Appendix – A

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-11991

Non-Argument Calendar

EVAN C. WILHELM,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:19-cv-00572-WS-HTC

Before JILL PRYOR, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

Evan Wilhelm, a Florida state prisoner proceeding *pro se*, appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. After careful consideration of the parties' briefs and the record, we affirm.

I.

This case arises out of a shooting at the Florida State University fraternity house where Wilhelm lived. Wilhelm attended a party at the fraternity house along with his girlfriend, Amy Cowie, and her twin sister, Ashley. During the party, Wilhelm, who had been drinking alcohol and smoking marijuana, went to his bedroom where he kept a semi-automatic rifle.

Earlier that day, Wilhelm had mounted a flashlight on the top of the weapon. At the party, he decided to test the flashlight's brightness. He pointed the weapon at, and thus shined the flashlight in, the faces of others gathered in his room. When he pointed the weapon at Ashley, the weapon fired. A bullet struck Ashley in the chest, passed through her body, and hit another student, Keith Savino, in the arm. Ashley died from her injuries.

In this section, we discuss the proceedings in Wilhelm's criminal case that followed. We then describe Wilhelm's state and federal post-conviction proceedings.

A.

Shortly after the shooting, Wilhelm was arrested. He was charged in Florida state court with manslaughter, possession of a firearm on school property, negligently inflicting personal injury, possession of marijuana, and possession of drug paraphernalia. At the time of the shooting, Wilhelm was 20 years old. His criminal case was initially assigned to Judge Josefina Tamayo.

The day after the shooting, Wilhelm retained criminal attorneys Stephen Dobson and Richard Smith. He later added an additional attorney, Alan Ceballos.

Approximately four months after the shooting, Wilhelm turned 21. Just over a year later, when Wilhelm was 22, he entered a plea of no contest to the manslaughter, possession of firearms on school property, and negligently inflicting personal injury charges.[1] At the time Wilhelm entered the no-contest plea, the court prepared a sentencing scoresheet reflecting that his lowest permissible sentence under Florida law was 127.35 months' imprisonment. *See* Fla. Stat. § 921.0024(7) (requiring preparation of a sentencing scoresheet for every defendant who is sentenced for a felony offense). The court could impose a shorter sentence only if it granted a downward departure. *See* Fla. Stat. § 921.0026(1) (prohibiting a sentencing judge from departing downward from the "lowest permissible sentence[]" absent a finding of "[m]itigating factors"); *see*

[1] The State agreed to *nolle prosse* the charges for marijuana possession and possession of drug paraphernalia.

also Jackson v. State, 64 So. 3d 90, 92 (Fla. 2011) (describing Florida's sentencing scheme). Before the sentencing hearing, Wilhelm's case was reassigned to Judge Charles Dodson.

At sentencing, Wilhelm sought a downward departure. He argued that a downward departure was warranted given his remorse, youth, and immaturity. Wilhelm also pointed out that he cooperated with law enforcement after the shooting. And he emphasized the accidental, isolated, and unsophisticated nature of the shooting. At the sentencing hearing, he called several witnesses and also addressed the court.[2] Wilhelm told the court that he accepted responsibility for Ashley's death, stating that "what happened is my fault entirely," and that he never intended to harm anyone. Doc. 14-1 at 183.[3]

Wilhelm also asked the court to consider Florida's Youthful Offender Act. At the time, the Act gave a sentencing judge discretion to impose a six-year maximum sentence for a defendant who pled guilty or entered a no-contest plea to a felony if the defendant was under the age of 21 at the time of sentencing. *See* Fla. Stat. § 958.04 (2012).[4] Although Wilhelm was under 21 at the time of the shooting, he acknowledged that he was no longer eligible for

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[2] Wilhelm also submitted dozens of letters vouching for his character.

[3] "Doc." numbers refer to the district court's docket entries.

[4] In 2019, Florida amended the statute to make a defendant eligible for youthful offender status if he committed the relevant crime before turning 21, regardless of his age at sentencing. *See* 2019 Fla. Leg. Sess. Laws Serv. ch. 2019-167 § 67.

youthful offender status because he had turned 21 before sentencing. He nevertheless asked the court to consider the reduced sentence that would have been available under the Youthful Offender Act, arguing that "profound injustices can occur" when a defendant turns 21 soon after committing a crime. Doc. 14-1 at 47. The Youthful Offender Act left these defendants "in the impossible position of having to elect between a thorough and competent defense or alternatively to rush to a sentencing hearing." *Id.*

The State urged the court not to award a downward departure and instead sought a sentence of 20 years. The State emphasized the dangerousness of Wilhelm's conduct. It introduced evidence that Wilhelm kept multiple firearms in his bedroom at the fraternity house and pointed his semiautomatic rifle at several people on the day of the shooting. To refute any suggestion that the weapon discharged on its own, the State elicited testimony from a firearms expert who had tested Wilhelm's weapon and concluded that it functioned properly and that the trigger had to be pressed for the weapon to fire. Ashley's family also addressed the court at sentencing and asked that it not grant a downward departure. And Savino testified about being shot and seeing Ashley die.

The State also argued that the Youthful Offender Act was inapplicable because Wilhelm had already turned 21. According to the State, if Wilhelm wanted the benefit of youthful offender status, he should have "made the decision to come in and enter a plea" earlier so that he would have been sentenced before turning 21. Doc. 14-2 at 76.

The court imposed a sentence of 20 years' imprisonment followed by 10 years' probation. Despite finding that Wilhelm had "true remorse" for the shooting, the court denied his request for a downward departure. *Id.* at 89. The court concluded that a longer sentence was warranted given that Wilhelm had kept a "small arsenal" of weapons in his bedroom at the fraternity house. *Id.* It stated that keeping these weapons on a college campus was a "tragedy waiting to happen," especially when "you start mixing guns and alcohol and drugs." *Id.*

B.

Wilhelm later filed a Rule 3.850 motion in the state court seeking post-conviction relief. In his motion, he argued that he was denied effective assistance of counsel because his attorneys' mistake about his age caused him to "miss[] the Youthful Offender sentencing deadline." Doc. 14-2 at 120. Wilhelm also alleged that his attorneys provided ineffective assistance by failing at sentencing to raise any argument for leniency based on their mistake about Wilhelm's age and its impact on his eligibility for youthful offender status. Wilhelm argued that his attorneys had decided to protect their "own interests rather than provide diligent and competent representation." Doc. 14-6 at 93.

The state habeas court held an evidentiary hearing on Wilhelm's claims. The witnesses at the evidentiary hearing included

Wilhelm; his father, Robert Wilhelm;[5] and the attorneys who represented Wilhelm at trial.

