties' written submissions, the record, and applicable law.

[1] The case has since been reassigned to Magistrate Judge Lisette Reid. (*See* [ECF No. 45]).

I. BACKGROUND

In March 2010, Petitioner was charged with the attempted premeditated first-degree murder of Nelson Puente. (*See* Exhibit A, Information [ECF No. 17-1] 2–4[2]). A jury trial was held in March 2013. (*See id.* Exhibit B, State Court Docket 10–11). Petitioner was found guilty of the lesser offense of attempted second-degree murder with a deadly weapon. (*See id.* Exhibit C, Verdict 47). The trial court entered a Judgment of Conviction on March 8, 2013. (*See id.* Exhibit D, Judgment 51). After adjudicating Petitioner guilty, the trial court sentenced him to 40 years' imprisonment, with a minimum mandatory term of 25 years. (*See id.* Exhibit E, Sentence 53–54).

Petitioner timely appealed his conviction and sentence to the Florida Third District Court of Appeal. (*See id.* Exhibit F, Initial Brief of Appellant 57–76). On November 19, 2014, the Third District affirmed the conviction and sentence in a *per curiam* opinion. (*See id.* Exhibit J, Final Criminal Judgment and Sentence Notice from Miami Dade County 43). Petitioner unsuccessfully pursued collateral relief alleging ineffective assistance of appellate counsel.[3] (*See id.* Exhibit K, Petition Alleging Ineffective Assistance of Appellate Counsel 45–77; *see also* Exhibit M, September 25, 2015 *Per Curiam* Denial of Petition Alleging Ineffective Assistance of Appellate Counsel 53, *Guzman v. State*, No. 3D15-0109, 2015 WL 6473557 (Fla. 3d DCA Sept. 25, 2015)). Petitioner also unsuccessfully pursued a Motion for Postconviction Relief under Florida Rule of

[2] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings, for all citations to the appendices, with the exception of citations to the trial transcript, which retain their original pagination.

[3] Florida Rule of Appellate Procedure 9.141(d) provides that a claim alleging ineffective assistance of counsel "be filed in, and treated by, *the appellate court* as an original proceeding . . . . A rule 3.850 motion filed in the trial court is not the appropriate mechanism for a defendant to assert the ineffective assistance of appellate counsel." *Marshall v. State*, 240 So. 3d 111, 113 (Fla. 3d DCA 2018) (citation omitted; alteration added; emphasis in original).

Criminal Procedure 3.850. (*See id.* Exhibit N, Motion for Postconviction Relief 57–99; *see also id.* Exhibit Q, December 4, 2015 Order Denying Defendant's Motion for Post-Conviction Relief).

On December 24, 2015, Petitioner filed a Motion for Rehearing. (*See id.* Exhibit R, Motion for Rehearing 26–36). After the trial court denied the Motion for Rehearing (*see id.* Exhibit R, *Per Curiam* Order 37), Petitioner appealed to the Third District. (*See id.* Exhibit S, Initial Brief of Appellant 39–70). On September 23, 2016, the Third District denied the appeal in a *per curiam* opinion. (*See id.* Exhibit W, *Per Curiam* Order 75). The Mandate issued on October 10, 2016. (*See id.* Exhibit X, Mandate 86).

Petitioner mailed his Petition on January 10, 2017. (*See* Pet. 1). The Petition was timely filed within the one-year period allowed under the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). (*See* Report 2; Resp. 6). On March 2, 2017, Petitioner filed a *pro se* Amended Petition, the final and operative Petition before the Court.

II. LEGAL STANDARDS

When a magistrate judge's "disposition" has been properly objected to, district courts must review the disposition *de novo*. Fed. R. Civ. P. 72(b)(3). Petitioner filed timely objections to the Report (*see generally* Objs.), and so the Court reviews the record *de novo*.

Federal review of state habeas petitions is governed by the AEDPA. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2288 (2015). Section 2254 provides that federal habeas relief for a person in state custody is available only if the state court decision was "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," or if a petitioner's state court claim "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." *Id.* at 2288–89 (internal quotation marks omitted) (quoting 28 U.S.C. § 2254(d)(1)–(2))). "When [Section] 2254(d) applies, the question is not whether counsel's actions were

reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (alteration added).

III. ANALYSIS

Petitioner raises four principal grounds for habeas relief, many of which contain sub-claims: (1) the trial court violated his right to due process when it prohibited his trial counsel from remarking on Puente's absence at trial; (2) his appellate counsel was constitutionally ineffective; (3) trial counsel was constitutionally ineffective; and (4) trial counsel was ineffective for advising him to reject the State's 10-year plea offer. (*See generally* Pet.). The State concedes Petitioner exhausted his state remedies by raising the claims in both his petition alleging ineffective appellate counsel and in his Rule 3.850 Motion for Postconviction Relief. (*See id.* 8).[4] The Court addresses the merits of Petitioner's first two habeas claims in turn, applying *de novo* review. *See* Fed. R. Civ. P. 72(b)(3).

A. Due-Process Right Violation During Closing Argument

First, due process. (*See* Pet. 5–6). The Report recommends this claim be denied, concluding the trial court properly refused to give a missing witness jury instruction. (*See* Report 7). Petitioner objects, insisting Puente and the State enjoyed a special relationship, which made it impractical for his trial counsel to call Puente as a defense witness. (*See* Objs. 3 (citing cases)). Petitioner also disputes the Report's characterization of the claim.

[4] The State argues grounds 3(C) and 3(G) are procedurally barred from federal review, as they could have been, but were not, raised on direct appeal. (*See* Resp. 8). Other than those two sub-claims on Petitioner's trial counsel's alleged ineffective assistance, the State agrees Petitioner's habeas claims are procedurally proper. (*See id.*).

