No. _____

In The
Supreme Court of the United States

PHILLIP KESSELL,

Petitioner,

v.

JAMES COKER, WARDEN,
WAKULLA CORRECTIONAL INSTITUTION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. On federal habeas review of a state guilty plea conviction, is a Sixth Amendment Strickland/Hill claim of ineffective assistance "adjudicated on the merits," or alternatively "based on an unreasonable determination of the facts," where the state collateral court summarily dismisses the claim as procedurally barred and, on appeal, the appellate court issues the first merits decision by resolving mixed questions of law and fact on the record of direct review proceedings of a state law claim?

2. When a federal habeas court reviews a state court decision for legal reasonableness under 28 U.S.C. § 2254(d)(1), can the court allow factual development and review the state claim in light of the new evidence if the "inability to develop the facts supporting his claim was the fault of the state court itself," as suggested by Justice Sotomayor in her dissent in Pinholster v. Cullen?

3. For the purpose of obtaining a certificate of appealability, does a petitioner make a substantial showing of a Strickland/Hill violation of the Sixth Amendment right to counsel where he alleges trial counsel's deficient investigation of the insanity defense caused him to waive his right to trial and the underdeveloped record does not conclusively disprove his allegations?

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The opinion of the Circuit Court of the Nineteenth Judicial Circuit of Florida denying Mr. Kessell's Rule 3.170(1) direct review motion to withdraw plea in State v. Kessell, No. 2002-CF-912A (Nov. 4, 2008) is not published and not included in the appendix, but is available on the docket of district court proceedings in this case. Kessell v. Dixon, No. 2:12-cv-14402 (S.D. Fla. Apr. 19, 2013) (D.E. 18-1, at 247-48). The table opinion of the Fourth District Court of Appeal of Florida summarily affirming that decision is reported at Kessell vs. State, 30 So. 3d 508 (Fla. 4th DCA 2010) (affirming without written opinion), and is not included in the appendix. The decision of the Nineteenth Judicial Circuit summarily dismissing Mr. Kessell's Rule 3.850 motion for postconviction relief in State v. Kessell, No. 2002-CF-912A, is not reported or included in the appendix, but is available on the docket of Kessell v. Dixon, No. 2:12-cv-14402 (S.D. Fla. Apr. 19, 2013) (D.E. 18-1, at 131-14). The Fourth District Court of Appeal's opinion affirming the decision is not in the appendix, but is reported at State v. Kessell, 96 So. 3d 1031 (Fla. 4th DCA 2012).

The report and recommendation of the magistrate judge, and the district court's order overruling Mr. Kessell's objections, Kessell v. Dixon, No. 2:12-cv-14402, are included in the appendix, with the order by the United States Court of Appeals for the Eleventh Circuit denying Mr. Kessell's request for a certificate of appealability in Kessell v. Warden, No. 14-10395-A (May 29, 2014).

JURISDICTION

Mr. Kessell seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit denying his request for a certificate of appealability from the district court's denial of Mr. Kessell's federal habeas petition under 28 U.S.C. § 2254. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

28 U.S.C. § 2254 provides in relevant part:

….

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

….

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

....

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or,

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. . . .

28 U.S.C. § 2253 provides in relevant part:

….

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

On July 25, 2002, Petitioner Phillip Kessell, an ex-Marine with a history of childhood abuse, instability, suicide attempts, and involuntary commitment, saw his ex-girlfriend (with whom he maintained a consensual sexual relationship) out on a date with another man.[1] Mr. Kessell went to her house and waited in the bushes by her front door for her to return. When she arrived, Mr. Kessell attacked her with a hammer, put her in his car, and drove to a nearby construction site. When he left the car, she locked him out. Mr. Kessell left the scene and slit his wrists in a failed suicide attempt before the police apprehended him. Mr. Kessell made a second suicide attempt by cutting his own throat on November 20, 2002.

1. Trial-level Proceedings

The state of Florida brought five charges: 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. At the request of the public defender appointed to represent him, Mr. Kessell was examined by three appointed clinical psychologists in anticipation of trial, to advise on issues of competency and sanity. Although

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[1] Mr. Kessell's reply in the district court in Kessell v. Dixon, No. 2:12-cv-14402 (S.D. Fla. July 1, 2013) (D.E. 25), contains a more fulsome recitation of the facts in this case, with citation to the state record as electronically filed by the state as appendices to Document 18.

[2] Strickland v. Washington, 466 U.S. 668 (1984) (establishing the elements of a Sixth Amendment ineffectiveness claim as deficiency and prejudice); Hill v. Lockhart, 474 U.S. 52, 59 (1985) (applying Strickland to guilty pleas; defining prejudice

all three diagnosed Mr. Kessell with depression and borderline personality disorder, two opined 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. Under Florida law, Mr. Kessell faced a life sentence for kidnapping.

Mr. Kessell retained private counsel after the state added a charge of sexual battery, which Mr. Kessell vigorously contested and the alleged victim did not remember. Mr. Kessell eventually pleaded *nolo contendere* to Count I (attempted first degree murder) and Count III (kidnapping). In exchange, the state dismissed the other four charges. Trial counsel did not present evidence of the appointed experts' diagnoses at sentencing. On October 14, 2004, the trial court imposed a life sentence.

2. Direct Review Rule 3.170 Proceedings

Mr. Kessell subsequently filed a motion to withdraw his plea pursuant to Rule 3.170(l) of the Florida Rules of Criminal Procedure, a direct review procedure which allows the withdrawal of an involuntary plea when a "manifest injustice" is present. Campbell v. State, 125 So. 3d 733, 735-36 (Fla. 2013). Florida law does not require that an error by counsel satisfy Strickland or Hill[2] to render a plea involuntary. See State v. Leroux, 689 So. 2d

[2] Strickland v. Washington, 466 U.S. 668 (1984) (establishing the elements of a Sixth Amendment ineffectiveness claim as deficiency and prejudice); Hill v. Lockhart, 474 U.S. 52, 59 (1985) (applying Strickland to guilty pleas; defining prejudice as "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial).

