UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PHILLIP KESSELL,

Petitioner/Appellant,

v.

RICKY DIXON, et al.,

Respondents/Appellees.

CASE NO: 14-10395

CASE BELOW: 12-CV-14402 (S.D. Fla.)

MOTION FOR CERTIFICATE OF APPEALABILITY

Petitioner/Appellant Phillip Kessell ("Mr. Kessell"), a Florida inmate, through counsel, requests this Court to issue a certificate of appealability ("COA") authorizing Mr. Kessell to raise the following issues in a full appeal of the denial of his 28 U.S.C. § 2254 petition alleging ineffective assistance of counsel:

> (1) Whether the District Court erred in holding that the decision of the Florida Court of Appeals denying Mr. Kessell's Rule 3.850 was a merits determination not based on an unreasonable determination of the facts where the Court of Appeals relied on a materially incomplete record and failed to allow further factual development;
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> (2) Whether the District Court erred in holding that the decision of the Florida Court of Appeals was not based on an unreasonable determination of the facts in light of the record; and,
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> (3) Whether the District Court erred in concluding that the decision of the Florida Court of Appeals was not based on an unreasonable application of clearly established Federal law or otherwise incorrect.

In support thereof, Mr. Kessell would show as follows:

I. Facts and Procedural History

The facts underlying the state's charges against Mr. Kessell are not in dispute. On July 25, 2002, he tried repeatedly to contact his ex-girlfriend Heidi Lantini, who did not respond. Mr. Kessell saw Ms. Lantini on a date with another man. He then hid in the bushes outside of her house. When Ms. Lantini arrived, Mr. Kessell attacked her with a hammer, causing severe head injuries. Mr. Kessell put Ms. Lantini in his car and drove to a construction site. Ms. Lantini was later found nearby after escaping.

On August 15, 2002, the state of Florida brought five charges via information: attempted first degree murder; aggravated battery with a deadly weapon; aggravated battery resulting in great harm; causing bodily harm in the commission of a felony; and, kidnapping. Mr. Kessell was examined by three experts in anticipation of trial, to advise on issues of competency and sanity. Two of them expressed the opinion that Mr. Kessell was sane at the time of all of the events. The third, Dr. Riordan, opined that Mr. Kessell was legally insane as to four of the five charges, but sane as to the kidnapping charge. Counsel did not investigate further despite the fact that the offenses occurred at the same time and Mr. Kessell continued to express a strong desire to pursue the insanity defense.

On August 9, 2004, Mr. Kessell pleaded *nolo contendere* to Count I (attempted first degree murder) and Count III (kidnapping). In exchange for his plea, the state agreed to dismiss the other four charges (the state had subsequently added a charge of sexual battery in an amended information); no agreement was reached as to sentencing.

Mr. Kessell subsequently argued that his plea was involuntary in a motion to withdraw his plea pursuant to Rule 3.170(l) of the Florida Rules of Criminal Procedure. In accordance with Florida law, Mr. Kessell addressed "whether the plea was infected by [his] misapprehension or ignorance," not "the issue of whether counsel's performance was deficient." (D.E. 18-1, at 227) (Mr. Kessell's Rule 3.170 motion). Mr. Kessell did not raise, and the court did not rule on, any Sixth Amendment claim.

During an evidentiary hearing, Mr. Kessell discovered that Dr. Riordan did not grasp the facts underlying the charges. Dr. Riordan believed that Mr. Kessell had attacked Ms. Lantini only after he abducted her. Dr. Riordan had not realized his mistake earlier because trial counsel had never contacted him to discuss his conclusions. Nevertheless, the trial court ultimately denied Mr. Kessell's motion to withdraw his plea because "the defendant fully understood the charges against him, what rights he waived by entering his plea and fully understood the potential sentence." (D.E. 18-1, at 250). The Court of Appeals affirmed without a written opinion. (D.E. 18-2, at 293; Kessell v. State, 30 So. 3d 508 (Fla. 4th DCA 2010) (table)).