Dobson and Smith, two of the attorneys who represented Wilhelm in the criminal case, admitted that they had been mistaken about his age and thus failed to advise him that to be eligible for youthful offender status he needed to plead guilty and be sentenced before turning 21. But even if they had been aware of Wilhelm's actual age, they said, they still would not have advised him to change his plea so that he could be sentenced before he turned 21.

The shooting occurred about four months before Wilhelm's twenty-first birthday. By the time the State turned over its discovery, his birthday was six weeks away. Given this short time frame, Dobson and Smith explained, they would not have advised Wilhelm to plead guilty so that he could be sentenced before his birthday because they needed more time to investigate the facts of the case. Although Wilhelm confessed shortly after the shooting, he also told his attorneys that he could not remember whether he pulled the trigger of the weapon. Based on this report, Dobson and Smith retained an expert to investigate whether the weapon fired without Wilhelm pulling the trigger.

Wilhelm also denied reports that he had been pointing the gun at other people. As a result, his attorneys interviewed other witnesses—members of Wilhelm's fraternity—to investigate

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[5] To avoid confusion, we refer to Robert Wilhelm as "Robert."

whether he had been pointing the weapon at others. In these interviews, the witnesses stated that Wilhelm had been pointing the weapon at others on the day of the shooting.[6]

The attorneys identified other reasons why they would not have advised Wilhelm to plead guilty so that he could be sentenced before he reached 21. A key part of their strategy was to allow as much time as possible to elapse before Wilhelm's sentencing to allow the Cowie family an opportunity to heal—in the hope that they would support a shorter sentence. In addition, the attorneys wanted to delay the sentencing to wait for the case to be assigned to a new judge. Judge Tamayo, who was assigned to the case when Wilhelm turned 21, had a reputation for being "very pro-state" and "giving longer sentences than the defense would like in most cases." Doc. 14-4 at 198. Dobson and Smith believed that if they delayed the sentencing, Judge Tamayo would rotate off the case, and a new judge, who might be more lenient at sentencing, would sentence Wilhelm.

Wilhelm testified at the evidentiary hearing about the Youthful Offender Act. Shortly after his arrest, Dobson and Smith advised him that he was eligible for a reduced sentence under the Youthful Offender Act. Several months later, after he turned 21, his father Robert, who was an attorney, read the Act for the first time

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[6] After these interviews, Dobson and Smith decided not to proceed with the expert's examination of the weapon to determine whether the trigger had been pulled.

and realized that Wilhelm was ineligible for youthful offender status because he had already turned 21.

Robert confronted Dobson. Dobson admitted that he had mistakenly believed that Wilhelm was only 19 at the time of the crime and acknowledged that Wilhelm was no longer eligible for a reduced sentence under the Act. Dobson agreed to tell the court at Wilhelm's sentencing that he was responsible for missing the youthful offender deadline and to ask the court to "craft a lawful sentence that resembles youthful offender." *Id.* at 122. At the sentencing hearing, Dobson asked the court to award a downward departure and impose a sentence that resembled what Dobson's sentence would have been if he had been eligible for youthful offender status. Despite Dobson's promise, at the sentencing hearing he never mentioned his mistake about Wilhelm's age. At the state post-conviction evidentiary hearing, Dobson testified that even if Wilhelm had pled guilty and been sentenced before turning 21, he did not believe that Judge Tamayo would have exercised her discretion to grant Wilhelm youthful offender status.

The state habeas court denied Wilhelm's Rule 3.850 motion. It found that Dobson and Smith had mistakenly believed that Wilhelm was 19 at the time of the offense and failed to meaningfully pursue youthful offender status before he turned 21. But the court concluded that Wilhelm was not prejudiced by this mistake.

The court gave several justifications why, even if Wilhelm had been properly advised about his eligibility for youthful offender status, he would not have pled guilty and been sentenced

before turning 21. It explained that the defense's strategy was "to delay the proceedings as long as practical to allow the Cowie family to heal as much as they could" in the hope that the family would "support[] a lenient disposition at sentencing." Doc. 14-3 at 59 (internal quotation marks omitted). Further, there "simply was not enough time for defense counsel to fully investigate and evaluate the matter" before Wilhelm turned 21. *Id.* at 60–61. Moreover, the court found that defense counsel never would have recommended, and Wilhelm never would have agreed to, entering a plea while the case was pending before Judge Tamayo because of her reputation as a tough sentencer.

The court also addressed the likelihood of Wilhelm's receiving a reduced sentence under the Youthful Offender Act if he had been sentenced before turning 21. The court noted that the decision to award a reduced sentence under the Act was "optional." *Id.* at 61. And the court found that Judge Tamayo would not "have availed herself of that option" for the same reasons that Judge Dodson declined to exercise his discretion and award a downward departure. *Id.* The court also noted that at the sentencing hearing the Cowie family "strongly objected to any leniency," and it reasoned that "those objections would not have been less" if Wilhelm's sentencing had occurred more than a year earlier, while he was still eligible for youthful offender status. *Id.*

Wilhelm appealed. The Florida District Court of Appeal considered whether Wilhelm's "attorneys were ineffective for . . . miscalculating his age and not taking advantage of the . . . window

during which he qualified for sentencing as a youthful offender" and for "not owning up to this error at the sentencing hearing." *Wilhelm v. State*, 253 So. 3d 736, 737 (Fla. Dist. Ct. App. 2018).

On the claim that counsel was ineffective in failing to adequately advise Wilhelm about youthful offender status, the court acknowledged that Dobson and Smith failed to "correctly account for [Wilhelm's] age and that the window to seek the mitigated sentence expired just a few months after the charges were filed when [] Wilhelm turned 21." *Id.* at 738. But it affirmed the lower court's decision that there was no prejudice flowing from the attorneys' failure to correctly account for Wilhelm's age. *Id.* It explained that the "overarching defense strategy was to delay sentencing to give the victim's family time to heal, hoping that they would not oppose a mitigated sentence" and to wait until Judge Tamayo was no longer presiding over the case. *Id.* Given this strategy, the appellate court concluded that the "failure to explore sentencing under the Youthful Offender Act would simply not have made any difference in the outcome." *Id.* (internal quotation marks omitted).

The court also considered Wilhelm's claim that Dobson's failure to acknowledge at sentencing his mistake in calculating Wilhelm's age constituted ineffective assistance. *Id.* It rejected this claim, stating it had "no merit." *Id.*

The Florida Supreme Court denied Wilhelm's petition for review.

C.

Wilhelm, proceeding *pro se*, then filed a federal habeas petition raising several claims. Two of these claims are relevant to this appeal. First, Wilhelm alleged that his trial counsel was ineffective because of their mistake about his age, which deprived him of the opportunity to promptly enter a plea and to be sentenced under the Youthful Offender Act. Second, he claimed that he was denied effective assistance of counsel when at sentencing Dobson failed to admit to the mistake regarding Wilhelm's age, depriving him of an argument for leniency.