235, 237 (Fla. 1996) (citing cases; describing Florida's voluntariness standard as allowing withdrawals of pleas based on "mistaken" rather than "deficient" advice); Woodall v. State, 39 So. 3d 419, 421 (Fla. 5th DCA 2010) (omitting deficiency from analysis; stating that "[a] defendant who proves he received no advice about an available defense has a colorable claim of involuntariness and can demonstrate the requisite manifest injustice"); Panchu v. State, 1 So. 3d 1243, 1245-46 (Fla. 4th DCA 2009) (reversing where Rule 3.170 motion was denied because defendant failed to allege prejudice; claim existed "independent of an ineffective assistance of counsel claim"); Nichol v. State, 892 So. 2d 1169, 1171 (Fla. 5th DCA 2005) (reversing because the trial court applied the wrong standard by focusing on whether trial counsel's performance was deficient); 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 . . . ."); compare Fla. Const. Art. I §§ 12 (searches and seizures), 17 (cruel and unusual punishment) (linking state rights to decisions of Supreme Court) with Fla. Const. Art. I § 9 (omitting reference to federal law in Florida's constitutional due process provision).

Accordingly, Mr. Kessell's motion explicitly alleged that the issue was "whether the plea was infected by [his] misapprehension or ignorance"

rather than "the issue of whether counsel's performance was deficient."

During the evidentiary hearings, Dr. Riordan testified that his opinion was based on his assessment that Mr. Kessell was not insane "prior to the actual assaultive behavior;" he remembered that the kidnapping "involved behavior prior to the actual" assault. When asked whether his opinion would change if he knew that the "transportation actually took place after the attempted murder and the assault," Dr. Riordan admitted that he "would have to reconsider [his] opinion on that." The prosecutor elicited that Dr. Riordan had written down a correct version of the facts in his notes. However, Dr. Riordan testified that the confusion may have arisen because trial counsel had not explained to him which facts formed the basis for the kidnapping charge and never contacted him after the evaluation to clarify.

Trial counsel testified that he had advised Mr. Kessell that he did not think much of Dr. Riordan, who had "somehow managed to come up with the conclusion that he was insane at the time he was bludgeoning her with the hammer but not insane at the time that he was kidnapping her," inexplicably indicating that Dr. Riordan had somehow concluded that Mr. Kessell was "insane for part of the crime and not insane for the other part." In any event, Dr. Riordan's "head scratcher" of an opinion did not help Mr. Kessell because it was unfavorable as to the kidnapping charge, a life-eligible felony. Trial counsel explained that he was essentially defenseless without a favorable expert opinion. He advised Mr. Kessell that the strategy was that "we go for a term of years that gives you an opportunity at some point

to get paroled."[3] However, counsel acknowledged Mr. Kessell's repeated references to his serious psychological problems, and that Mr. Kessell had requested psychological retesting as late as one week before trial. Counsel remembered the August 2, 2004 letter wherein Mr. Kessell wrote "You told me an insanity plea is very difficult. I understand that, I truly do. On the other hand, I feel my mental status at the time of the incident was more catastrophic than you believe."

Mr. Kessell testified that he had never seen Dr. Riordan's report. When Mr. Kessell asked trial counsel about the insanity defense, Mr. Bailey dismissively told him that he was not "crazy," and he did not change his opinion even though Mr. Kessell explained his history of suicide attempts and other mental health issues. Counsel refused to order an independent evaluation psychological test. According to Mr. Kessell, the "bottom line" was that trial counsel was "not going to pursue an insanity defense."

The trial court 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." The trial court found that Mr. Kessell "was fully aware of the serious allegations against him;" "the potential sentence in each count;" "the possibility of an insanity defense being presented, but knowingly and voluntarily (with his counsel) rejected such a strategy;" that "there was no viable defense available to him except to argue for

[3] Florida abolished parole for all offenders before the date of Mr. Kessell's offenses.

convictions on lesser offenses;" that "he agreed with [trial counsel]'s decision to plea and ask for a term of years, but was fully aware the state would seek a life sentence and that the Court might impose such a sentence;" and that he was "fully aware of the rights he was waiving" and "was not coerced, threatened, or misadvised in any way by his attorney or anyone else." The trial court did not address whether counsel rendered objectively deficient performance, or whether Mr. Kessell would have gone to trial but for counsel's failure to correct Dr. Riordan's mistake of fact. The trial court cited to a long series of state cases, none of which addressed the Strickland/Hill standard. The Court of Appeals affirmed without a written opinion. Kessell v. State, 30 So. 3d 508 (Fla. 4th DCA 2010) (table).

3. Collateral Review Rule 3.850 Proceedings

Mr. Kessell then filed a postconviction motion in the trial court 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 by failing to further investigate the insanity defense. Mr. Kessell further alleged that Dr. Dev Chacko, a more-experienced and better-credentialed forensic psychiatrist, would testify that Mr. Kessell was insane as to all counts. In defiance of settled Florida law, the state trial-level postconviction court ("PCR court") summarily denied Mr. Kessell's petition as successive, explaining that the claim was "procedurally barred as the issue has already been raised, rejected, and affirmed on appeal." See, e.g., Gadson v. State, 807 So. 2d 817 (Fla. 4th DCA 2002) (holding that procedural bar

could not apply where the circuit court did not explicitly treat the 3.170 motion as a 3.850 motion, with notice and an opportunity to respond); Dooley v. State, 789 So. 2d 1082, 1084 (Fla. 1st DCA 2001) (explaining that Rule 3.170 proceedings should not bar later Strickland claims because, inter alia, Rule 3.170 proceedings occur during direct review, where "it can be reasonably assumed that the defendant will be relying upon the same lawyer" who rendered ineffective assistance); see also Brown v. McDonough, 200 F. App'x 885, 887-889 (11th Cir. 2006) (reversing finding of procedural default because the Florida court had not applied an adequate procedural bar when it dismissed Strickland claim as successive based on a claim raised in a Rule 3.170 motion to withdraw plea).