Mr. Kessell then filed a postconviction motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. Mr. Kessell alleged that counsel rendered ineffective assistance by failing to recognize and correct Dr. Riordan's mistake of fact and failing to further investigate the insanity defense. (D.E. 18-2, at 301-08). The court dismissed Mr. Kessell's claim as "procedurally barred as the issue has already been

raised, rejected, and affirmed on appeal." (D.E. 18-2, at 313). The Florida Court of Appeals for the Fourth District affirmed with an opinion.[1] (D.E. 18-2, at 353-56); Kessell v. State, 96 So. 3d 1031 (Fla. 4th DCA 2012). Agreeing that Mr. Kessell's claim was barred, the Court of Appeals also held that Mr. Kessell had not shown deficient performance during the Rule 3.170 proceedings:

> Even if Counsel knew that Riordan was mistaken about the timing of the events and this may have contributed to his opinion, this does not show that Kessell had a viable insanity defense or that counsel was deficient in failing to conduct further investigation or request another evaluation. There was no showing that Riordan would in fact change his opinion. Defense counsel was aware that there was some basis for raising an insanity defense, and he discussed the issue with Kessell.

(D.E. 18-2, at 355); Kessell, 96 So. 3d at 1033.

Mr. Kessell filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mr. Kessell claimed, *inter alia*, that counsel was ineffective for failing to correct Dr. Riordan's mistake of fact, failing to further investigate the factual basis for an insanity defense, and failing to properly advise Mr. Kessell that his defense was supported as to each charge by at least one expert. (D.E. 1, at 4; D.E. 1-1, at 9-17). The District Court denied the habeas petition and denied a certificate of appealability.

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1 In Mr. Kessell's case, the District Court of Appeals for the Fourth District was the only court engaged in finding facts pursuant to a squarely-raised Sixth Amendment ineffectiveness claim. Accordingly, its opinion figures prominently in the discussion that follows. For brevity's sake, Mr. Kessell abbreviates the term "Florida Court of Appeals for the Fourth District" as "Court of Appeals" or "state Court of Appeals."

II. Standards of Review

To obtain a COA, an appellant must show that the issues involved deserve encouragement to proceed further because reasonable jurists could debate whether relief should have been granted. Reasonable jurists could disagree whether the state Court of Appeals issued an "adjudication on the merits" entitled to the deferential standard of review to 28 U.S.C. § 2254(d). Reasonable jurists could further debate whether the state Court of Appeals relied on an adjudication that "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 Section 2254(d)(2), either because the state court factfinding procedures resulted in a materially incomplete record, or because the limited record before the state Court of Appeals did not adequately support the ultimate "facts" used to justify that Court's decision on the merits. Taking the record before the Court of Appeals, reasonable jurists could debate whether denying Mr. Kessell's ineffectiveness claim resulted in a decision that unreasonably applied Supreme Court precedent.

A. Certificate of Appealability

A COA should issue whenever the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(2). The applicant must show that "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" Gonzalez v. Sec'y, Dep't of

Corr., 366 F.3d 1253, 1267 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000) (further citation omitted)). Because "the question is the debatability of the underlying constitutional claim, not the resolution of that debate," the inquiry "neither requires nor permits full consideration of the factual and legal merits of the claims." Id. (citation omitted).

B. Review of State Court Decisions in Federal Habeas Proceedings

With respect to claims denied on the merits, federal habeas courts may grant relief when the lower court's decision relies on a clear error of law or fact:

> (d) An application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim -
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> > (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). However, federal courts apply *de novo* review to claims that were never adjudicated in state court, including those rejected pursuant to a state procedural bar. Conner v. Hall, 645 F.3d 1277, 1292 (11th Cir. 2011).

Petitioners challenging a finding of fact must contend with Section 2254(e)(1), which requires clear and convincing evidence to rebut the presumption of correctness. However, if a factual finding is unreasonable under Section 2254(d)(2), the presumption

of correctness disappears and need not be rebutted. Adkins v. Warden, Holman Corr. Fac., 710 F.3d 1241, 1249 (11th Cir.), *cert*. *denied* 134 S. Ct. 268 (Oct. 7, 2013).