(*See* Reply to Resp. to Objs. 3). Petitioner clarifies his claim is about "the trial court's refusal to let the defense comment, during closing arguments, on the absence of the victim." (*Id.*).

Petitioner is correct in insisting that the Court evaluate this claim through a due process framework. Again, Petitioner seeks relief from the trial court's "*refusal to allow any comment* on the State's key witness failing to testify," which purportedly "undermined the Defense's ability to present a viable self-defense theory." (Pet. 6 (emphasis added)). The Court thus resolves Petitioner's claim applying constitutional due process principles. *See United States v. Walcott*, 431 F. App'x 860, 864–66 (11th Cir. 2011) (analyzing trial court's failure to give missing witness jury instruction independently of trial court's limitation of counsel's closing argument).

While "the [Due Process Clause of the] Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks and citations omitted; alteration added), a "presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations," *Herring v. New York*, 422 U.S. 853, 862 (1975). "Only the rare type of error — in general, one that infects the entire process and necessarily renders it fundamentally unfair — requires automatic reversal . . . . None of our cases clearly requires placing improper restriction of closing argument in this narrow category." *Glebe v. Frost*, 135 S. Ct. 429, 430–31 (2014) (internal quotation marks and citation omitted; alterations removed).

The transcript reveals the trial court did not allow Petitioner's counsel to comment on Puente's absence. (*See* Trial Transcript [ECF No. 18-7] 709–12). In denying the request, the trial court relied on *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990). (*See id.*). In *Haliburton*, the Florida Supreme Court held that a counsel's comment about an opposing party's failure to call a witness is allowed only when the party shows "the witness is peculiarly within the [opposing]

party's power to produce and the testimony of the witness would elucidate the transaction." *Id.* at 250 (internal quotation and citation omitted; alteration added). In contrast, when an absent witness is "equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness." *Id.* (citation omitted)).

Petitioner argues Puente was "for all intents and purposes unavailable to the defense" because Puente and the State enjoyed a "special relationship." (Objs. 3). Petitioner contends the special relationship existed through Puente's status as the only victim in the case, Puente's financial interests in seeing to it that Petitioner's defense failed, and Puente's status as a criminal defendant in another case. (*See id.*).

Petitioner relies on *United States v. Mahone*, 537 F.2d 922 (7th Cir. 1976), where the Seventh Circuit concluded "tight control over [closing] argument is undesirable when it precludes counsel from raising a significant issue." *Id.* at 928 (alteration added). In determining whether "a significant enough question regarding the grounds for the government's failure to call [a witness] to testify [] justif[ies] argument on the point by the defendant's counsel," courts should consider (1) whether the State referenced the witness in its opening argument; (2) "the peculiar availability of the witness to the government;" and (3) whether the testimony of the witness would elucidate issues in the case. *Id.* at 927–28 (alterations added)). A "special relationship" may render a witness unavailable. *Id.* at 926–27. Petitioner also cites *Martinez v. State* (*see* Objs. 3), which held that a "special relationship" between a witness and the State may render the witness practically unavailable to the criminal defendant, necessitating that a defendant be allowed "to argue that the jury may draw negative inferences from the fact that the State refused to call the [witness]." 478 So. 2d 871, 871–72 (Fla. 3d DCA 1985) (alteration added).

Petitioner fails to show the state habeas court unreasonably applied clearly established federal law, as determined by the United States Supreme Court. The only Supreme Court decision on which Petitioner relies, *Graves v. United States*, 150 U.S. 118 (1893), does not establish a constitutional rule, but rather an evidentiary one. *See Finkes v. Timmerman-Cooper*, 159 F. App'x 60, 610 (6th Cir. 2005) ("In *Graves*, the Court simply ruled as an evidentiary matter. It did not elevate its ruling to a constitutional level or in any way suggest that due process requires such a result.").

Graves also addresses an entirely different issue from the one here. In *Graves*, the prosecution commented on the absence of the defendant's wife in court. *See Graves*, 150 U.S. at 120. The Court reversed the defendant's conviction, as an evidentiary matter, concluding the wife was not a competent witness and the defendant should not have called her as a witness at trial. *See id.* at 121. The Court reiterated the evidentiary rule that "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be favorable." *Id.*

Graves thus does not support Petitioner's claim, for it involves an *evidentiary* issue about alleged prosecutorial misconduct. For the same reason, *Mahone* and *Martinez* do not help Petitioner. They also involve the missing-witness rule – an evidentiary matter – rather than a pronouncement of constitutional law from the Supreme Court.

In any event, Puente and the State never enjoyed a special relationship. In *Martinez*, the Third District outlined the following "special relationships" which could render a witness unavailable:

> (1) the witness was defendant's daughter . . . , (2) there was a friendship between the party and witness . . . , (3) the witness was the employer of the defendant . . . , (4) the witness was a police officer closely associated with the government in developing its case and had an interest in seeing his police work vindicated by

> defendant's conviction . . . , (5) the witnesses were state employees who were present at alleged suggestive pretrial line-up and were still in state's employ at time of trial . . . , and (6) the witness was an informer associated with government in development of case against defendant and there was no indication at trial of any break in the association . . . .

Martinez, 478 So. 2d at 872 (alterations added; citations omitted).

Puente belongs in none of these categories. Just because Puente was the only victim, with an interest in a victim compensation fund, does not render him unavailable to Petitioner. *See United States v. Villegas*, 655 F.3d 662, 670–71 (7th Cir. 2011) ("[W]e cannot find the bias required to reach the level of pragmatic unavailability" as "[t]he 'bias' or 'prejudice' discussed in the case law is generally a product of the uncalled witness's status, usually as an employee of the party opposing the instruction, or is due to the witness having a personal stake in the conviction of the defendant." (alterations added; citations omitted)). Because the state court's decision was not an unreasonable application of federal law, Petitioner's first habeas claim is denied. *See Jackson v. Senkowski*, No. 03 CV 1965 (JG), 2007 WL 2275848, at *9 (E.D.N.Y. Aug. 7, 2007).