Mr. Kessell appealed, submitting a written report in which Dr. Chacko opined that Mr. Kessell was legally insane as to all counts. The Florida Court of Appeals for the Fourth District ("the appellate court") affirmed with an opinion. Kessell v. State, 96 So. 3d 1031 (Fla. 4th DCA 2012). The Court of Appeals agreed that Mr. Kessell's claim was procedurally barred, explaining that "[m]uch of the information upon which Kessell relies in his 3.850 motion was elicited in the 3.170(l) proceedings." Id. at 1033. "Whether Kessell's plea was involuntary because he received misadvice about a possible insanity defense is another way of stating the claim in this motion that the plea was involuntary because counsel did not investigate whether he had a viable insanity defense." Id.

Additionally, the Florida appellate court issued a decision on the merits. First, it found that Mr. Kessell's claims were merely speculative. Under

the record developed in the Rule 3.170 proceedings, Dr. Riordan had "acknowledged that he was confused . . . and agreed this might affect his opinion," but had not changed his opinion at the hearing; instead, he only went so far as to state that if there were new facts "he would have to reconsider." Id. Additionally, the Court of Appeals relied on the record adduced during Rule 3.170 proceedings to hold that Mr. Kessell had not met his burden of showing deficient performance because the advice to seek a lesser sentence by pleading guilty was not unreasonable considering the information counsel had at the time he made his strategic decision:

> 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 and Kessell were aware when he entered the plea that there was some support for an insanity defense, but at least two experts would have disagreed. . . . Kessell has no basis to question the findings of the two experts who concluded he was sane or any reason to believe they might change their opinions. This is not a situation where a defendant did not know of the existence of a possible defense. Considering the facts of the case and the opinions of the other experts, counsel was not deficient in opining that Kessell's best chance to avoid a life sentence was through the negotiated plea.

Kessell, 96 So. 3d at 1033-34. The appellate court did not address whether trial counsel's decision not to investigate the basis of Dr. Riordan's opinion, or not to arrange for another test, was deficient.

4. Federal habeas proceedings

Mr. Kessell filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Kessell v. Dixon, No. 2:12-cv-14402 (S.D. Fla. Filed Nov. 8, 2012) (D.E. 1). Mr. Kessell claimed that counsel rendered ineffective assistance by failing to adequately investigate the factual basis for an insanity defense and failing to discover that such a defense could be supported by an expert as to each charge in the original indictment. Mr. Kessell alleged that if he had known that any expert would testify that he was insane as to all of charges in the original indictment, he would have insisted on trial by jury.[4] Mr. Kessell was permitted to expand the record to include a copy of Dr. Chacko's report. (D.E. 27).

The magistrate judge recommended dismissal. He reasoned that the state's decision was an adjudication on the merits entitled to deference under Section 2254(d). Appx. 27-28. Mr. Kessell had not shown that the decision was unreasonable. The magistrate judge also felt that, when reviewed with respect to the factual record before the district court, that Mr. Kessell's claim would fail even under a de novo standard of review because defense counsel reasonably believed that "the potential insanity defense [was not] strong enough to take to trial."

[4] Mr. Kessell's reply in the district court (D.E. 26) contains a review of the state court record with citations to the record.

Appx. 24. Counsel's alleged failure to recognize that Dr. Riordan mistakenly believed that Mr. Kessell had first kidnapped and then assaulted the victim was not "deficient enough to constitute a Strickland violation." Appx. 26. The magistrate judge also noted that the record did not show that Dr. Riordan would have changed his mind if confronted on the issue. Appx. 26-27. The magistrate judge did not think Mr. Kessell was entitled to an evidentiary hearing because he "had the opportunity to develop the factual record and indeed did so" during state proceedings. Appx. 28.

Mr. Kessell filed objections, but the district court overruled them and adopted the report and recommendation. The district judge reasoned that:

> Essentially, Mr. Kessell takes issue with the factual statements contained in the Magistrate Judge's Report. [D.E. 30]. Judge Lynch largely relied on the State court factual findings in [the appellate court's published opinion]. This Court finds no error with Judge Lynch's reliance on [sic] factual record in [the 3.170 proceedings] because "a state court's factual findings are presumed correct, unless rebutted by the petitioner with clear and convincing evidence". . . . Mr. Kessell has not shown by clear and convincing evidence that the Court should depart from the factual findings of [the appellate court].
>
> Moreover, Mr. Kessell's Petition and the record before the Court does not show that the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law . . . ; or resulted in a

> decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court decision."

Appx. 4-5 (citations omitted). The district court did not issue a certificate of appealability ("COA").

Mr. Kessell then filed an application for a COA in the United States Court of Appeals for the Eleventh Circuit. He sought review of whether the appellate court's decision was "a merits determination" or "based on an unreasonable determination of the facts where the [appellate court] relied on a materially incomplete record and failed to allow further factual development;" whether the appellate court's decision was "based on an unreasonable determination of the facts in light of the record;" and, whether the appellate court's decision was "based on an unreasonable application of clearly established federal law or otherwise incorrect." The Eleventh Circuit denied a COA, with Judge Tjoflat explaining only that Mr. Kessell had "failed to show that his underling [sic] claim has merit." Appx. 1-2.

Mr. Kessell now files this petition for certiorari to the United States Court of Appeals for the Eleventh Circuit, and requests the Court exercise its discretionary jurisdiction to review the denial of a certificate of appealability.

REASONS FOR GRANTING PETITION

As state law permitted, Mr. Kessell explicitly failed to allege any Sixth Amendment Strickland/Hill claim on direct-review proceedings pursuant to Rule 3.170. Instead, Mr. Kessell withheld that theory so he could defer factual development until collateral proceedings under Rule 3.850, where he expected to elicit evidence of the proper standard of competence in investigating the insanity defense, the likely results of a reasonable investigation, and whether he would have insisted on trial if a single expert had supported the insanity defense as to all of the life-eligible offenses. The PCR court did not issue any merits decision, instead applying a procedural bar that unreasonably conflated the state Rule 3.170(l) standards with the elements of a Strickland/Hill claim. The appellate court affirmed that unpredictable ruling, depriving Mr. Hill of factual development in state courts.