C. Ineffective Assistance of Counsel

The two-part Strickland test applies to guilty pleas. Hill v. Lockhart, 574 U.S. 52, 58 (1985) (citing Strickland v. Washington, 466 U.S. 668 (1984)). To establish deficient performance, the petitioner must show that counsel's representation was unreasonable under "prevailing professional norms." Strickland at 688. Prejudice means "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill, 574 U.S. at 59.

Pillar v. Beard illustrates the standard for effective assistance in researching claims and defenses. 545 U.S. 374 (2005). In Pillar, the Supreme Court explained that attorneys have an obligation to defer strategic decisions until after they investigate and understand the relevant evidence. See also Sears v. Upton, 130 S. Ct. 3259, 3265 (2010) (per curiam) (explaining that a strategy can be deficient with respect to a particular defendant even when "reasonable in the abstract"); cf. Wood v. Allen, 130 S. Ct. 841 (2010) (affirming Eleventh Circuit's denial of habeas relief where the state showed that counsel's decision not to present an expert's report at sentencing, some of which was adverse to the defendant, was based on reasoned consideration and rejection of alternatives).

III. Grounds for Appeal

The District Court erred by finding that 28 U.S.C. § 2254(d)(2) applies to the Court of Appeals' decision to deny Mr. Kessell's ineffectiveness claim. The Court of Appeals relied on the record developed during Rule 3.170 proceedings. Mr. Kessell had no obligation to raise a Sixth Amendment claim in Rule 3.170 proceedings, and did not raise such a claim. The record from the Rule 3.170 proceedings is materially incomplete as to his Sixth Amendment claim, and therefore cannot support a merits determination.

To the extent that Section 2254(d)(2) applies, the decision of the Court of Appeals is "based on an unreasonable determination of the facts." The procedural unfairness of using a materially incomplete record rendered the decision of the Court of Appeals *per se* "unreasonable." Assuming *arguendo* that the Court of Appeals issued an adjudication on the merits entitled to deference under Section 2254(d), the Court of Appeals made findings that were unreasonable based on the record before it.

Finally, the decision of the Court of Appeals resulted in an unreasonable application of clearly established federal law, as determined by the Supreme Court. The District Court erred in holding that Mr. Kessell had failed to show that the Court of Appeals unreasonably or incorrectly applied federal law.

A. The Court of Appeals Did Not Adjudicate Mr. Kessell's Claim, and Unreasonably Determined Facts, because the Record was Materially Incomplete.

All findings of fact by the state Court of Appeals are non-merits adjudications, or alternatively are unreasonable *per se*, because they rely on the record of Mr. Kessell's

motion to withdraw his plea pursuant to Rule 3.170 of the Florida Rules of Criminal Procedure. The Sixth Amendment claim raised in Mr. Kessell's Rule 3.850 motion was not the same claim developed in Rule 3.170 proceedings. Because the facts underlying the Rule 3.170 claim differ from the Rule 3.850 claims, the Rule 3.170 record is not sufficiently reliable to support a merits adjudication of Mr. Kessell's Sixth Amendment.

1. Rule 3.170 Proceedings are not Intended to Address Sixth Amendment Claims of Ineffective Assistance of Counsel.

A 3.170(l) motion is used to challenge the voluntariness of a guilty or nolo contendere plea within thirty days of the rendition of a sentence. Cella vs. State, 831 So. 2d 716 (Fla. 5th DCA 2002); see also Fla. R. App. P. 9.140(2)(A)(ii)(c) (allowing appeals of involuntary pleas, but only where "preserved by a motion to withdraw plea"). Pursuant to Florida law, in Rule 3.170(l) proceedings the defendant must show a "manifest injustice" warranting permission to withdraw the plea. Panchu v. State, 1 So. 3d 1243, 1245 (Fla. 4th DCA 2009).