B. Ineffective Assistance of Appellate Counsel

Next, ineffective assistance of appellate counsel. (*See* Pet. 8–10). "The *Strickland* standard for ineffective assistance of counsel governs claims of ineffective assistance of appellate counsel." *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016) (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). Thus, "[t]o prevail on a claim of ineffective assistance of appellate counsel, a habeas petitioner must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense." *Rambaran v. Sec'y, Dep't of Corr.*, 821 F.3d 1325, 1331 (11th Cir. 2016) (alteration added; citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); other citation omitted).

"Under the deficient performance prong, Petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* (quoting *Strickland*, 466 U.S. at 688). "Appellate counsel's performance will be deemed prejudicial only if [the Court] find[s] that the neglected claim would have a reasonable probability of success *on appeal*." *Farina v. Sec'y, Fla. Dep't of Corr.*, 536 F. App'x 966, 979 (11th Cir. 2013) (internal quotation marks and citation omitted; emphasis added). In evaluating the prejudice prong in an ineffective-assistance-of-appellate-counsel claim, "the relevant proceeding is the appellant's direct appeal and it is therefore important to reconstruct the precise circumstances his appellate counsel confronted." *Id.* (internal quotation marks, citation, and alterations omitted).

As to Petitioner's ineffective-assistance-of-counsel claims, the state court opinion the Court reviews is the Florida appellate court's *per curiam* denial of the petition alleging ineffective assistance of appellate counsel. (*See* Exhibit M, September 25, 2015 *Per Curiam* Denial of Petition Alleging Ineffective Assistance of Appellate Counsel 53; *see also Guzman v. State*, No. 3D15-0109, 2015 WL 6473557 (Fla. 3d DCA Sept. 25, 2015))). Where a state court resolves a habeas claim with an unwritten opinion, the relevant question is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

Petitioner states his appellate counsel was ineffective in failing to argue on direct appeal (1) the trial court's fundamental error in applying impermissible factors at sentencing (*see* Reply to Resp. to Objs. 4–5; *see also* Pet. 8); (2) the trial court's fundamental error in omitting the definition of excusable homicide in the jury instruction for the lesser-included manslaughter charge (*see* Pet. 8); and (3) the trial court's fundamental error in instructing the jury on the independent forcible felony exception to self-defense (*see id.* 8–9). The Court addresses the first two of these sub-claims.

i. Impermissible Sentencing Factors

Petitioner asserts the trial court relied on impermissible sentencing factors, faulting his trial counsel for failing to object at the sentencing hearing. (*See id.* 8). Petitioner later insists his ineffective-assistance-of-counsel claim is directed at his appellate counsel. (*See* Reply to Resp. to Objs. 4; *see also* Objs. 5). While the Report analyzes Petitioner's ineffective-assistance-of-trial-counsel claim (*see* Report 8 n.7), the Report should have also analyzed the ineffective-assistance-of-appellate-counsel claim. Liberally construing the Amended Petition, the Court notes Petitioner includes this claim under the umbrella of his *appellate* counsel's ineffective assistance. (*See* Pet. 8). *See Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000) ("*Pro se* filings, including those submitted by [the petitioner] in the present case, are entitled to liberal construction." (alteration added)).

"In Florida, a sentencing court may not consider or use against a defendant his assertion of innocence and refusal to admit guilt." *Griffin v. Sec'y, Dep't of Corr.*, No. 8:13-CV-2025-T-36TBM, 2016 WL 5146611, at *11 (M.D. Fla. Sept. 21, 2016) (citing *Bracero v. State*, 10 So. 3d 664, 665–66 (Fla. 2d DCA 2009)). "Fundamental error occurs where a trial court considers constitutionally impermissible factors when imposing a sentence." *Yisrael v. State*, 65 So. 3d 1177, 1177 (Fla. 1st DCA 2011). A habeas petitioner can establish an ineffective-assistance-of-appellate-counsel claim by showing appellate counsel failed to raise a meritorious due process violation. *See Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990).

As the Report's survey of the trial record reveals (*see* Report 16), the trial court's references to Petitioner's "responsibility" were directed at Petitioner's criminal conduct, for which he was being sentenced, and not Petitioner's proclamation of his innocence. (*Id.* (citing trial record)). Appellate counsel was therefore not ineffective in not appealing a frivolous issue on direct appeal.

See Shere v. Sec'y, Fla. Dep't of Corr., 537 F.3d 1304, 1311 (11th Cir. 2008) (holding the petitioner's "appellate counsel did not have a meritorious issue to raise on appeal, so his failure to address the issue did not constitute deficient performance"); *see also Griffin*, 2016 WL 5146611, at *12 (holding the petitioner failed to establish ineffective assistance of appellate counsel where there was "no indication that any belief by the court that [petitioner] lacked remorse affected the sentence imposed." (alteration added)).

ii. Omission of Excusable Homicide in Jury Instruction

Next, Petitioner states his appellate counsel was constitutionally ineffective for not raising as fundamental error the trial court's failure in omitting the definition of excusable homicide when instructing the jury on the lesser-included offense of attempted voluntary manslaughter. (*See* Report 9).