Additionally, the appellate court issued a merits decision on the Strickland/Hill claim, making factual findings on the basis of the Rule 3.170 proceedings. The facts so found were not of the nature appropriate for appellate adjudication – as might be appropriate if, for example, a defendant's sworn statement contradicted a subsequent claim. Instead, the appellate court decided the merits of the Strickland/Hill claim by resolving complex issues of credibility, standards of professional competence, and expert opinions on a cold record of a state law claim adjudicated on direct review. Unsurprisingly, the appellate court found that the record did not demonstrate by a preponderance of the evidence that a Strickland/Hill violation occurred.

The appellate court's factfinding procedures violate the principles of responsible appellate adjudication. See, e,g., Lewis v. Jeffers, 497 U.S. 764, 800-01 (1990) (citing cases; discussing pre-AEDPA limits on deference to appellate decisions). Its decision is unquestionably not as reliable as it would have been with further factual development, and state law abundantly supported Mr. Kessell's expectation that he would have a chance to develop the record unless his claim were summarily denied for failure to state a prima facie case. The question Mr. Kessell asks this Court to resolve is the proper standard of review for his Strickland/Hill claim in subsequent federal habeas proceedings.

The circuits have split on whether decisions like the appellate court's should receive any deference. A minority would not apply deference; the majority would consider the adequacy of state procedures as one of many factors in determining whether a factual determination is reasonable. Additionally, Mr. Kessell may be entitled to further factual development before the federal habeas court concludes that the appellate court's decision was legally reasonable under Section 2254(d)(1) if, as was suggested, the bar on expanding the record not apply when "a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself." Cullen v. Pinholster, 131 S. Ct. 1388, 417 n.5 (2011) (Sotomayor, J., Dissenting). Although no circuit split has arisen yet, Mr. Kessell's case presents an opportunity to settle the important question of the limits of Pinholster's rule against factual development for Section 2254(d)(1) review.

For the purposes of demonstrating that his case deserved encouragement to go further, it should

have been enough to allege a prima facie Strickland/Hill violation because arguably his claim should be reviewed de novo. If the record of the state proceedings is relevant on federal habeas review, it should be enough that the record does not conclusively disprove his allegations. Under either standard, Mr. Kessell has established the basis for a Strickland/Hill claim which reasonable jurists could conclude deserves encouragement to go further.

1. The circuits have split on how to review a state court merits decision that relies on a materially incomplete record.

Federal courts agree that deficient state factfinding procedures create problems for habeas review, but differ on whether and to what extent federal law grants the authority to address those problems. A minority of circuits would decline to apply any deference at all. These courts reason that a "claim" is not "adjudicated on the merits" under Section 2254(d) when it presents a mixed question of law and fact and a diligent petitioner's record is materially incomplete due solely to a state procedural rule. The circuits have also split on whether this Court's recent decisions in Harrington and Pinholster permit this approach.

The majority view is that a claim is "adjudicated on the merits" unless the state court decision rests on a procedural ground. Until Pinholster, these courts would have allowed petitioners like Mr. Kessell to expand the record before deciding whether the state court decision was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(1). Now, unless an exception to Pinholster exists, new evidence is

considered only in determining whether a finding of fact is unreasonable under Section 2254(d)(2). The Circuits have split on whether a decision on a materially incomplete record renders factual determinations unreasonable per se, or whether the adequacy of state procedures is merely one factor to consider in determining whether the decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." This Court should resolve this split between the federal circuits by adopting the Fourth Circuit's approach and holding that Section 2254(d) does not apply to petitioners like Mr. Kessell.

A. A minority holds that 28 U.S.C. § 2254(d) does not apply; a split exists on whether the Court overruled this "adjudication approach."

Federal Courts of Appeals have split on how to analyze cases like Mr. Kessell's. A minority recognizes that that a claim is not "adjudicated on the merits" when the state court's decision rests on a "materially incomplete record." Winston v. Kelly, 592 F.3d 535, 555 (4th Cir. 2010) ("Winston I"). The Winston I court reasoned that "the 'exhaustion' and 'adjudicated on the merits' elements of federal habeas practice are mirror images." Id. (quoting Wilson v. Workman, 577 F.3d 1284, 1292 (10th Cir. 2009)). Just as petitioners have an obligation to present their claims in accordance with state procedures, state courts have an obligation to rule on claims properly presented. Id. The petitioner's obligation to diligently comply with state procedures prevents deliberate bypass or other abuse. Winston v. Pearson, 683 F.3d 489, 497 (4th Cir. 2012)

("Winston II") ("Lest our holding [in Winston I] be viewed as a pliable safety valve for habeas petitioners, we reiterated that "the requirements that petitioners exhaust their state remedies and diligently develop the record in state court are exacting burdens."); see also Wilson, 77 F.3d at 1290-91 (finding no adjudication, and therefore no deference, where "state court disposed of mixed questions of law and fact . . . on a factual record that was, solely as a result of the state procedural rule, incomplete.").[5]

Similarly, the Tenth circuit in Wilson explained that "a claim must have a factual basis, and an adjudication of that claim requires an evaluation of that factual basis." 577 F.3d at 1291. No adjudication could occur without proper factual development because "To decide a legal claim without regard to the evidence is surely unreasonable." Wilson, 577 F.3d at 1293-94 (citing Williams v. Taylor, 529 U.S. 362, 416 (2000) (O'Connor, J., Concurring)).

The Sixth Circuit once stood with the Fourth and Tenth Circuits as an "adjudication approach" jurisdiction, but the Sixth Circuit has split with the

[5] The undersigned respectfully submits that these cases require the state court to inappropriately refuse proffered evidence or foreclose further development of the record, and do not apply when "the state court, through no fault of its own, lacked all the relevant evidence." Pinholster, 131 S. Ct. at 1417 (Sotomayor, J., Dissenting) (emphasis added); see Winston II, 683 F.3d at 502 (disagreeing with Justice Sotomayor's characterization of Winston I as eliminating deference under 2254(d)(1) whenever new evidence is introduced during federal habeas proceedings); see also Samuel Wiseman, "Habeas After Pinholster," 53 B.C. L. Rev. 953, 981-82 (disagreeing with proposition that majority's decision rejected principles of Winston I) (2013).