A magistrate judge recommended that the district court deny the petition. The magistrate judge accepted that the attorneys' performance was deficient because they failed "to know their client's age" and did not "talk to [Wilhelm] about the Youthful Offender Act until *after* he had already turned 21." Doc. 20 at 11 (emphasis in original). But the magistrate judge nevertheless concluded that the petition should be denied because the Florida District Court of Appeal's conclusion that Wilhelm "had not shown a reasonable probability of a different outcome" was entitled to deference. *Id.* at 15.

The magistrate judge also rejected Wilhelm's claim that he was denied effective assistance of counsel when Dobson failed to admit at sentencing to the error regarding Wilhelm's age. Although "counsel should have fallen on their sword and admitted their error," the magistrate judge concluded, "their failure to do so was not prejudicial" because "[t]he tenor of the statements made

by the trial court at sentencing, after considering the overwhelming amount of mitigation presented, show that it was unlikely that one additional factor, counsel's admission, would have tipped the scales in [Wilhelm's] favor." *Id.* at 18–19.

Wilhelm objected. The district court adopted the recommendation and denied Wilhelm's petition but granted him a certificate of appealability. This is Wilhelm's appeal.

II.

We review *de novo* a district court's denial of a petition for a writ of habeas corpus. *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138, 1146 (11th Cir. 2018). We liberally construe a *pro se* litigant's pleadings, holding them "to less stringent standards than formal pleadings drafted by lawyers." *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168 (11th Cir. 2014).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs our review of federal habeas petitions. *See* 28 U.S.C. § 2254(d). "AEDPA prescribes a highly deferential framework for evaluating issues previously decided in state court." *Sears v. Warden GDCP*, 73 F.4th 1269, 1279 (11th Cir. 2023). Under AEDPA, a federal court may not grant habeas relief on claims that were "adjudicated on the merits in [s]tate court" unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal 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 in the [s]tate court proceeding." 28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established law if the court "applie[d] a rule that contradicts the governing law" set forth by the Supreme Court or the state court confronted facts that were "materially indistinguishable" from Supreme Court precedent but arrived at a different result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). To meet the unreasonable application of law standard, "a prisoner must show far more than that the state court's decision was merely wrong or even clear error." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (internal quotation marks omitted). Rather, the decision must be "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Id.* (internal quotation marks omitted). This standard is "difficult to meet and . . . demands that state-court decisions be given the benefit of the doubt." *Raulerson v. Warden*, 928 F.3d 987, 996 (11th Cir. 2019) (internal quotation marks omitted).

We also must defer to a state court's determination of facts unless the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(2). "We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015) (alteration adopted) (internal quotation marks omitted). We presume that a state court's factual determinations are correct, absent clear and convincing evidence to the contrary. *See Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc).

III.

The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). For claims of ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's performance was deficient and (2) he was prejudiced by the deficient performance. *Id.* at 687. A court deciding an ineffectiveness claim need not "address both components of the inquiry if the [petitioner] makes an insufficient showing on one." *Id.* at 697.

We focus today on *Strickland*'s prejudice requirement. To establish prejudice, a 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 one "sufficient to undermine confidence in the outcome." *Id.* When applying AEDPA to this prejudice standard, "we must decide whether the state court's conclusion that [counsel's] performance . . . didn't prejudice [the petitioner]—that there was no substantial likelihood of a different result—was so obviously wrong that its error lies beyond any possibility for fair-minded disagreement." *Pye*, 50 F.4th at 1041–42 (internal quotation marks omitted).

Wilhelm argues that his attorneys were ineffective in two ways: by (1) miscalculating his age and thus denying him the opportunity to be sentenced as a youthful offender and (2) failing to

admit at sentencing to the error in calculating his age and thus depriving him of an argument that he should receive a lenient sentence due to counsel's error. We address each issue in turn.

A.

We begin with the claim that Wilhelm received ineffective assistance of counsel because his attorneys miscalculated his age, which deprived him of the opportunity to seek a reduced sentence under the Youthful Offender Act. To demonstrate prejudice for this claim, Wilhelm had to show that if he had been advised about the Youthful Offender Act in a timely manner, there was a reasonable probability that he would have (1) changed his plea and been sentenced before turning 21 and (2) received a reduced sentence under the Act. *See Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 479 (11th Cir. 2012); *Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1210–11 (11th Cir. 2021).

The Florida District Court of Appeal's determination that Wilhelm failed to demonstrate prejudice is entitled to deference. There was ample evidence in the record to support the state court's conclusion that, even if Wilhelm had been properly advised of the Youthful Offender Act, there was no reasonable probability that he would have changed his plea and been sentenced before he turned 21. The record from the evidentiary hearing shows that the defense's strategy was to delay sentencing in the hope that (1) the Cowie family would heal and support a lighter sentence and (2) Wilhelm could avoid being sentenced by Judge Tamayo, given her reputation for imposing stiff sentences. For Wilhelm to have

been eligible for youthful offender status, he would have had to jettison his strategy of delay and go forward with the sentencing hearing only about four months after Ashley's death and while the case was still assigned to Judge Tamayo.

There was ample evidence in the record, too, to support the conclusion that even if Wilhelm had been sentenced before he turned 21, there was no reasonable probability that he would have received youthful offender status and a reduced sentence. Under Florida law, an eligible defendant does not automatically receive youthful offender status. Instead, the decision to grant youthful offender status is left to the discretion of the trial judge. *See* Fla. Stat. § 958.04 (2012); *Jackson v. State*, 191 So. 3d 423, 427 (Fla. 2016) (describing the "discretionary nature of youthful offender sentencing"). Dobson testified that he did not believe that Judge Tamayo would have exercised her discretion to grant Wilhelm youthful offender status. Indeed, the same considerations that led Judge Dodson to deny a downward departure at sentencing—that Wilhelm kept a small arsenal of weapons in his bedroom and handled firearms while under the influence of drugs and alcohol—would have provided a basis for denying youthful offender status.

Because the state court's determination that Wilhelm failed to establish prejudice was not "so obviously wrong that its error lies beyond any possibility for fairminded disagreement," *Pye*, 50 F.4th at 1041–42 (internal quotation marks omitted), we conclude that the decision of the Florida District Court of Appeal is

entitled to AEDPA deference. Thus, the district court properly denied habeas relief on this claim.

B.

We now turn to Wilhelm's claim that counsel was ineffective by failing to admit at sentencing to their error regarding his age and the availability of youthful offender status. Wilhelm argues that the attorneys had a conflict of interest and chose to protect their professional reputations by failing to disclose their mistake rather than to advocate for him, which deprived him of a potential argument for leniency.