Under Florida law, the manifest injustice/voluntariness issue is commonly raised without reference to any Sixth Amendment right, even where the defendant alleges error by counsel. There is no need to allege and prove deficiency in a motion to withdraw plea under Rule 3.170(l), not even when a defendant claims that counsel's advice was mistaken. Id. at 1246 (explaining that "defendant did not base her motion to withdraw on the ground of ineffective assistance of counsel but, rather, on the ground that her plea was not voluntarily, knowingly, and intelligently entered because she received no advice

or inadequate advice as to these available defenses. . . . Her claim is cognizable, independent of an ineffective assistance of counsel claim"); see also Brazeail v. State, 821 So. 2d 364, 366-67 (Fla. 1st DCA 2002) (explaining that "[s]eparate and apart from any Sixth Amendment considerations, the appellant's claim is colorable under decisional law of this state relating to the requirement that pleas be voluntarily and knowingly entered. The law of Florida has long recognized that a plea of guilty or nolo contendere may be vacated when the defendant has entered his plea as a result of mistaken advice by defense counsel . . . ."). It is the content of counsel's advice, not its reasonableness, that bears on a plea's voluntariness. See Thompson v. State, 351 So. 2d 701, 701 (Fla. 1977) (reversing with instructions to grant motion where defendant "was prejudiced by an honest misunderstanding which contaminated the voluntariness of his pleas"); Brazeail, 821 So. 2d at 366-67 (explaining that "[t]he issue under the Florida decisions is not whether the defense counsel has blundered in some manner [but whether] the plea was entered because of mistaken information given to the defendant regarding the consequences of his plea, regardless of the source of the misinformation").

As with most jurisdictions, Florida courts prefer that claims of Sixth Amendment ineffectiveness proceed through postconviction review. See Massaro v. United States, 538 U.S. 500, 504 (2004) (holding that movants under 28 U.S.C. § 2255 may bring ineffective assistance claims that could possibly have been brought on direct appeal; noting "the risk that defendants would feel compelled to raise the issue before there has

been an opportunity fully to develop the factual predicate for the claim"). In Dooley v. State, the Fourth District Court of Appeals gave a reasoned explanation for this policy:

> [T]he involuntary-plea claim appellant has raised in his motion for postconviction relief is precisely the type of claim that is unlikely to be made in a motion to withdraw under rule 3.170(l). A defendant proceeds through the criminal process relying upon his lawyer, whether court-appointed or retained. Rule 3.170(l) is intended to be part of that proceeding; thus, it can be reasonably assumed that the defendant will be relying upon the same lawyer if he or she elects to file a rule 3.170(l) motion. Under those circumstances, it would be most unlikely that the defendant's attorney would file a motion asserting that he or she coerced the defendant into entering the plea.

789 So. 2d 1082, 1084 (Fla. 1st DCA 2001). The Supreme Court of Florida has also observed that claims of ineffective assistance of counsel generally only can be raised on collateral review, via a 3.850 motion. Corzo vs. State, 806 So. 2d 642 (Fla. 2d DCA 2002) (citing Bruno vs. State, 807 So. 2d 55 (Fla. 2001)). Moreover, in Mr. Kessell's case, the reasoning and cases cited by the trial court extend only to the Due Process Clause/voluntariness/manifest injustice strand of Florida law, not to the Sixth Amendment/ineffective assistance of trial counsel cases.[2]

2 In support of its denial of Mr. Kessell's Rule 3.170 motion, the trial court cited to many Florida cases governing voluntariness in the context of motions to withdraw guilty pleas and of Rule 3.850 motions. These cases reinforce the conclusion that the trial court did not actually address Mr. Kessell's claim as a violation of his Sixth Amendment right to counsel. For ease of comparison, these cases are cited in the same order used by the trial court. (D.E. 18-1, at 249). See Vitello v. State, 609 So. 2d 111(Fla. 4th DCA 1992) (voluntary based on understanding of possible sentence); Woodly v. State, 937 So. 2d 194 (Fla. 4th DCA 2006) (finding of voluntariness based on record of plea colloquy and other items of record); Jones v. State, 680 So. 2d 585 (Fla. 4th DCA 1996) (alleged misadvice as to sentence belied by plea colloquy); Ragoobar v. State, 893 So. 2d 647 (Fla 4th DCA 2005) (same); Snodgrass v. State,