Fourth on whether the adjudication approach is still viable. In Brown v. Smith, the Sixth Circuit concluded that a Brady claim had not been adjudicated on the merits when evidence previously withheld by the state surfaced for the first time on habeas review because the state court inexplicably issued a summary denial. 551 F.3d 424, 428-30 & n.1 (6th Cir. 2008). However, a panel subsequently concluded that this Court's recent decisions in Pinholster and Harrington v. Richter, 131 S. Ct. 770 (2011), overruled Brown. Ballinger v. Prelesnik, 709 F.3d 558, 562 (6th Cir. 2013), *cert denied* 133 S. Ct. 2866 (June 24, 2013) (explaining that courts may not inquire into whether the state court allowed factual development sufficient to support an "adjudication" because "the plain language of Pinholster and Harrington precludes it."). The Ballinger court concluded that Harrington's holding – that an unexplained decision not accompanied by an opinion was nevertheless a decision "on the merits" unless the petitioner rebutted the presumption that the decision had not relied solely on procedural grounds – created a presumption that any state decision based on a materially incomplete record was nevertheless an "adjudication" entitled to deference under Section 2254(d). Id. The First Circuit, which had already rejected the adjudication approach for itself, has also expressed its opinion that this Court has precluded lower courts from using the adjudication approach. Atkins v. Clarke, 642 F.3d 47, 49 (1st Cir. 2011); see also Garuti v. Roden, 733 F.3d 18, 22-24 (1st Cir. 2013).

The Fourth Circuit, on the other hand, has explicitly held that the adjudication approach it endorsed in Winston I remains viable today.

Winston II, 683 F.3d at 500-02. The Winston II panel explained that "Neither decision clarifies the 'adjudicated on the merits' requirement of § 2254(d)(1)" and that "interplay between the majority opinion and Justice Sotomayor's dissent [in Pinholster] lends strength to" the Winston I decision. Id. at 501. As for Harrington, that decision was irrelevant because the petitioner did not "contest the thoroughness of the state-court decision but rather the court's unreasonable denial of his requests for discovery and an evidentiary hearing." Winston II, 683 F.3d at 502. The Fourth Circuit explained:

> We found in [Winston I] that the state court's refusal to allow Winston to develop the record, combined with the material nature of the evidence that would have been produced in state court were appropriate procedures followed, rendered its decision unbefitting of classification as an adjudication on the merits. [Harrington] mentions nothing of possible defects in a state-court decision save the summary nature of its disposition . . . .

Id.

The Tenth Circuit has not addressed the issue since Harrington or Pinholster, but at least one lower court has questioned whether Wilson remains good law. See Duran v. AG of N. M., No. CIV-11-0816, 2013 WL 168216, 2013 U.S. Dist. LEXIS 55111, at * 23 (D.N.M. March 29, 2013) (characterizing Wilson as a pre-Harrington case that had been limited to its facts).

Mr. Kessell urges this Court to adopt the adjudication approach. As panels in the Fourth, Sixth, and Tenth Circuits have recognized, Congress did not enact the AEDPA against a blank slate.

Perhaps the most fundamental principle of pre-AEDPA habeas federalism was that the individual and the courts of his State owed reciprocal duties: the petitioner's to fairly present his claim, and the State's to decide claims presented in accordance with their procedural requirements. Like "exhaustion," "adjudicated on the merits" lacks any statutory definition, and therefore ought to be interpreted in accordance with pre-AEDPA common law regarding the adequacy of state procedure by which a decision is reached.[6] Mixed questions of law and fact cannot be adjudicated on a materially incomplete record.

Here, Mr. Kessell developed the factual basis of a state law claim during direct review proceedings to withdraw his guilty plea. The PCR court refused to hear the merits of the Strickland/Hill claim by applying a state procedural rule that was not supported by mandatory state precedent. The appellate court affirmed, but also issued a merits decision, denying the claim because Mr. Kessell had failed to prove the Strickland/Hill claim by a preponderance of the evidence on the record before it. While the end of that process perhaps can be termed a "decision" that could have relied on an unreasonable application of law or determination of fact, on a more fundamental level Mr. Kessell's Strickland/Hill claim was never "adjudicated on the

[6] This Court also preserved the pre-AEDPA balance in Williams v. Taylor, where the Court decided AEDPA's stricter statutory restrictions on holding an evidentiary hearing only applied when the petitioner was not diligent in the state court. 529 U.S. 420, 432 (2000) (holding that Section 2254(e)(2)'s "failed to develop" language excluded petitioners who made "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court").

merits" because the appellate court failed to conduct any meaningful evaluation of its legal and factual bases. AEDPA did not so drastically alter existing law as to require federal courts to attempt to defer to the decision that resulted from such a defective adjudication process.

B. The majority finds a claim adjudicated on the merits unless the state decision rests on a procedural ground; these circuits have split on whether defective factfinding procedures render a state court decision unreasonable per se.