This claim is based on Florida's jury pardon rule, established in *State v. Lucas*, 645 So. 2d 425 (Fla. 1994). Under the jury pardon rule, a jury must be "given a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime." *State v. Montgomery*, 39 So. 3d 252, 259 (Fla. 2010) (quoting *Pena v. State*, 901 So. 2d 781, 787 (Fla. 2005)). To fairly have the opportunity to exercise this power, the logic goes, the trial court must read to the jury the relevant instructions for every lesser-included offense. *See Black v. State*, 695 So. 2d 459, 460 (Fla. 1st DCA 1997). Failing to define excusable homicide on a lesser-included offense taints the jury's ability to exercise its pardon power. *See id.* In other words, under Florida law, "failure to give a complete instruction on manslaughter constitutes fundamental error, which is not subject to a harmless-error analysis, in cases where the defendant has been convicted of manslaughter or a greater offense not more than one step removed." *Id.* (citing *Lucas*, 645 So. 2d at 425).

a. The Report

The Report recommends the Court deny this claim. (*See* Report 9). The Report notes that although Petitioner's trial counsel initially requested the excusable homicide instruction, counsel did not object when the trial court omitted the instruction. (*See id.*). Appellate counsel's only option would have been to raise the issue as fundamental error on direct appeal. (*See id.* (citing *Lucas*, 645 So. 2d at 427)). This much seems indisputably true.

The Report then concludes that nothing about Petitioner's case called for an excusable homicide instruction. (*See* Report 9). The Report points out Petitioner's trial counsel never argued the shooting was accidental, and the evidence established Puente was shot at least five times. (*See id.*). In the Magistrate Judge's view, Petitioner's own testimony of having "discharged the clip" as he shot the victim in self-defense forecloses any fundamental error in the trial court's failure to instruct the jury on excusable homicide. (*Id.* 10).

b. Procedural History

On May 17, 2018, Petitioner filed a successive Petition for Writ of Habeas Corpus (*see* Exhibit Z [ECF No. 37-2]) with the Florida Third District Court of Appeal. Petitioner sought relief solely on this claim, raising the same arguments he brings here and acknowledging this section 2254 habeas petition was pending. (*See id.* 4). The State filed its Response on November 8, 2018. (*See* Florida Third District Court of Appeal Docket, *Guzman v. State*, No. 3D 18-989). On December 10, 2018, Petitioner filed his Reply. (*See id.*).

On January 18, 2019, the undersigned entered an Order [ECF No. 46] staying this case pending the Third District's decision on Petitioner's successive petition. (*See id.* 3). The Court was mindful then, as she is now, that she would benefit from the Third District's interpretation of

Florida law. (*See id.* 2). Recognizing the "careful review," needed to resolve this claim, the Court concluded the interests of judicial economy and federalism necessitated a stay. (*Id.* 2).

On January 30, 2019, the Third District denied the successive petition in an unwritten opinion. (*See* Order [ECF No. 48-3]). Petitioner filed a Motion for Rehearing, Clarification, and Request for Written Opinion [ECF No. 48-4] on February 13, 2019. On February 28, 2019, the Third District denied Petitioner's request for rehearing. (*See* Order [ECF No. 49-1]). After learning that Petitioner had failed to obtain relief through the successive petition, the Court reopened this case, taking the Amended Petition and the Report under advisement. (*See* March 14, 2019 Order [ECF No. 51]).

c. Analysis

After carefully reviewing the record, the Court cannot accept the Report's recommendation. Instead, considering the parties' extensive briefing supplied after the Magistrate Judge entered his Report and the nuanced legal principles involved, the Court would benefit from a more comprehensive report. To facilitate this effort, the Court highlights a few relevant legal principles, as she sees them, below.

Before the trial court instructed the jury, Petitioner requested an excusable homicide instruction, but the trial court omitted the instruction on the basis it was irrelevant to Petitioner's defense:

> [State]: The next paragraph however talks about the excusable or justifiable. Excusable should be out. Excusable not a defense being pursued here.
>
> [Trial Counsel]: I would ask for excusable.
>
> [State]: Committed by accident and didn't mean to do what he did.
>
> [Trial Counsel]: I just like it judge.

> The Court: That goes to the new case law, the Ware [sic] Case.[5]
>
> [State]: An excusable homicide is where you commit an act which does not intend to do, commit a killing but as a result of that act somebody dies. That has nothing to do with it.
>
> The Court: If the defendant cannot be guilty of attempted manslaughter if the attempted killing was in the favor of justice. I'm going to get rid of either justifiable, as I just explained in those terms. I'm going to get rid of those instructions. Everything else okay?
>
> [State]: I just want to lay a proper record, judge. I know counsel is not asking for excusable, if he can lay grounds as to what the accidental act was or –
>
> [Trial Counsel]: The inference judge, he is being excused for acting in self-defense.
>
> [State]: That's not what the defense is. The excusable defense is I accidentally pulled the trigger when I tripped. The gun went off and this person died. I don't believe that's what we have here.
>
> The Court: Okay I agree, excusable going to come out. The next one.

(Trial Transcript [ECF No. 18-7] 719:11–720:17 (alterations added)).

In instructing the jury, the trial court outlined the lesser-included offenses after reading the instruction on attempted first-degree murder. In descending order, the trial court read each applicable lesser offense: attempted second degree murder, attempted voluntary manslaughter, and aggravated battery. (*See id.* 784–794). The trial court *never* instructed the jury on the excusable homicide defense. (*See id.*). The court did, however, advise the jury of the justifiable homicide defense with the attempted voluntary manslaughter instruction. (*See id.* 791:4–6).