The Florida District Court of Appeal summarily rejected this claim, stating that it had "no merit." *Wilhelm*, 253 So. 3d at 738. This decision is entitled to deference because it was reasonable for the state court to conclude that Wilhelm failed to establish prejudice.[7] At the sentencing hearing, Wilhelm's attorneys presented a thorough and well-developed argument for a downward departure based on Wilhelm's remorse, cooperation with law enforcement,

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[7] Wilhelm argues that we should review this claim *de novo* because the Florida District Court of Appeal disposed of this claim in a single sentence, stating that the claim had no merit without explaining the rationale underlying its decision. This argument assumes that for AEDPA deference to apply, a state court must set forth the rationale for its decision. But the United States Supreme Court has recognized that a state court decision may be considered an adjudication on the merits and entitled to AEDPA deference even if it contains no reasoning or explanation. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011) (explaining that AEDPA deference may attach to a state court decision "unaccompanied by an explanation").

and youth, as well as the accidental nature of the shooting. And even though Dobson did not acknowledge his error in calculating Wilhelm's age, he did ask the court at sentencing to consider what Wilhelm's sentence would have been under the Youthful Offender Act. He also discussed the difficulties posed by the brief window during which Wilhelm could seek youthful offender status. Judge Dodson's statements at sentencing about why he refused to exercise his discretion to grant a downward departure—that Wilhelm kept a small arsenal of weapons in his college bedroom and played with firearms while using alcohol and drugs—suggest that he would have imposed the same sentence even if counsel had admitted their mistake about Wilhelm's age. Because the state court decision rejecting this claim was not "so obviously wrong that its error lies beyond any possibility for fairminded disagreement," it is entitled to deference. *Pye*, 50 F.4th at 1041–42 (internal quotation marks omitted). The district court did not err in denying habeas relief.

AFFIRMED.

Appendix – B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

EVAN C. WILHELM,

Petitioner,

v. 4:19cv572–WS/HTC

RICKY DIXON, as Secretary of the
Florida Department of Corrections,

Respondent.

ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Before the court is the magistrate judge's report and recommendation (ECF No. 23) docketed May 2, 2022. The magistrate judge recommends that Petitioner's amended petition for writ of habeas corpus be DENIED. Petitioner has filed objections (ECF No. 23) to the magistrate judge's report and recommendation, and those objections have been carefully reviewed by the undersigned.

Upon review of the record in light of Petitioner's objections, the court has determined that the magistrate judge's report and recommendation is due to be adopted. Like the magistrate judge, the undersigned finds that Petitioner has failed

to demonstrate that he is entitled to relief under 28 U.S.C. § 2254. The court is nonetheless sympathetic with Petitioner's request for a certificate of appealability as to Grounds One and Two of his amended habeas corpus petition. As argued by Petitioner, reasonable jurists might disagree as to whether counsels' deficient performance was prejudicial to Petitioner.

Accordingly, it is ORDERED:

1. The magistrate judge's report and recommendation (ECF No. 20) is hereby ADOPTED and incorporated by reference into this order.

2. Petitioner's amended petition for writ of habeas corpus (ECF No. 8) is DENIED.

3. The clerk shall enter judgment stating: "Petitioner's petition for writ of habeas corpus is DENIED."

4. A certificate of appealability is GRANTED as to the issues raised in Counts One and Two of Petitioner's amended habeas petition.

DONE AND ORDERED this 13th day of May, 2022.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

EVAN C. WILHELM,

Petitioner,

v. Case No. 4:19cv572–WS/HTC

RICKY DIXON, as Secretary of the Florida Department of Corrections,

Respondent.
_____/

JUDGMENT

Petitioner's petition for writ of habeas corpus is DENIED.

JESSICA J LYUBLANOVITS,
CLERK OF COURT

May 13, 2022
DATE

s/ Ronnell Barker
DEPUTY CLERK

Appendix – C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

EVAN C. WILHELM,

Petitioner,

v. Case No. 4:19cv572-WS-HTC

RICKY D. DIXON,[1]

Respondent.
_____/

ORDER and REPORT AND RECOMMENDATION

Petitioner, Evan C. Wilhelm, proceeding *pro se*, filed an amended petition under 28 U.S.C. § 2254 challenging his conviction in the circuit court of Leon County, Florida, in 2011 CF 104. ECF Doc. 8. Petitioner raises three (3) grounds of ineffective assistance of trial counsel. The matter was referred to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After considering the amended petition and supporting memorandum, the State's response (ECF Doc. 14), and Petitioner's reply (ECF Doc. 18), the undersigned recommends the Petition be DENIED without an evidentiary hearing.

[1] Ricky D. Dixon succeeded Mark S. Inch as Secretary of the Florida Department of Corrections and is automatically substituted as the respondent. *See* Fed. R. Civ. P. 25(d). The clerk is directed to update the case file information to reflect Ricky D. Dixon as the Respondent.

I. BACKGROUND

A. Offense and Conviction

On January 9, 2011, Petitioner, a student at Florida State University, was drinking and playing with a loaded AK-47 semi-automatic rifle in his apartment, pointing it at various people who had gathered for a fraternity party. *Wilhelm v. State*, 253 So. 3d 736, 737 (Fla. 1st DCA 2018). As he was pointing the firearm at one young woman, Ashley Cowie, the firearm discharged, striking her in the chest and killing her. *Id.* The same bullet also injured another student, Keith Savino. Petitioner was charged in a 5-count information with manslaughter of Cowie by shooting with a firearm, possession of a firearm on school property, culpable negligence with injury for injuring Savino; possession of cannabis, and possession of drug paraphernalia. *Id.*; ECF Doc. 14-1 at 15.

At the time Petitioner committed the crime, he was four (4) months shy of his 21st birthday. ECF Doc. 14-4 at 101. Because Petitioner was not yet 21, he could have sought to be sentenced under Florida's Youthful Offender Act, Fla. Stat. § 958.011, *et seq.* (the "Act").[2] To take advantage of the Act, however, Petitioner would have had to plead guilty and be sentenced *before* his 21st birthday. *See* Fla.

[2] The maximum sentence under the Act is 6 years of incarceration. Fla. Stat. § 958.04(2)(d).

Stat. § 958.04 ("[t]he court may sentence as a youthful offender" any person who was "younger than 21 years of age at the time sentence is imposed.")[3].

However, retained counsel, Stephen Dobson and Richard Smith, mistakenly believed their client was 19 – not 20 – at the time of the offense, ECF Doc. 14-3 at 59, and, thus, did not discuss the impending deadline to take advantage of the Act with Petitioner prior to Petitioner's 21st birthday. ECF Doc. 14-4 at 118. After discovering the error, in November of 2011, Doc. 14-4 at 116, Petitioner's father, also a lawyer, filed a notice of appearance in the case, *id.* at 120, and hired a third counsel, Michael Alan Ceballos. *Id.* at 121.