The majority of the circuits have rejected the adjudication approach to deciding whether state procedures are sufficient to require deference to the outcome. These circuits focus on Section 2254(d)'s "on the merits" language to the exclusion of any broad concept of a "claim . . adjudicated on the merits." In these circuits, unless a decision rests on procedural grounds, Section 2254(d) mandates deference. Childers v. Floyd, 642 F.3d 953, 968 (11th Cir. 2011) ("an 'adjudication on the merits' is best described as any state court decision that does not rest solely on a state procedural ground" (citation omitted)); Thomas v. Horn, 570 F.3d 105, 114-15 (3d Cir. 2009) (an adjudication occurs when any court "finally resolve[s] the claim"); Teti v. Bender, 507 F.3d 50, 557 (1st Cir. 2007) ("[Section] 2254(d) applies regardless of the procedures employed or the decision reached by the state court, as long as a substantive decision was reached"); Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005) (defining merits adjudication by "stating what it is not: it is not the resolution of a claim on procedural grounds");

Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004) ("a state has adjudicated a petitioner's constitutional claim 'on the merits' . . . when it has decided the petitioners right to post conviction relief on the basis of the substance of the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other rule precluding state court review of the merits"); Eze v. Senkowski, 321 F.3d 110, 121 (2d Cir. 2003) ("a state court adjudicates a claim on its merits by (1) disposing of the claim on the merits, and (2) reducing its disposition to judgment"); Valdez v. Cockrell, 274 F.3d 941, 950 (5th Cir. 2001) (noting that the term "'adjudication on the merits' . . . does not speak to the quality of the process").

However, these cases were all decided against the general background of the more permissive pre-Pinholster standards of review. These circuits believed that conclusions of law could be reviewed against evidence adduced during federal habeas proceedings, with relief available if the petitioner showed the decision would have been unreasonable even on a fully developed record. See, e.g., Drake v. Portuondo, 321 F.3d 838, 345 (2d Cir. 2003) (allowing factual development where the trial court did not permit the development of the factual record; because the Appellate Division relied on that incomplete record" no reliable determination of unreasonableness could occur); Valdez, 274 F.3d at 951-52 (explaining that if petitioner satisfied standards for federal habeas evidentiary hearing, evidence could "assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2)"). Petitioners could expect an

evidentiary hearing unless they culpably "failed" to develop the record under § 2254(e)(2) and could not satisfy the limited innocence-based exceptions. Williams v. Taylor, 529 U.S. 420, 432 (2000) ("failure to develop" the facts for 2254(e)(2) exists only if "there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel"). Pinholster now prohibits federal habeas courts from considering new evidence in determining whether a state court decision represents an unreasonable conclusion of law.

The majority circuits have split on the sub-issue of how to apply § 2254(d)(2) when the state court caused the merits determination to issue on a materially incomplete record. The Ninth Circuit recognizes that a decision rendered on a materially incomplete record is per se "based on an unreasonable determination of the facts." Tyler v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004) (Kozinski, J.). As Judge Kozinski explained, no deference is due when "the fact-finding process is defective. If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts." Id.; see also Hibbler v. Benedetti, 693 F.3d 1140, 1147-49 (9th Cir. 2012) (directing lower courts to begin the analysis by determining whether pre-AEDPA standards would require a hearing; ultimate question remained whether state court of appeals was unreasonable in holding no evidentiary hearing was necessary under the record). One commentator has suggested a similar approach that could both acknowledge congress's intent to limit the scope of habeas review

and preserve the common-law tradition. See Samuel Wiseman, "Habeas After Pinholster", 53 B.C. L. Rev. 953, 984-86 (2012) (suggesting that courts could lawfully apply pre-AEDPA standards for minimum procedural requirements for deference to state findings of fact, but decline to afford deference only if the state court unreasonably denied further factual development). In Mr. Kessell's case, the same factors that support his argument that no adjudication occurred render the appellate court's "determination of the facts" unreasonable per se.

Other circuits consider the adequacy of state factfinding procedures in the course of deciding whether the ultimate decision is "based on an unreasonable determination of the facts in light of the evidence presented in state proceedings." See, e.g. Sharpe v. Bell, 592 F.3d 372, 378 (4th Cir. 2010); Teti, 507 F.3d at 57 (explaining that the "adequacy of the procedures and of the decision are addressed through the lens of § 2254(d), not as a threshold matter"); Lambert v. Blackwell, 387 F.3d 210, 239 (3d Cir. 2004). In many cases, this rule should be expected to deliver the right result. After all, "[i]f a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254." Mendiola v. Schomig, 224 F.3d 589, 592 (7th Cir. 2000). But here, the appellate court's decision rests on something more complicated that "thin air;" the findings occurred after direct-review hearings on a state law claim, but no factual development during proceedings aimed at adjudicating the Strickland/Hill claim.

Reviewing Mr. Kessell's claim "in light of the evidence presented in the State court proceedings" is fundamentally inappropriate when Mr. Kessell has

the burden to prove his claim and the record is materially incomplete. Nevertheless, if this approach is used, the appropriate question should be whether, on the record before the appellate court, it was unreasonable to adjudicate the merits of Mr. Kessell's claim before remanding for an evidentiary hearing. Because the adjudication process created serious doubts about whether the appellate court's decision was reliable, the state court's decision should be deemed "based on an unreasonable determination of the facts" unless the record before the appellate court conclusively demonstrated that Mr. Kessell was not entitled to review.

The record does not preclude any subsequent finding that trial counsel rendered deficient performance by failing to follow up with Dr. Riordan or by failing to arrange an independent evaluation. The record does not render impossible a post-hearing finding that Dr. Riordan would have changed his mind, or that trial counsel would have found an expert with a favorable opinion if he had ordered a fourth test. The record does not disprove Mr. Kessell's allegations that he would have insisted on trial if even one of expert found him insane as to all charges, or his allegations that he was willing to take the sexual assault charge to trial. Under these circumstances, the appellate court's decision to adjudicate the Strickland/Hill claim on the underdeveloped record was an unreasonable determination of the facts in light of the record before the appellate court.

2. This Court should decide the important question of whether Pinholster allows factual development in federal court when "a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself."

This Case presents an opportunity to settle the issue of whether Pinholster's bar on factual development applies when "a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself." Pinholster, 131 S. Ct. at 1417 n.5 (Sotomayor, J., dissenting). Circuit courts considering the issue have yet to encounter a suitable petitioner, or relied on circuit law to afford relief without resort to Section 2254(d)(1). E.g., Milke v. Ryan, 711 F.3d 998, 1007 n.3 (9th Cir. 2013) (declining to decide question because prosecutor's failure to disclose Brady material during state proceedings rendered findings of fact unreasonable under 2254(d)(2)); Black v. Workman, 682 F.3d 880, 895-96 (10th Cir. 2012) (refusing question where petitioner had "no acceptable excuse for not developing the facts in state court"). Nevertheless, this important issue should be decided before the Circuits have an opportunity to split on cases like Mr. Kessell's.