The parties do not dispute the general proposition in *Lucas*. *See Garcia v. Sec'y, Dep't of Corr.*, No. 5:12-cv-384, 2014 WL 6882926, at *4 (M.D. Fla. Dec. 4, 2014) (citing *Lucas*, 645 So. 2d at 427). Because Petitioner was convicted of attempted second-degree murder, an offense one-

[5] The trial court appears to have relied on *Weir v. State*, 777 So. 2d 1073 (Fla. 2001), as the basis for excluding the excusable homicide instruction. *Weir*, however, involved an appeal of the trial court's denial of the defendant's motion for judgment of acquittal. *See id.* at 1076. *Weir* does not affect the line of cases under *Lucas*.

step removed from the lesser offense of attempted voluntary manslaughter, the trial court was required to instruct the jury on justifiable *and* excusable homicide with the attempted manslaughter instruction. *See Martinez v. McNeil*, No. 09-22687-CIV, 2010 WL 3222120, at *11 (S.D. Fla. July 14, 2010) (alterations added). Even though the parties seem to agree the trial court was wrong for not reading the excusable homicide instruction, the parties dispute whether that error was *fundamental.*

For its part, the State contends *Lucas* does not extend to claims for collateral relief because the jury pardon doctrine cannot prejudice Petitioner under *Strickland.* (*See* Resp. 20). According to the State, *Byrd v. State*, 216 So. 3d 39, 43 (Fla. 3d DCA 2017), forecloses Petitioner's ineffective-assistance-of-appellate-counsel claim. (*See* Resp. to Objs. 6). Petitioner disagrees, insisting whether the evidence at trial supports an excusable homicide jury instruction is irrelevant. (*See* Objs. 6). Petitioner distinguishes *Franco v. State*, 901 So. 2d 901 (Fla. 4th DCA 2005) (per curiam), a case on which the State relies. (*See* Resp. 20). Petitioner also distinguishes *Byrd*, as it involved an ineffective-assistance-of-*trial*-counsel claim, rather than an ineffective-assistance-of-*appellate*-counsel claim. (*See* Reply to Resp. to Objs. 6).

The Court is inclined to agree with Petitioner. While controversial, *Lucas* has been consistently followed by Florida courts. *See Davis v. State*, 100 So. 3d 1152 (Fla. 3d DCA 2012) (reversing for new trial because of two fundamental errors in jury instructions, including court entirely omitting an excusable homicide instruction).

In *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), the Florida Supreme Court upheld the proposition in *Lucas*. Not giving the excusable homicide instruction to a manslaughter charge is "fundamental, reversible error" because the "intent which the State must prove for the purpose of

manslaughter by act is the intent to commit an act that was not justified or excusable, which caused the death of the victim." *Id.* at 259–60.

To be sure, the jury pardon rule was controversial at the time of Petitioner's appeal (and it still is). In *Moore v. State*, a Florida intermediate appellate court wrestled with the conundrum that while fundamental error is usually found only *after* a court conducts a harmless-error analysis, *Lucas* requires a court to conclude the error was necessarily fundamental under the jury pardon doctrine. *See* 114 So. 3d 486, 492 (Fla. 1st DCA 2013). In the *Moore* panel's own words, "*Lucas* seems to be at odds with the well-established rule that for jury instructions to constitute fundamental error, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* at 493 (internal quotation marks and citations omitted).

In *Moore*, there was "no dispute in the trial as to whether the killing was justifiable or excusable homicide." *Id.* Therefore, "that omission from the jury instruction was not pertinent or material to what the jury needed to consider in order to convict" and it could not be "said that the guilty verdict could not have been obtained without the omission." *Id.* Reversal did "not serve the ends of justice" but would rather "waste[] valuable time and resources due to an error that could not have possibly affected the jury's verdict." *Id.* (alteration added). Yet, the court, "constrained by *Lucas*," was "required to reverse" the conviction. *Id.* Had the court not been bound by *Lucas*, it would have concluded "the error was not fundamental because there was no dispute in the trial as to whether the killing was justifiable or excusable homicide." *Id.*

As recently as 2017, the Florida Supreme Court refused to entertain the State's request to "recede from *Lucas* even where there is nothing in the evidence from which a jury could conclude that a homicide or an attempted homicide was excusable or justified." *State v. Spencer*, 216 So.

3d 481, 486 (Fla. 2017). It appears whether evidence at Petitioner's trial supported an excusable homicide instruction is irrelevant under *Lucas*.

The cases on which the State relies are distinguishable. In *Franco v. State*, "the jury was fully and properly instructed on the lesser offense of attempted voluntary manslaughter." 901 So. 2d 901, 904 (Fla. 4th DCA 2005). Because the justifiable and excusable homicide instructions were given with the attempted manslaughter instruction, any error in not reading the instructions with the attempted second-degree murder charge was "harmless" because the "jury was afforded a full and fair opportunity to exercise its pardon power and refused to do so." *Id.* at 904–05 (alterations added). Again, at Petitioner's trial, the court never gave the excusable homicide instruction. (*See* Trial Transcript [ECF No. 18-7] 784–794). Courts have uniformly limited *Franco* to its facts. *See Buford v. State*, 77 So. 3d 917, 918 (Fla. 4th DCA 2012) (rejecting State's reliance on *Franco* and noting that unlike in *Franco*, the excusable homicide instruction "was *not read at all*" at the defendant's trial) (emphasis in original; citation omitted)).

Pena v. State, 901 So. 2d 781 (Fla. 2005), is not on point. In *Pena*, the Florida Supreme Court concluded the trial court did not commit fundamental error when it omitted the definition of excusable homicide because (1) the lesser offense was more than two steps removed from the offense for which the defendant was convicted and (2) "the facts in this case [involved] the unusual form of felony murder." *Id.* at 788 (alteration added). Here, attempted manslaughter is a lesser-included offense *one* step removed from the attempted second-degree murder charge. Also, unlike the "unusual form of felony murder" in *Pena*, the attempted manslaughter charge contained the material element of intent that the State had to prove beyond a reasonable doubt.

Byrd v. State, 216 So. 3d 39 (Fla. 3d DCA 2017), is also inapposite. In *Byrd*, the habeas petitioner asserted a misidentification defense at trial. *See id.* at 43. Because the petitioner failed

to prove prejudice under *Strickland*, trial counsel's failure to object did not constitute ineffective assistance of counsel. *See id.* (citation omitted). *Byrd* states that a *trial* counsel's failure to request an excusable homicide instruction with a lesser-included offense does not satisfy the prejudice prong of *Strickland*. *See id.* *Byrd* is a progeny of *Sanders v. State*, 847 So. 2d 504, 506 (Fla. 1st DCA 2003) (en banc), *approved*, 946 So. 2d 953 (Fla. 2006), in which the court extensively discussed the application of *Lucas* to ineffective-assistance- of-trial-counsel claims.