On March 30, 2012, the Assistant State Attorney faxed a plea offer to counsel Dobson and Smith, offering 10 years in FDOC custody followed by 5 years of probation and stating that it expired on April 26, 2012. ECF Doc. 14-6 at 9-10. That offer was not accepted. It is also the subject of Ground Three of the petition and, as discussed, in that section, Petitioner disputes he was advised of that plea or provided information sufficient to make a knowing decision to reject the plea.

On April 26, 2012, Petitioner entered a negotiated open plea of no contest to Count 1, Manslaughter (maximum penalty 30 years DOC); Count 2, Possession of Firearm on School Property (maximum penalty 5 years DOC); and Count 3,

[3] This part of the Youthful Offender Statute was amended in 2019 to apply "if such crime was committed before the defendant turned 21 years of age" rather than "if the offender is younger than 21 years of age at the time sentence is imposed." Fla. Stat. § 958.04(1)(b).

Culpable Negligence with Injury (maximum penalty of 1 year DOC). Under the terms of the agreement, the State agreed to Nolle Pross Counts 4 and 5. ECF Doc. 14-1 at 38.

On June 15, 2012, the court rejected a downward departure argument and sentenced Petitioner to 20 years in the Department of Corrections followed by 10 years of probation.

B. Postconviction Procedural History and Timeliness under the Antiterrorism Effective Death Penalty Act

Generally, under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a petitioner has one (1) year from when the judgment becomes final to file an application for habeas relief. 28 U.S.C. § 2244(d)(1). Such time is tolled by the filing and pendency of post-conviction motions, such as a Rule 3.800 or 3.850 motion. 28 U.S.C. § 2244(d)(2). As discussed below, the instant petition is timely.

Petitioner filed a direct appeal of his conviction and sentence to the First District Court of Appeals ("First DCA"), but the appeal was voluntarily dismissed on March 18, 2013. ECF Doc. 14-2 at 102, First DCA Case No.: 1D12-3420. On June 3, 2013, seventy-seven (77) days later, Petitioner filed two postconviction motions. The first was a Motion to Correct Sentence, *id.* at 106, which was granted in part and denied in part on February 9, 2017. Petitioner appealed the state court's decision to the First DCA. *See* First DCA Case No.: 1D17-0571.

The second was a 3.850 Motion for Post-Conviction Relief, ECF Doc. 14-6 at 65. It was corrected on June 28, 2013, ECF Doc. 14-2 at 118; an evidentiary hearing was held on January 14-15, 2016, ECF Doc. 14-4 at 85; and the state court denied the motion on April 12, 2016.[4] ECF Doc. 14-3 at 51. On May 17, 2016, following a summary denial of a motion for rehearing, Petitioner appealed the state court's denial to the First DCA. *See* First DCA Case No.: 1D16-2262.

The appeals in First DCA Case Nos. 1D16-2262 and 1D17-0571 were consolidated, and the First DCA entered a joint opinion affirming the denial of both motions on June 4, 2018. ECF Doc. 14-10 at 17. On June 19, 2018, Plaintiff filed a motion for rehearing. *Id.* at 22. Although the First DCA denied the motion, it granted clarification and, by superseding written opinion, once again affirmed the circuit court's denial of post-conviction relief. *Id.* at 36; *Wilhelm v. State* (1D17-0571), 253 So. 3d 736 (Fla. 1st DCA, August 10, 2018). The First DCA issued its mandate on August 31, 2018. ECF Doc. 14-10 at 41. Petitioner sought review from the Florida Supreme Court, which was denied. *Wilhelm v. State*, No. SC18-1519, 2018 WL 6704724, at *1 (Fla. Dec. 19, 2018); ECF Doc. 14-11 at 2.

Before the First DCA's mandate was entered, however, Petitioner filed a second or successive 3.850 petition on January 16, 2018. The state court denied the motion on June 27, 2018. Petitioner appealed the court's denial to the First DCA.

[4] Because it is not relevant to these proceedings, the undersigned has left out the interim motions relating to the recusal of counsel that were filed by the State after the 3.850 motion was filed.

See First DCA Case No.: 1D18-3911. The First DCA issued a *per curiam* affirmance without written opinion on July 22, 2019. *See Wilhelm v. State* (1D18-3911), 279 So. 3d 71 (Fla. 1st DCA July 22, 2019). The First DCA issued its mandate on September 27, 2019. ECF Doc. 14-12 at 127. Petitioner filed the instant federal petition on November 19, 2019. Because only 131 days ran off of the AEDPA one-year limit, the Petition is timely filed.

II. LEGAL STANDARDS

A. The Antiterrorism Effective Death Penalty Act ("AEDPA")

The AEDPA governs a state prisoner's petition for habeas corpus relief. 28 U.S.C. § 2254. Under that act, relief may only be granted on a claim adjudicated on the merits in state court if the adjudication:

> (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). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). A state court's violation of state law is not enough to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010).

"Clearly established federal law" consists of the governing legal principles set forth in the decisions of the United States Supreme Court when the state court issued its decision. *White*, 134 S. Ct. at 1702; *Casey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Habeas relief is appropriate only if the state court decision was "contrary to, or an unreasonable application of," that federal law. 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision."

Harrington v. Richter, 562 U.S. 86, 101 (2011). "[T]his standard is difficult to meet because it was meant to be." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018).

Finally, when reviewing a claim under 28 U.S.C. § 2254(d), a federal court must remember that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.").

B. Ineffective Assistance of Trial Counsel ("IATC") Claims

Petitioner's grounds for relief are premised on ineffective assistance of trial counsel. An IATC claim requires a showing that (1) counsel's performance during representation fell below an objective standard of reasonableness, and (2) prejudice resulted, *i.e.*, that a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *Id.* at 689. The defendant bears the burden of proving that counsel's performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688-89

Strickland's prejudice prong requires a petitioner to allege more than simply that counsel's conduct might have had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. The petitioner must show a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Bare allegations the petitioner was prejudiced by counsel's performance are not enough. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir. 1987).