Thus, the factual development that occurred during Mr. Kessell's Rule 3.170 proceeding is not sufficient to adjudicate his claims of ineffective assistance of counsel because Florida law does not require those claims to be raised and litigated until Rule 3.850 proceedings. Indeed, Florida law appears to discourage such the practice of bringing Sixth Amendment claims during Rule 3.170 proceedings. Defendants invoking

837 So. 2d 507 (Fla. 4th DCA 2003) (remanding for hearing where defendant's claims of misadvice were not conclusively refuted by the record); Scott v. State, 629 So. 2d 888 (Fla. 4th DCA 1993) (holding that defendant failed to meet manifest injustice standard where newly discovered evidence would not have probably resulted in acquittal at trial); Robinson v. State, 761 So. 2d 269 (Fla. 1999) (rejecting conclusory oral motion that plea was involuntary because defendant "was not able to form an intelligent waiver of his rights"); State v. Wiita, 744 So. 2d 1232 (Fla 4th DCA1999) (affirming grant of motion to withdraw plea where defendant entered plea to avoid publicity, and was deprived of the benefit of the bargain when forced to register as a sex offender pursuant to subsequently-enacted statutes); Adler v. State, 666 So. 2d 998 (Fla. 5th DCA 1996) (affirming denial of motion to withdraw plea where trial court did not inform disclose that victim was still alive at time plea was entered); Williams v. State, 316 So. 2d 267 (Fla. 1975) (denial of motion to withdraw plea based on court's failure to discern factual basis for plea not reversible absent showing of prejudice); Sharpe v. State, 547 So. 2d 334 (Fla. 1st DCA 1989) (reversing for further proceedings where court failed to determine whether defendant understood that court was not bound by sentencing recommendations); Adler v. State, 382 So. 2d 1298 (Fla. 3d DCA 1980) (affirming denial of motion to withdraw plea because allegations were conclusively refuted by plea colloquy and state honored plea agreement); Panno v. State, 517 So. 2d 129 (Fla. 4th DCA 1987) (affirming denial of motion to withdraw guilty plea where defendant failed to prove manifest injustice because he was sentenced to probation rather than the unexpectedly-high statutory maximum); Elias v. State, 531 So. 2d 418 [cited as 530 So. 2d 481] (Fla 4th DCA 1988) (granting motion to withdraw plea where defendant misunderstood terms of plea agreement); Bennet v. State, 588 So. 2d 672 (Fla 1st DCA 1991) (affirming denial of motion to withdraw plea where plea colloquy belied claims that defendant misunderstood terms of plea bargain); Lopez v. State, 536 So. 2d 226 (Fla. 1988) (affirming denial of motion to withdraw plea where defendant was adequately warned that refusal to testify against his accomplices could result in a death sentence); Porter v. State, 564 So. 2d 1060 (Fla. 1990) (denial of motion to withdraw plea proper where defendant refused to provide facts to support conclusory assertions of coercion by

Rule 3.170 lack an incentive to bring and fully develop claims of constitutionally ineffective assistance, and the Rule 3.170 record will generally (if not always) be materially incomplete with respect to the elements of any Sixth Amendment claims.

2. The Trial Court did not Comply with Florida Law in Summarily Dismissing Mr. Kessell's Ineffectiveness Claim on Procedural Grounds.

Mr. Kessell is not at fault for failing to develop the record during Rule 3.850 proceedings. In his Rule 3.850 motion, Mr. Kessell argued that counsel rendered ineffective assistance by failing to discover the psychiatric expert's mistake of fact. The trial court denied the Rule 3.850 motion as second or successive, reasoning that Mr. Kessell was bringing the same claim he had brought in Rule 3.170 proceedings.