The *Sanders* panel concluded the considerations relevant to an ineffective-assistance-of-counsel claim for a trial counsel's failure to request an excusable homicide instruction with a lesser-included offense "do not apply in the context of a collateral proceeding in which ineffective assistance of counsel is claimed *for failure to request an instruction as to a lesser included offense*." 847 So. 2d at 507 (emphasis added). The *Sanders* court reasoned the jury pardon doctrine cannot alone establish prejudice under *Strickland*. *See id.* As the *Sanders* court explained:

> [A] finding of reasonable probability under *Strickland* does not require a finding that it is more likely than not that the deficient performance of counsel affected the outcome of the proceeding. It requires only a finding that the deficient performance put the whole case in such a different light as to undermine the court's confidence in the outcome of the proceeding . . . . But we have difficulty accepting the proposition that there is even a substantial *possibility* that a jury which has found every element of an offense proved beyond a reasonable doubt, would have, given the opportunity, ignored its own findings of fact and the trial court's instructions on the law and found a defendant guilty of only a lesser included offense.

Id. (alterations added; emphasis in original).

Sanders is distinguishable for it involved a trial counsel's failure to request an instruction on a lesser included offense. An ineffective-assistance-of-*appellate*-counsel claim is starkly different in nature. Again, "[a]ppellate counsel's performance will be deemed prejudicial only if [the court] find[s] that the neglected claim would have a reasonable probability of success *on appeal*." *Farina*, 536 F. App'x at 979 (internal quotation marks and citation omitted; emphasis and alterations added). The "relevant proceeding" is Petitioner's *direct appeal* from his conviction

and *not* the outcome at trial; and it is "therefore important to reconstruct the precise circumstances his appellate counsel confronted." *Id.* (internal quotation marks, citation, and alterations omitted).

Buford v. State highlights this distinction in the jury pardon context. *See* 77 So. 3d 917 (Fla. 4th DCA 2012). In *Buford*, a habeas petitioner alleged his *appellate counsel* was ineffective for not raising the omission of the excusable homicide instruction on direct appeal. *Id.* at 918. The parties agreed the trial court had "failed to instruct the jury on justifiable and excusable homicide in connection with the manslaughter instruction." *Id.* The State conceded the instruction was not read but argued that failing to read the instruction was not fundamental error. *See id.* Noting the court had "previously recognized this to be fundamental error and found appellate counsel ineffective for not raising it," the court granted the petition and remanded for a new trial. *Id.* (citation omitted). The court reasoned the State's "suggestion that the facts, themselves, do not support excusable homicide" was irrelevant to the ineffective-assistance-of-appellate-counsel analysis. *Id.* (citation omitted).

Other Florida courts have adopted the reasoning in *Buford*. In *Grant v. State*, the State, relying on *Sanders*, argued the petitioner's claim of ineffective assistance of appellate counsel should be denied for it was "founded on the jury's exercise of its 'pardon power,' which would present a matter of pure speculation, thereby precluding demonstration of the prejudice prong required for" ineffective assistance of counsel. 189 So. 3d 878, 881 (Fla. 4th DCA 2016). The court rejected that argument, explaining ineffective-assistance-of-appellate-counsel claims "require a finding of prejudice in the *appellate* proceedings — that confidence in the appellate proceeding is undermined by the serious error." *Id.* (emphasis in original). In contrast to ineffective-assistance-of-trial-counsel claims, ineffective-assistance-of-appellate-counsel claims are not "governed by a consideration of prejudice in the ultimate outcome of the criminal

proceeding." *Id.* at 881–82. The court granted the petition, concluding "the failure to instruct on the necessarily lesser-included offense constituted a per se reversible error" and "[n]o review of the record or harmless error analysis is required." *Id.* at 882 (alteration added).

Finally, it appears that neither of the two recognized exceptions to *Lucas* applies here. The first exception to *Lucas* applies where a defendant's trial counsel affirmatively agrees to or requests an incomplete instruction. *See Spencer*, 216 So. 3d at 486 (citations omitted). The State suggests in its initial briefing the first exception applies because Petitioner's trial counsel "voiced no objection to the trial court's decision to omit the instruction." (Resp. 20). In the State's view, trial counsel's failure to object triggered the "exception to fundamental error rule where defense counsel agrees to the incomplete instruction." (*Id.*).

This is incorrect. The first exception to *Lucas* requires a trial counsel's affirmative agreement to the omission of the excusable homicide instruction — trial counsel's mere failure to object is not enough. Certainly, if the first *Lucas* exception "does not apply where defense counsel merely acquiesced to jury instructions that did not provide a full instruction on justifiable or excusable homicide," then it does not apply here, where Petitioner's trial counsel *affirmatively requested* the excusable homicide jury instruction. *Spencer*, 216 So. 3d at 486 (citations omitted).

The State also suggests the second exception to *Lucas* should apply because "Petitioner conceded that the shooting was not committed by 'accident or misfortune.'" (Resp. to Objs. 7). The Florida Supreme Court recently established "a second exception to [*Lucas*'s] fundamental error rule is warranted where a defendant expressly concedes that a homicide or an attempted homicide is not justified or excusable." *Spencer*, 216 So. 3d at 486 (alteration added).

The Court can look only to the relevant law at the time of Petitioner's direct appeal in assessing whether his appellate counsel provided ineffective assistance. *See Mann v. Moore*, 794

So. 2d 595, 599 (Fla. 2001) (assessing habeas petitioner's ineffective-assistance-of-appellate-counsel claim in light of case law "[a]t the time of his direct appeal" (alteration added)). For this reason alone, the State cannot rely on the second exception to *Lucas*, for it was not an established exception at the time of Petitioner's direct appeal.