Mr. Kessell had every right under Florida law to expect an evidentiary hearing on his Strickland/Hill claim unless he failed to allege a prima facie violation. The PCR court denied factual development because it avoided reaching a merits decision by applying a procedural rule neither "firmly established" nor "regularly followed." Lee v. Kemna, 534 U.S. 362, 389 (2002); see Brown v. McDonough, 200 F. App'x 885, 887-889 (11th Cir.

2006) (reversing finding of procedural default because the Florida court had not applied an adequate procedural bar when it dismissed Strickland claim as successive based on a claim raised in a Rule 3.170 motion to withdraw plea). The appellate court issued a merits decision based on its conclusion that, as a matter of law, Mr. Kessell had failed to prove his Strickland/Hill claim by a preponderance of the evidence. The state of the record is clearly due to the state court's fault, not any lack of diligence by Mr. Kessell.

Mr. Kessell reiterates his opposition to reviewing his claim through the deferential lens of Section 2254(d). The reasonableness of a state decision, reviewed on the record before the state court (as explicitly commanded in Section 2254(d)(2) and expanded to include Section 2254(d)(1) in Pinholster), should be beside the point where the factfinding process was so deficient that the issue cannot reliably be determined without further factual development, the need for which is apparent on the face of the existing record. Nevertheless, if a federal court is to decide the legal reasonableness of the state court's decision, the decision should not be limited to the current record. If federal courts are to afford deference to legal conclusions like the one in Mr. Kessell's case, review is meaningless without an opportunity to expand the record. If the "fault of the state court itself" exception exists, the Court should remand Mr. Kessell's case for factual development and a determination of whether the decision was contrary to, or an unreasonable application of, clearly established federal law, based on the evidence adduced during federal habeas proceedings.

3. Mr. Kessell has made a substantial showing of the denial of a constitutional right.

To obtain a certificate of appealability, an applicant must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different matter, or that the issues presented therein were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473, 484 (2000). 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). That is, any particular decision not to investigate must be assessed for reasonableness. In any such assessment, the court must consider not only the evidence known to counsel, but also whether it would have led a reasonable attorney to investigate further, and what additional evidence would thereby have been uncovered. Rompilla v. Beard 545 U.S. 374, 390-93 (2005); Wiggins v. Smith, 539 U.S. 510, 527 (2003). Conventional wisdom does not substitute for an individualized assessment of a client's case. 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"). In the context of expert assistance, counsel must factor in the level of financial resources available to the client. Hinton v. Alabama, 134 S. Ct. 1081 (2014) (per curiam) (remanding for further proceedings where counsel's deficient failure to recognize that state law provided for additional funds to secure expert resulted less-qualified expert testifying unpersuasively at trial;

petitioner could show prejudice if a reasonable probability existed that "Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted.").

Whether Mr. Kessell's claims are debatable depends greatly on the appropriate standard of review. If Mr. Kessell's case is within the exception to Pinholster's prohibition on factual development for Section 2254(d)(1) review, merits review should be delayed until after Mr. Kessell receives an opportunity to expand the record; a federal court can then review the reasonableness of the appellate court's application of the Strickland/Hill standard.

If this Court applies Section 2254(d)(2), the Court could decide now that the decision is per se based on an unreasonable determination of facts because the state court factfinding procedures were defective. Under Eleventh Circuit precedent, review of Mr. Kessell's claim would be de novo, with no obligation to disprove the findings by clear and convincing evidence. Adkins v. Warden, Holman Corr. Fac., 710 F.3d 1241, 1249-50 (11th Cir.), *cert. denied* 134 S. Ct. 268 (Oct. 7, 2013); but see Fields v. Thaler, 588 F.3d 270, 279-80 (5th Cir. 2009) (outlining still-existing circuit split on interplay of Section 2254(d)(2) and Section 2254(e)(1)).

The same result would obtain if this Court adopted the Fourth Circuit's adjudication approach. Additionally, there is no possibility that a hypothetical future defendant whose only avenue of relief was Section 2254(d)(1) would be precluded from factual development on review of the state court's adjudication of law.

Alternatively, the Court could side with the jurisdictions which would attempt to evaluate the reasonableness of the state court's factual determination in light of the existing record. Due to Mr. Kessell's diligence and the state court's fault in denying further factual development, Mr. Kessell should only be required to show that the record before the appellate court does not conclusively preclude relief. As discussed in the final paragraph of Reason 1 for granting this petition, Mr. Kessell has met that burden.

CONCLUSION

For the foregoing reasons, Mr. Kessell prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Attorney for Petitioner

August 27, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10395-A

PHILLIP J. KESSELL,

Petitioner-Appellant,

versus

WARDEN, WAKULLA CORRECTIONAL INSTITUTION, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

ORDER:

(Filed May 29, 2014)

Phillip Kessell moves for a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. To merit a certificate of appealability, an appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because Kessell's petition has failed to show that his

underling claim has merit, he has failed to satisfy the *Slack* standard. The motion for a certificate of appealability is DENIED.

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. PIERCE DIVISION
Case No. 12-14402-CIV-GRAHAM/LYNCH

PHILLIP J. KESSELL,

Petitioner,

vs.

RICKY DIXON, et al.,

Respondents. /

CLOSED CIVIL CASE

ORDER

(Filed Dec. 30, 2013)

THIS CAUSE comes before the Court upon Phillip Kessell's Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody [D.E. 1].

THE COURT has conducted a *de novo* review of the record and is otherwise fully advised in the premises.