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state officials); Lines v. State, 594 So. 2d 322, 324 n.1 (Fla.1st DCA 1992) (no allegation that counsel rendered ineffective assistance, "nor could there be on direct appeal" of a motion to withdraw plea); Gover v. State, 552 So. 2d 1185 (Fla. 5th DCA 1989) (violations of Rule 3.172 of the Florida Rules of Criminal Procedure [governing acceptance of plea] are not reversible error unless defendant is prejudiced thereby); Joyner v. State, 583 So. 2d 726 (Fla. 4th DCA 1991) (affirming denial of Rule 3.850 motion after evidentiary hearing on relevant issues of fact); Rouser v. State, 579 So. 2d 842 (Fla. 4th DCA 1991) (affirming denial of motion to withdraw plea where defendant violated agreement by failing to provide assistance); Yesnes v. State, 440 So. 2d 628 (Fla. 1st DCA 1983) (reversing and remanding where defendant claimed his plea was involuntary because he was under the influence of sedatives) ; Hatcher v. State, 591 So. 2d 1134 (Fla. 4th DCA 1992) (affirming denial of motion to withdraw plea where defendant's sentence was within the terms of plea arrangement); Wagner v. State, 895 So. 2d 453 (Fla. 5th DCA 2005) (affirming denial of motion to withdraw plea where plea colloquy belied claims of misadvice); Nicol v. State, 892 So. 2d 1169 (Fla. 5th DCA 2005) (reversing denial of motion to withdraw plea where trial court would have required defendant to show that motion to suppress would have been successful); Thomason v. State, 732 So. 2d 1122 (Fla. 4th DCA 1999) (reversing for evidentiary hearing on Rule 3.170(f) motion).

Many Florida courts, including the Fourth District Court of Appeals, had held that Sixth Amendment claims like Mr. Kessell's were not barred in similar circumstances. E.g. Haynes vs. State, 24 So. 3d 726 (Fla. 4th DCA 2009) (finding Rule 3.170 motion did not bar subsequent Rule 3.850 motion alleging ineffective assistance of counsel); Scheele vs. State, 995 So. 2d 1129 (Fla. 4th DCA 2008) (holding that an ineffective assistance of counsel claim was not "precluded by appellant's previously filed motion to withdraw plea under Florida Rule of Criminal Procedure 3.170" or by "our affirmance of the trial court's denial of that earlier motion"); Gadson vs. State, 807 So. 2d 817 (Fla. 4th DCA 2002) (holding that rule against successive petitions did not apply where the circuit court did not explicitly treat the Rule 3.170 motion as a Rule 3.850 motion after giving notice and an opportunity to respond). Mr. Kessell cannot be at fault for failing to follow a procedural rule that did not exist until it was announced in his case.[3]

3. The State Court did not Render an Adjudication on the Merits; alternatively, the Record Developed in Rule 3.170 Proceedings is Insufficient to Support any Reasonable Factual Finding Regarding Mr. Kessell's Claims of Ineffective Assistance of Counsel.

The trial court did not allow Mr. Kessell to develop the record or engage in any factfinding, relying on a novel state procedural bar to dismiss his Rule 3.850 motion. The Court of Appeals agreed that Mr. Kessell's motion was procedurally barred, but also buttressed its opinion with a merits determination on the record developed during Rule

3 For the same reason, the state trial court did not rely on an "adequate and independent" procedural rule when it dismissed the Rule 3.850 motion as second or successive under state law. Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001).

3.170 proceedings. The decision of the Court of Appeals should not be treated as an adjudication on the merits. In the alternative, the decision is unreasonable because the Court of Appeals should not have engaged in any findings of fact with respect to the Rule 3.850 motion without allowing further factual development.