In any event, the second exception to *Lucas* does not apply here. In *Spencer*, the Florida Supreme Court concluded the narrow exception to *Lucas* did not apply despite the defendant's admission that "he started shooting as the victims sped away in a vehicle," because "the presence or absence of excusable or justifiable attempted homicide was not mentioned by defense counsel;" instead, defense counsel "contended that the State had failed to sustain its burden of proof." 216 So. 3d at 487–88. As Petitioner notes, "the presence or absence of excusable . . . attempted homicide was not mentioned" by his trial counsel. *Id.* at 488 (alteration added). The record instead shows trial counsel maintained the "State had failed to sustain its burden of proof." *Id.* The second exception to *Lucas* "is not applicable, and fundamental error occurred during [Petitioner's] trial." *Id.* (alteration added).

In short, Petitioner was convicted of attempted second-degree murder, an offense one step removed from the lesser-included offense of attempted voluntary manslaughter. The trial court did not give the excusable homicide instruction with the attempted manslaughter instruction; in fact, excusable homicide was not referenced at all. And Petitioner's appellate counsel failed to raise the trial court's fundamental error on appeal. (*See* Exhibit F, Initial Brief of Appellant 57–76).

Based on the case law, Petitioner's appellate counsel's failure to raise the excusable homicide instruction issue seems to have undermined the confidence in the correctness of the result on appeal. Had appellate counsel raised the trial court's error in omitting the excusable homicide

jury instruction, the appellate court very well could have reversed the conviction based on seemingly binding and uniform (albeit controversial) case law. This potential presents a rather serious concern with constitutional dimensions.

Yet, the undersigned, in her role as a federal judge, does not review a federal habeas claim, based on a *state* law error, in a vacuum. She is mindful of the section 2254 posture in which she is sitting. She knows her "review of counsel's performance is deferential under *Strickland* and that an appellate lawyer is not required or expected to raise all plausible claims on appeal." *Farina*, 536 F. App'x at 984. The undersigned also recognizes that the AEDPA imposes "a highly deferential standard that is intentionally difficult to meet." *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1348–49 (11th Cir. 2019) (citations omitted). Of course, the undersigned resolves all state habeas petitions bearing in mind that under the AEDPA, "error is not enough; even clear error is not enough." *Id.* at 1349 (citation omitted). Rather, "the question is whether every fairminded jurist would conclude that [cause and] prejudice ha[ve] been established." *Id.* at 1351 (alterations added; citations omitted).

Pinkney v. Secretary, is instructive on this point. *See* 876 F.3d 1290, 1301 (11th Cir. 2017), *cert. denied sub nom. Pinkney v. Jones*, 139 S. Ct. 193 (2018). There, a state prisoner filed a section 2254 petition alleging his appellate counsel was ineffective for failing to argue that a jury instruction was fundamental error under Florida law. *See id.* at 1292. After the district court denied the habeas petition, the Eleventh Circuit granted a certificate of appealability to resolve the petitioner's ineffective-assistance-of-appellate-counsel claim.

The Eleventh Circuit noted that under Florida law, an error is fundamental if it reaches down into the validity of the trial itself. *See id.* at 1297 (citation omitted). The panel then turned to that very question: whether the state trial court's error in reading the jury instruction was

fundamental. The State argued that fundamental error analysis is not one for a federal court to decide. *See id.* Because Florida's Second District denied the state habeas petition, the State insisted the Florida court already implicitly determined the error was not fundamental. *See id.* at 1297–98. In the State's view, the Eleventh Circuit was therefore required to defer to the Florida court's underlying determination of state law. *See id.* at 1298.

The *Pinkney* panel agreed with the State. *See id.* The panel concluded had the error been fundamental, the state habeas court would have granted relief under *Strickland*. *See id.* After all, a state court can apply federal constitutional law just as competently as a federal one. *See id.* at 1298–99. The Eleventh Circuit thus interpreted the state habeas court's decision rejecting the ineffective-assistance-of-appellate-counsel claim "as having been based on the theory that while the [state law] instruction was error, it was not fundamental error . . . ." *Id.* at 1299 (alterations added).

The petitioner argued that a federal court should not interpret a state court's decision that way where the instruction error was actually fundamental, for it would not make sense to assume an erroneous premise on an issue with constitutional dimensions. *See id.* The Eleventh Circuit rejected that argument for two reasons: first, fundamental error is an issue of state law, and state law is what the state courts say it is; and second, the instruction error was not fundamental under Florida law. *See id.*

As for the first reason, the Eleventh Circuit relied on various cases stating a federal habeas court should not reexamine a state court's interpretation of state law. *See id.* (citing cases). With respect to the second reason, the Eleventh Circuit explained "even if the issue were ours to decide, we would conclude that the error involving the . . . instruction was not fundamental error under Florida law." *Id.* (alteration added). In its analysis, the Eleventh Court applied the traditional

fundamental error analysis under Florida law. *See id.* at 1299–1302. After weighing the two reasons, the Eleventh Circuit was "convinced" the state habeas court rejected the petitioner's ineffective-assistance-of-counsel claim, "because the error was not fundamental error" and it followed that "it wasn't ineffective assistance of counsel not to raise" the issue on appeal. *Id.* at 1302.

Pinkney is very relevant to Petitioner's ineffective-assistance-of-appellate-counsel claim. Yet, as best the Court can tell, neither party referenced it in the briefing. Read broadly, *Pinkney* suggests that an ineffective-assistance-of-appellate-counsel claim, based on the propriety of an issue of state law, must necessarily fail because a federal judge sitting in a section 2254 posture should always assume the underlying state law question was correctly decided.