III. ANALYSIS

Petitioner raises three (3) claims of ineffective assistance of counsel: (1) counsel miscalculated his age and failed to take advantage of the sentencing window during which he qualified for sentencing as a youthful offender; (2) counsel was ineffective for failing to admit to their error, which failure was a result of a conflict of interest between zealously representing Petitioner and protecting their reputations; and (3) counsel failed to convey sufficient information about a 10-year plea deal for Petitioner to make an informed decision on it. Respondent admits Petitioner exhausted these claims by raising them in state postconviction motions and on appeal to the First DCA, which issued an opinion affirming the denial of each

of the state claims relating to the current federal claims. *Wilhelm v. State*, 253 So. 3d 736 (Fla. 1st DCA 2018).[5]

Respondent argues; however, that the grounds fail on their merits under the *Strickland* analysis, particularly when analyzed through the highly deferential lens this Court is to apply to the state court's determinations. For the reasons set forth below, the undersigned agrees.

A. Ground One: IATC for Allowing Youthful Offender Act Eligibility to Expire

Petitioner, who was 20 years old when he committed the offense, argues he was prejudiced by counsel's failure to advise him of his right to plead guilty and seek sentencing under Florida's Youthful Offender Act prior to his 21st birthday. ECF Doc. 8 at 5. Petitioner's family hired counsel Stephen Dobson and Richard Smith on January 10, 2011, the day after the incident, ECF Doc. 14-4 at 186. Wilhelm turned twenty-one on May 2, 2011. *Id.* at 4-5. Counsel, however, were unaware of Petitioner's impending birthday, believing instead that he was 19 at the time of the offense and, thus, did not discuss the Youthful Offender Act with him until October 2011, after he had already turned 21.[6]

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[5] Petitioner filed notice to invoke the discretionary jurisdiction of the Florida Supreme Court, but the Florida Supreme Court declined to exercise jurisdiction by order rendered December 19, 2018. *Wilhelm v. State*, — So.3d —, 2018 WL 6704724 (Fla. 2018).

[6] It was not until November that Petitioner's father uncovered the error and the expiration of the Petitioner's youthful offender status. ECF Doc. 14-4 at 116. After discovering the error, Petitioner's father, who was also a lawyer, filed a notice of appearance, *id.* at 120, and also retained new counsel, Michael Alan Ceballos. *Id.* at 121.

The First DCA was the last state court to consider this claim. In doing so, the court determined no relief was warranted because, although counsel admitted they were wrong about Petitioner's age, this error did not affect their "overarching defense strategy [] to delay sentencing to give the victim's family time to heal, hoping that they would not oppose a mitigated sentence." *Wilhelm v. State*, 253 So. 3d 736, 738 (Fla. Dist. Ct. App. 2018). Also, counsel testified they also wanted to delay the plea and sentencing to avoid having Petitioner sentenced by Judge Tamayo, the assigned judge at the time and whom they believed was generally more inclined to give out lengthier prison sentences. *Id.* Given counsel's strategy, the court concluded "the failure to explore sentencing under the Youthful Offender Act would simply not have made any difference in the outcome." *Id.*

The undersigned finds this conclusion was not contrary to, and did not involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d). As stated above, to show counsel was ineffective, Petitioner must not only meet the performance prong, but also the prejudice prong of *Strickland*. It cannot seriously be disputed that counsel's failure to know their client's age was deficient. As a result of this failure, counsel did not talk to Petitioner about the Youthful Offender Act until *after* he had already turned 21 and could no longer benefit from it. That was also deficient. *See* ECF Doc. 14-3 at 59 (trial court's discussion of counsel's testimony at the 3.850 hearing); ECF

Doc. 14-4 at 199 ("I've got to admit, we missed that. We didn't tell him that he could qualify for a youthful sentence.").

Petitioner, however, did not show a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 689. First, according to counsel, even were they aware of Petitioner's age, they would not have taken advantage of his youthful offender status because doing so would have been contrary to their strategy to delay sentencing and would not have given them sufficient time to investigate the incident.

Specifically, according to counsel they wanted to delay sentencing in hopes that with additional time to heal, the Cowie family would be more supportive of a lighter sentence. Counsel also wanted to delay sentencing because Judge Tamayo was leaving, and the case would be assigned to a new judge, who, hopefully, would be more favorable when it comes to sentencing. Counsel Dobson testified at the January 14, 2016 evidentiary hearing that Judge Tamayo had a reputation for being "very pro state in her sentencing, giving longer sentences than the defense would like in most cases." ECF Doc. 14-8 at 53. Dobson further testified that in his discussions with Petitioner, Petitioner indicated he did not want to be sentenced by Judge Tamayo and said "You know, Tamayo is leaving, don't act stupid" and allow him to be sentenced by her. *Id.*

Petitioner argues his comment about Judge Tamayo should have no bearing because it was made in January 2012, after he had already turned 21, and thus has

no bearing on what he would have done back in 2011. ECF Doc. 18 at 12. The undersigned disagrees. The defense's feelings regarding their chances of success before Judge Tamayo is relevant to whether Petitioner would have pushed for sentencing under the Youthful Offender Act knowing that he would be sentenced by Judge Tamayo, or, as the state courts determined, regardless of whether Petitioner could have taken advantage of the Youthful Offender Act, he would not have do so because it meant being sentenced by Judge Tamayo. In other words, Petitioner's comment about Judge Tamayo merely corroborates defense counsel's concerns regarding Judge Tamayo back in 2011.

Also, when counsel were initially retained, Petitioner told them "he didn't pull the trigger, that he had no recollection of pulling the trigger, and then the gun went off." ECF Doc. 14-4 at 229; ECF Doc. 14-8 at 84. Thus, counsel needed time to investigate whether Petitioner may have had a defense to the assert i.e., whether the gun may have misfired. ECF Doc. 14-8 at 84. According to counsel, "we would never have recommended that we rush in without doing any investigation, without looking at the facts, and plead him guilty in six weeks." ECF Doc. 14-4 at 199-200. Indeed, as Smith stated at the evidentiary hearing on the post-conviction motions, "The problem is – is the course of action that everyone is suggesting that would have been best to take back then had no guarantee that Mr. Wilhelm would have been treated as a youthful offender. All it would have guaranteed is that he opened –

entered an open plea without any investigation taking place in this case." ECF Doc. 14-5 at 44-45.

Petitioner argues the state courts erred in giving credence to counsel's after-the-fact attempt to cloak an error as a strategic decision because counsel's conduct should be viewed "*at the time of the event*". ECF Doc. 18 at 10 (emphasis in original). Petitioner's argument, however, misconstrues the state court's analysis. The state courts did not determine counsel's conduct was not deficient because it was based on a strategic decision. Instead, the courts found counsel's explanation to be relevant to the issue of prejudice -- i.e., whether counsel's knowledge of Petitioner's correct age would have made a difference -- and determined it would not. In fact, Petitioner admitted at the post-conviction evidentiary hearing that even after learning about the Youthful Offender Act (but before realizing it had expired), "[t]he course of the defense didn't change. It was still to wait. It was still a very much do-nothing approach." ECF Doc. 14-8 at 145.