Other Courts have observed that "judgment on a materially incomplete record is not an adjudication on the merits." Skipwith v. McNeil, No. 09-cv-60361, 2011WL 1598834, 2011 U.S. Dist. Lexis 45829, at *11 (S.D. Fla. Feb. 17, 2011) (citing Winston v. Kelly, 592 F.3d 535, 555-56 (4th Cir. 2010)); Wilson v. Workman, 577 F. 3d 1284, 1291 (10th Cir. 2009) (en banc); see also Justin F. Marceau, Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications, 62 Hastings L.J. 1, 62 (2010) (remarking on "growing support among the federal courts for a recognition that a claim which has not been fully and fairly reviewed in state court will not be considered an adjudication on the merits for purposes of § 2254(d)"). Especially now that further factual development is precluded unless a finding of fact is unreasonable, federal courts should pay careful attention to the procedures by which those findings are reached, and afford no deference to factual determinations based on proceedings that do not afford a full and fair opportunity to develop the record. See generally Samuel Wiseman, Habeas After *Pinholster,* 53 B.C. L. Rev. 953 (2012).

Reasonable jurists could agree that Mr. Kessell's claim has not been adjudicated on the merits. Reasonable jurists could also conclude that the factfinding process in this

case was unreasonable *per se* because it relied on the record of a proceeding only marginally related to his claim that counsel rendered ineffective assistance. Therefore, this Court should grant Mr. Kessell a certificate of appealability on whether the Court of Appeals' findings of fact are entitled to deference under Section 2254(d)(2).

B. The Factual Findings of the Court of Appeals are Unreasonable on the Record before the Court

Assuming *arguendo* that the factual findings of the state Court of Appeals are entitled to deference under Section 2254(d)(2), reasonable jurists could conclude that those findings are unreasonable based on the record.

According to the state Court of Appeals, "based on the gap in time between the assault and the kidnapping and the relocation of the victim, Riordan could still find that Kessell was insane as to the initial attack, but sane at the time of the kidnapping." (D.E. 18-2, at 355). There is no record support for this proposition. Dr. Riordan found Mr. Kessell insane when he hit the victim with a hammer, and the hammer blow proved up an essential element of every offense charged. Under Florida law, there was no gap between the assault and the kidnapping, or between the kidnapping and the infliction of bodily harm while perpetrating a felony. The assault, *i.e.*, the initial attack, commenced the kidnapping, and was also an element of the bodily harm charge. Dr. Riordan also stated that driving a long distance to the victim's home and waiting for her and other such conduct would not <u>necessarily</u> preclude a finding of insanity; those events could be committed in a psychotic state. (D.E. 18-2, at 24). Dr. Riordan's opinion was based on a

mistake of fact as to the sequence of events, and speculation by the Court of Appeals on a cold record is no substitute for allowing Mr. Kessell to introduce evidence on what opinion Dr. Riordan would have given regarding events as they actually occurred.

Another example of an unreasonable finding occurred when the Court of Appeals made a factual determination that "counsel concluded an insanity defense was weak and explained this to Kessell. Defense counsel and Kessell were aware when he entered the plea that there was some support for an insanity defense. . . . This is not a situation where a defendant did not know of the existence of a possible defense." (D.E. 18-2, at 355). This factual finding is unreasonable because uncontroverted evidence showed that counsel told Kessell that the insanity defense was completely unsupported as to the kidnapping charge, which could carry a life sentence. Therefore, this Court should grant a Certificate of Appealability to decide whether the decision of the Court of Appeals relied on an unreasonable determination of fact in light of the record before it.

C. The state Court of Appeals Unreasonably Applied Clearly Established Federal Law.

Assuming *arguendo* that the state Court of Appeals has issued an adjudication on the merits of Mr. Kessell's ineffectiveness claim, this Court should grant a certificate of appealability because the District Court should have held that the decision of the state Court of Appeals is based on an unreasonable application of federal law clearly established by the Supreme Court. To the extent that the proper standard of review is *de novo*, the District Court's finding that no Strickland violation occurred is an error of law.