Read more narrowly, *Pinkney* can be confined to its facts. The cases on which the *Pinkney* panel relies instruct federal courts to not revisit or second-guess a state court's interpretation of state law. To be sure, the Court owes substantial deference to the state habeas court that summarily denied Petitioner's claim. By the same token, the Court owes deference to every state court that has upheld *Lucas* and applied it to ineffective-assistance-of-appellate-counsel claims. What's more, *Pinkney* involved the law-to-fact analysis the *traditional* fundamental error doctrine under Florida law requires. *Lucas*, in contrast, compels courts to reverse a conviction on appeal independent of the facts of the case.

An important issue, which the parties have not briefed, is whether a federal court must assume that a state law issue was correctly decided, even where the state courts' otherwise uniform and binding case law appears to contradict it,[6] and even where the fundamental error analysis is

[6] The Court's analysis of the legal issues should not be construed as a conclusion one way or another. This section of the Order merely illuminates the issues the Magistrate Judge will tackle in the first instance. In that regard, this section of the Order is not intended to, nor should it, operate as the law of the case.

not fact-intensive. The Eleventh Circuit has previously affirmed the grant of a section 2254 petition based on state law with federal constitutional dimensions. *See Clark v. Crosby*, 135 F. App'x 347, 348 (11th Cir. 2005) (affirming district court's order granting state prisoner's petition with respect to ineffective-assistance-of-appellate-counsel claim predicated on Florida law).

Because the parties have not briefed the issue with the rigor it requires, and the Magistrate Judge has not had the opportunity to share her recommendations in light of the applicable law surveyed in this Order, the Court is not in a position to resolve this claim. At a minimum, justice demands a more thorough review of this claim.

*****

Finally, the Court would also benefit from a report and recommendation on Petitioner's final sub-claim of ineffective assistance of appellate counsel, the seven sub-claims relating to his *trial* counsel's ineffective assistance of counsel, and the claim of ineffective assistance for trial counsel's alleged advice relating to a plea offer. (*See* Report 10–24). The initial Report did not liberally construe some of those claims. Judicial economy requires the Magistrate Judge to review those claims on their merits in the first instance, with the benefit of the entire record and extensive briefing, bearing in mind the need to consider every habeas claim raised in a petition. *See Burgess v. United States*, 609 F. App'x 627 (11th Cir. 2015) (per curiam) (holding where a lower court does not adequately address a claim for habeas relief, the court commits reversible).

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Report **[ECF No. 29]** is **ACCEPTED** in part as follows:

1. Petitioner, Pablo Guzman's Amended Petition Under 28 U.S.C. [Section] 2254 for

Writ of Habeas Corpus by Person in State Custody **[ECF No. 8]** is **DENIED in part.**

2. Petitioner's first claim and his first sub-claim of ineffective assistance of appellate counsel are **DENIED.**

3. The remaining claims are **RETURNED** to Magistrate Judge Reid for a report and recommendation.

DONE AND ORDERED in Miami, Florida, this 13th day of June, 2019.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record
Petitioner, *pro se*
Magistrate Judge Lisette Reid

APPENDIX B "3"
Report and Recommendation Of Magistrate Judge, 04/19/2018

APPENDIX C Opinion Plenary Appeal

PABLO GUZMAN, Appellant(s)/Petitioner(s), vs. THE STATE OF FLORIDA, Appellee(s)/Respondent(s),
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
206 So. 3d 712; 2015 Fla. App. LEXIS 15368
CASE NO.: 3D15-0109
September 25, 2015, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

L.T. NO.: 10-4216.Guzman v. State, 151 So. 3d 1256, 2014 Fla. App. LEXIS 18886 (Fla. Dist. Ct. App. 3d Dist., Nov. 19, 2014)
Judges: WELLS, LAGOA and LOGUE, JJ., concur.

Opinion

Following review of the petition alleging ineffective assistance of appellate counsel and the response thereto, it is ordered that said petition is hereby denied.

WELLS, LAGOA and LOGUE, JJ., concur.

APPENDIX D Opinion State Appellate Court Habeas Corpus

Third District Court of Appeal

State of Florida

Opinion filed November 19, 2014.
Not final until disposition of timely filed motion for rehearing.

No. 3D13-1720
Lower Tribunal No. 10-4216

Pablo Guzman,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Stacy D. Glick, Judge.

Carlos J. Martinez, Public Defender, and Brian L. Ellison, Assistant Public Defender, for appellant.

Pamela Jo Bondi, Attorney General, and Joanne Diez, Assistant Attorney General, for appellee.

Before SHEPHERD, C.J., and LAGOA and SALTER, JJ.

PER CURIAM.

Affirmed.

APPENDIX A "1" Order Rejecting Rehearing

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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August 11, 2023

Pablo Guzman
South Bay CF - Inmate Legal Mail
PO BOX 7171
SOUTH BAY, FL 33493

Appeal Number: 20-14181-DD
Case Style: Pablo Guzman v. Secretary, Department of Corr., et al
District Court Docket No: 1:17-cv-20220-CMA

NO ACTION / DEFICIENCY NOTICE

No action will be taken on filing submitted by Appellant Pablo Guzman. Motion for Reconsideration construed as a Rehearing for panel rehearing only [10002652-2]., is deficient for failure to comply with this Court's rules on Certificates of Interested Persons and Corporate Disclosure Statements. Please be advised that a copy of the opinion sought to be reheard must also be attached to your rehearing.

No deadlines will be extended as a result of your deficient filing.

Certificate of Interested Persons and Corporate Disclosure Statement ("CIP")

You failed to comply with the CIP rules by:

- not including a CIP in your filing. See 11th Cir. R. 26.1-1(a)(1).

ACTION REQUIRED

For motions for reconsideration or petitions for rehearing that are not permitted, no action is required or permitted. Your filing will not be considered.

For mistaken filings, to have your document considered, **you must file the document in the correct court.**

APPENDIX B District Court Order Denying Habeas Corpus Relief