Second, application of the Youthful Offender Act is discretionary, and there was considerable evidence that the sentencing judge would not be likely to apply it in this case. *See Fla.* Stat. § 958.04(1) (a judge "may sentence as a youthful offender" any person who meets the requirements). Counsel testified he did not believe Judge Tamayo would have exercised that discretion in favor of Petitioner, ECF Doc. 14-4 at 200 ("It's absolutely left to the discretion of the court. And my honest opinion as a lawyer at that time was Judge Tamayo would not have done that

anyway."). Indeed, despite getting a different judge at sentencing, Judge Dodson, counsel was unsuccessful in getting the court to agree to a downward departure.

After hearing arguments in support of a downward departure, Judge Dodson stated, "This is a case that may very well fall within the downward departure exception, but I do not find a downward departure to be appropriate." ECF Doc. 14-2 at 89. The judge continued:

> I tell you, I look at the small arsenal that was in that fraternity house room and it scares the dickens out of me. And to think that we've got young people on these campuses that have these kinds of small arsenals in their room, that's a tragedy waiting to happen. And it is very, very sad on the Cowie family's part, the Wilhelm's family part. And it's just real, real scary. Those of you that are here today that are in college and all now, let this be a message to you because it really is extremely scary. And when you're young, sometimes you think you're invincible or invisible, but you start mixing guns and alcohol and drugs and all of that, and this is a classic example of what's going to happen.

Id. at 89-90.

Considering the statements made by the sentencing judge, along with the testimony provided by counsel, and the deference to be accorded to the state courts, the undersigned finds the state courts did not act contrary to *Strickland* or misapply the facts in determining that Petitioner had not shown a reasonable probability of a different outcome if counsel had been able to argue the Youthful Offender Act. Petitioner, therefore, is not entitled to habeas relief on Ground One.

B. Ground Two: IATC Based on a Conflict of Interest"

In a related argument, Petitioner argues, in Ground Two, that counsel's error in Petitioner's age created a conflict of interest between counsel and Petitioner, because it put counsel in the position of either helping Petitioner by admitting their error at sentencing or protecting their professional reputations and malpractice coverage by not revealing their error. ECF Doc. 18 at 16-26.

According to Petitioner, on January 27, 2012, Dobson personally promised Petitioner's father he would confess his miscalculation of Petitioner's age to the court as mitigation, explain that they considered Petitioner an "ideal" candidate under the Youthful Offender Act, and ask the court for a lawful sentence that resembled a Youthful Offender type sentence of approximately 6 years. *Id.* at 9. It is undisputed, however, that Dobson did not admit counsel's error at sentencing. Petitioner takes issue with the fact that counsel did not do so even after the prosecutor argued, "Clearly, youthful offender does not apply. The defendant at the time this happened was twenty years old. Had he made the decision to come in and enter a plea, he would have been able to get sentenced pursuant to that statute. But he chose not to." ECF Doc. 14-2 at 76.

Petitioner further argues this Court should review this issue *de novo* because it was not adjudicated on the merits by the First DCA or lower state court. Specifically, Petitioner argues neither court's written decisions addressed the issue of a conflict of interest. ECF Doc. 18 at 21. The undersigned disagrees. While it is

true that neither the First DCA nor the lower state court discussed whether a conflict existed, it is clear the lower state court specifically addressed Petitioner's argument "that attorney Dobson represented that he would apprise the Court of the oversight with regard to the running of youthful offender status at sentencing and complains that Mr. Dobson failed to do so." ECF Doc. 14-7 at 86. Thus, the lower court addressed the conflict argument on the merits and its decision is entitled to deference.[7]

The lower court rejected this claim, finding that despite any conflict counsel vigorously defended Petitioner and presented a great amount of mitigating evidence.[8] The court explained that counsel raised the Youthful Offender Act in the sentencing memo and how "at the time of the event and because of his youth, the Defendant was eligible to be sentenced under the Youth Offender Act" but that "he is no longer statutorily eligible for such a sentence." ECF Doc. 14-3 at 60. Counsel also described the unfairness of the situation where "a Defendant turns 21 years of age just weeks or months after the event" and noted that counsel "can be placed in

[7] The First DCA found "no merit to the argument that counsel's failure to own up to miscalculating Mr. Wilhelm's age at the sentencing hearing created a conflict of interest and ineffective assistance." *Wilhelm v. State*, 253 So. 3d 736, 738 (Fla. Dist. Ct. App. 2018). The court, however, did not provide a rationale for its decision. Thus, this Court should "look through" that decision to the rationale provided in the lower court's April 11, 2016 order denying the postconviction motion. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

[8] As the Respondent points out, even under a conflict of interest argument, Petitioner must still meet the prejudice prong under *Strickland*. ECF Doc. 14 at 41. Petitioner does not dispute this legal principle. ECF Doc. 18 at 17.

the impossible position of having to elect between a thorough and complete defense or alternatively to rush to a sentencing hearing." *Id.*

In fact, defense counsel's sentencing memorandum a) explained defendant's remorse; b) described his full cooperation with law enforcement; c) asserted that the incident was entirely accidental; d) raised the issue of the defendant's youth and immaturity; and e) asserted bases for downward departure as well as rehabilitative conduct. Defense counsel's efforts to mitigate sentencing was not limited to just the sentencing memo, but included the presentation of significant mitigation evidence, which, as the lower court noted, included: (1) at least 25 letters from individuals that essentially attested to Mr. Wilhelm's character, his genuine remorse, and further requested a minimum sentence and (2) testimony from twelve (12) witnesses who testified on behalf of Petitioner. ECF Doc. 14-3 at 63-65.

Thus, while counsel should have fallen on the sword and admitted their error, their failure to do so was not prejudicial. As the state court recognized, counsel were diligent in their efforts to present mitigation. They explained to the judge the unfairness Petitioner faced with regard to the Youthful Offender's triggering date being the offender's age at sentencing rather than at commission of the crime. They offered many letters, biographical history and witnesses in support of Petitioner, and they "argued vigorously for leniency and a downward departure." ECF Doc. 14-3 at 65.

Despite the volume of mitigating evidence that was presented to Judge Dodson and the court's acknowledgment that this was a case for a downward departure, the circuit court sentenced Petitioner to 20 years because of the circumstances of the offense. The tenor of the statements made by the trial court at sentencing, after considering the overwhelming amount of mitigation presented, show that it was unlikely one additional factor, counsel's admission, would have tipped the scales in Petitioner's favor.

Moreover, Petitioner's argument of prejudice is undermined by the fact that at the time of sentencing, Petitioner was represented by four (4) attorneys: Dobson, Smith, Petitioner's father, and Ceballos. Either Petitioner's father or Ceballos could have easily told the court about Dobson and Smith's error if they felt such information would tip the scales. Petitioner is not entitled to relief on Ground Two.