A federal court may grant habeas relief if a state court identifies correct governing legal principles from the Supreme Court's decisions, but unreasonably applies those principles to the petitioner's case. E.g., Wiggins vs. Smith, 539 U.S. 510, 520 (2003). The state court's application must be objectively unreasonable, not merely incorrect. Id. Although the Fourth District Court of Appeals correctly identified Strickland as the governing law, its application thereof was objectively unreasonable because it concluded that counsel did not render deficient performance by failing to adequately investigate Mr. Kessell's insanity defense.

Although § 2254(d)(1) requires deference to the state court's conclusions of law, it does not require a federal court "to defer to the opinion of every reasonable state judge on the content of federal law." Wilkerson vs. Taylor, 529 U.S. 362, 389 (2000). "If after carefully weighing all of the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." Id. Clearly established federal law imposes on counsel a duty to make reasonable investigations, or to make a reasonable decision that makes a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691 (1984). Any particular decision not to investigate must be assessed for reasonableness, with reference to whether the evidence would have led a reasonable attorney to investigate further. Wiggins, 539 U.S. at 527. Counsel failed to investigate sufficiently to recognize that Dr. Riordan's opinion was not based on the facts of the

case. Legal issues are within the scope of counsel's Sixth Amendment duty, and effective counsel would have realized that, based on the elements of the charges, Dr. Riordan's opinion of sanity as to the kidnapping count meant that Mr. Kessell was sane and insane at the same time.

Further investigation (here, merely discussing the issue with Dr. Riordan) would have revealed that factual support existed for Mr. Kessell's insanity defense as to each offense, including the kidnapping charge. Mr. Kessell was willing and able to pay for an evaluation by a more well-qualified expert, but counsel failed to arrange for further examination. But for counsel's deficient performance Mr. Kessell would not have accepted a plea agreement. Reasonable jurists could conclude that the state Court of Appeals unreasonably applied the Strickland standard in concluding that counsel did not render deficient performance under prevailing professional norms, and that the trial court's decision to the contrary was error.[4]

IV. Conclusion

Reasonable jurists could debate whether the District Court erred by applying the deferential standards of Section 2254(d) to the decision of the state Court of Appeals; by finding that the decision of the state Court of Appeals was not based on unreasonable findings of fact in light of the record before it; and, by holding that the decision of the state Court of Appeals did not result in an incorrect or unreasonable application of

4 The Court of Appeals did not appear to make any finding with respect to prejudice. Kessell v. State, 96 So. 3d 1031, 1033-34 (Fla. 4th DCA 2012).

clearly established federal law. Reasonable jurists could conclude that Mr. Kessell has established a right to habeas corpus relief under Section 2254(d)(1), or that his case should be remanded to the District Court for further factual development, including an evidentiary hearing. Accordingly, Mr. Kessell requests this Court to issue a certificate of appealability and to engage in a full review of Mr. Kessell's claims.

DATED: February 21, 2014

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Kessell v. Warden, Wakulla Corr. Inst. Appeal No. 14-10395

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

Bruce Baillie, appellant's state defense counsel

Honorable Dorian K. Damoorgian, state appellate judge

Laura Fisher-Zibura, assistant attorney general, attorney for appellee

Honorable Donald L. Graham, district judge

Honorable Fred A. Hazouri, state appellate judge

Phillip Kessell, appellant

Heidi Lantini, victim

Honorable Frank J. Lynch, magistrate judge

Honorable Melanie G. May, state appellate judge

Daniel D. Mazar, appellant's co-counsel

Office of the Florida Attorney General

Office of the State Attorney, Indian River County, Florida

Honorable Robert L. Pegg, state circuit court judge

Gray Proctor, appellant's co-counsel

Nikki Robinson, assistant state attorney

Honorable W. Matthew Stevenson, state appellate judge

Honorable Dan L. Vaughn, state circuit court judge

Honorable Martha C. Warner, state appellate judge

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following counsel of record:

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Respectfully submitted,

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