C. Ground Three: IATC as to Plea Negotiations

As stated above, on March 30, 2012, the Assistant State Attorney faxed a plea offer to counsel Dobson and Smith, offering 10 years in FDOC custody followed by 5 years of probation and stating that it expired on April 26, 2012. ECF Doc. 14-6 at 9-10. Petitioner argues in Ground Three that counsel failed to convey to him two previous offers that had been made prior to the 10-year offer, one for 20 years, and one for 15 years. According to Petitioner, without knowledge of this plea history, Petitioner was left making an uninformed decision regarding the 10-year plea offer.

Petitioner did not know, for example, that the 10-year offer was a "drop dead" final offer. ECF Doc. 18 at 27.

In Petitioner's initial 3.850 motion, Petitioner argued that counsel never informed him of the 10-year plea. ECF Doc. 14-6 at 105. The state court, however, found Dobson and Smith's testimonies that the plea offer was communicated to be credible as it was consistent with the other evidence presented. ECF Doc. 14-3 at 58 (April 12, 2016). The state court also determined the "evidence establishes that Mr. Wilhelm was simply not prepared to agree to a sentence of 10 years in the Department of Corrections." *Id.*

Given the state court's conclusion, Petitioner revised this argument in his successive 3.850 motion, filed January 16, 2018, accepting, "in arguendo", that the 10-year plea offer was presented to him. ECF Doc. 14-12 at 14. Thus, rather than contend he did not know about the plea, Petitioner argued in the successive motion, as he does here, that he was not given all the facts needed to be fully informed in rejecting that 10-year plea offer. ECF Doc. 14-12 at 9. The state court summarily rejected Petitioner's argument. The court stated it had "reservations that the offers were formal enough to requirement conveyance" and found a lack of prejudice, because Petitioner "would not have accepted either plea offer." ECF Doc. 14-12 at 45.

Although the state court did not specifically address how the purported lack of knowledge of those plea offers impacted Petitioner's ability to make an informed

decision regarding the 10-year plea, this Court may nonetheless assume the lower court denied this claim for relief on the merits. "Ordinarily, when a state court addresses some claims raised by a defendant, but not a claim that is later raised in a federal habeas proceeding, the federal habeas court presumes that the state court denied the claim on the merits."[9] *Julio Garcia, IV v. Sec'y, Dep't of Corr.*, 2021 WL 1516070, at *9 (M.D. Fla. Apr. 16, 2021) (citing *Johnson v. Williams*, 568 U.S. 289 (2013)). Neither party argues the state court did not address this claim on the merits.

The standard set forth in *Strickland* applies to ineffective assistance of counsel claims arising out of the plea process, including to the negotiation and consideration of pleas that are rejected or lapse. *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). "Counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution." *Diaz v. United States*, 930 F.2d 832, 834 (11th Cir. 1991). This obligation includes informing a client about formal plea offers presented by the government and correctly advise a client about such offers. Failure to do so is ineffective assistance of counsel. *See Missouri v. Frye*, 566 U.S. 134, 144-45 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012).

[9] Although this presumption is rebuttable, particularly where it appears the lower court inadvertently overlooked the argument, the result would be the same even if this Court were to apply a *de novo* standard of review. *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1245 (11th Cir. 2017).

In the context of a rejected plea offer, the prejudice prong requires the movant to show "a reasonable probability 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*, 751 F.3d at 1222 (quoting *Lafler*, 566 U.S. at 164).

As stated above, in the initial 3.850 motion, Petitioner argued counsel did not advise him of the 10-year plea deal. As Petitioner acknowledge in his reply, "the state court credited Dobson and Smith's account that the 10-year offer was conveyed." ECF Doc. 18 at 31. Petitioner specifically states he "does not challenge this finding" here. *Id.* In addition to finding Petitioner's position to be less credible, the circuit court also specifically found that Petitioner "was simply not prepared to agree to a sentence of 10 years in the Department of Corrections." ECF Doc. 14-3 at 58. Furthermore, the first 3.850 judge credited counsel Smith's testimony that "his client's position was that he would only consider up to two years in the Department of Corrections" and that "the client's father Robert Wilhelm indicated they would never accept more than three years." ECF Doc. 14-3 at 57.

The circuit court's findings, particularly its credibility determinations, are entitled to deference and support a finding that Petitioner would not have accepted

the 10-year plea, regardless of what he had been told about that plea. This finding is further supported by Petitioner's testimony (when he claimed he had not been told about the 10-year plea), that he would have accepted the plea without knowing more and even without any additional information. ECF Doc. 14 at 56-57. Thus, Petitioner cannot show he was prejudiced by counsel's failure to advise him of the plea negotiation history going from 20 years, then to 15, and finally to 10.

In the reply, Petitioner offers only his own after-the-fact claims that he would have accepted a ten-year plea. However, "after the fact testimony concerning [the movant's] desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer." *Diaz v. United States*, 930 F.2d 832, 834 (11th Cir. 1991). For these reasons, Petitioner is not entitled to habeas relief on Ground Three.

IV. CONCLUSION

A. Evidentiary Hearing

The undersigned finds that an evidentiary hearing is not warranted. In deciding whether to grant an evidentiary hearing, this Court must consider "whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Additionally, this Court must take into account the deferential standards prescribed by § 2254. *See id.* Upon consideration,

the undersigned finds that the claims in this case can be resolved without an evidentiary hearing. *See Schriro*, 550 U.S. at 474.

B. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides: "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." 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)." 28 U.S.C. § 2254 Rule 11(a). A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. 28 U.S.C. § 2254 Rule 11(b).

After review of the record, the Court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended that the district court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Rule 11(a), Rules Governing Section 2254 Cases. If there is an objection to this recommendation by either party, that party may bring such argument to the attention of the district judge in the objections permitted to this report and recommendation.

Accordingly, it is ORDERED: the clerk shall update the electronic docket to substitute Ricky Dixon, in place of Mark Inch, as the current Secretary of the Florida Department of Corrections.

It is also respectfully RECOMMENDED:

1. That the amended petition, ECF Doc. 8, be DENIED without an evidentiary hearing.

2. That a certificate of appealability be DENIED.

3. That the clerk be directed to close the file.

At Pensacola, Florida, this 28th day of February, 2022.

s/ Hope Thai Cannon

HOPE THAI CANNON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed **within fourteen (14) days** of the date of the Report and Recommendation. Any different deadline that may appear on the electronic docket is for the court's internal use only and does not control. An objecting party must serve a copy of its objections upon all other parties. A party who fails to object to the magistrate judge's findings or recommendations contained in a report and recommendation waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.