THIS MATTER was initially referred to the Honorable United States Magistrate Judge Patrick A. White pursuant to 28 U.S.C. § 636 and the Magistrate Rules for the Southern District of Florida [D.E. 3]. Thereafter, the case was reassigned to the Honorable United States Magistrate Judge Frank J. Lynch, Jr. [D.E. 6]. Judge Lynch has issued a Report and Recommendation [D.E. 29] (the "Magistrate Judge's Report") for this Court's consideration recommending

that Phillip Kessell's ("Mr. Kessell") Petition be denied. [D.E. 29 at 24].

Pursuant to 28 U.S.C. §636(b)(1) and Local Magistrate Rule 4(a), the Parties have fourteen (14) days after being served with a copy of the Report and Recommendations to serve and file written objections, if any, with the District Court. Failure to file timely objections shall bar the Parties from a *de novo* determination by the District Court of issues covered in the Magistrate Judge's Report and bar the Parties from attacking on appeal the factual findings contained therein. *LoConte v. Dugger,* 847 F.2d 745, 749-50 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988). Mr. Kessell filed a timely objection the Magistrate Judge's Report.

Based on Mr. Kessell's timely objection, the Court conducted a *de novo* review of the record and the case law cited in the Magistrate Judge's Report as well as in Mr. Kessell's pleadings. After careful consideration, the Court finds Mr. Kessell's objections to be unavailing. Essentially, Mr. Kessell takes issue with the factual statements contained in the Magistrate Judge's Report. [D.E. 30]. Judge Lynch largely relied on the State court factual findings in *Kessell v. State,* 96 So.3d 1031 (4th DCA 2012). The Court finds no error with Judge Lynch's reliance on factual record in *Kessell* because "a state court's factual findings are presumed correct, unless rebutted by the petitioner with clear and convincing evidence." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001). Mr. Kessell has not shown by clear and convincing evidence that the

Court should depart from the factual findings of Florida's Fourth District Court of Appeal.

Moreover, Mr. Kessell's Petition and the record before the Court does not show that the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law . . . ; or 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." *Head,* 268 F.3d at 1241; *see also* 28 U.S.C. §2254(d). Furthermore, Mr. Kessell has not made "a substantial showing of a denial of a constitutional right and is not entitled to a Certificate of Appealability." *Id.* at 1228. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Magistrate Judge's Report and Recommendation [D.E. 29] is **AFFIRMED, ADOPTED, AND RATIFIED** in its entirety. It is further

ORDERED AND ADJUDGED that Phillip Kessell's Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody [D.E. 1] is **DENIED**. It is further

ORDERED AND ADJUDGED that no Certificate of Appealability shall issue in this cause. It is further

ORDERED that the Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of December, 2013.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES
DISTRICT JUDGE

cc: U.S. Magistrate Judge Lynch

Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-14402-CIV-GRAHAM/LYNCH

PHILLIP J. KESSELL,

Petitioner,

v.

RICKY DIXON, in his official capacity as Warden of Wakulla Correctional Facility, et al.,

Respondents. /

REPORT AND RECOMMENDATION ON PETITIONER'S PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS (DE 1)

(Filed Nov. 5, 2013)

THIS CAUSE comes before this Court upon the above Petition. Having reviewed the Petition, Response, Reply, and record, this Court recommends as follows:

BACKGROUND

1. The Petitioner had had an abusive childhood. He graduated high school and attended two years of college. He enlisted in the Marines at the age of 19, and 23 years later he left with an honorable discharge at the rank of Chief Warrant Officer III. He has service connected disabilities for hypertension and ulcerative colitis. From the time of his discharge

in 1996 until 2002, he worked as an electrician. He continued to receive treatment for the hypertension and ulcerative colitis as well as for gout.

2. He married his high school girlfriend, and the marriage lasted for eleven years. That relationship ended in 1985 when his wife asked for divorce after she had had an affair. He remarried in 1987, but that marriage ended in 1993 after that wife also had an affair. From 1996 to 1999 he was in a relationship with a third woman (who was married to someone else). The Petitioner suffered progressively worse depression and depression-related symptoms with the end of each relationship. These depressive episodes included suicide attempts and mental health treatment.

3. His next relationship began in 2001. When that relationship ended in June 2002, he experienced another depressive episode including a suicide attempt. On July 25, 2002, three weeks after the relationship had ended, he observed the woman out. He waited for her at her home. When she returned, he attacked her with a hammer causing severe injury to her head. He placed her in his van, and he drove them to a construction site. When he exited the van, the woman locked herself inside. Eventually the Petitioner was found asleep nearby. At some point during the episode, either en route to the site or after the victim had locked herself inside the vehicle, he cut himself all over. The woman was found outside near a canal, still alive.

4. The Petitioner was charged with attempted first degree murder with a weapon, aggravated battery with a deadly weapon, kidnapping, aggravated battery with great bodily harm, and felony causing bodily injury. The Public Defender initially represented the Petitioner.

5. On August 29, 2002, soon after being charged, the court appointed Dr. Williams to conduct a psychological evaluation of the Petitioner's competency to proceed to trial and his sanity at the time of the crime. The instant record does not contain Dr. Williams' report, but reportedly Dr. Williams found him to be sane as to all offenses. What else is known of Dr. Williams' report comes from a much later report by Dr. Chacko. There Dr. Chacko recalls Dr. Williams' diagnosis of a serious mental illness – Borderline Personality Disorder – that impacts the Petitioner's ability to manage his feelings when overwhelmed and that substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the crime.

6. Nearly a year later, in June 2003, the court granted the Public Defender's request for two additional psychological evaluations, one by Dr. Landrum and the other by Dr. Riordan. The record does not contain Dr. Landrum's report, but reportedly Dr. Landrum, like Dr. Williams, found the Petitioner sane as to all offenses. As recalled by Dr. Chacko, Dr. Landrum diagnosed Borderline Personality Disorder as well as depression marked by the loss of

significant others. Unlike Dr. Williams, Dr. Landrum regarded these mental health conditions as less of a contributory factor. Dr. Landrum concluded that at the time of the crime, the Petitioner was not suffering from a reasoning defect that rendered him unable to distinguish between right and wrong or hindered his ability to form criminal intent.

7. Dr. Riordan authored the third psychological report after evaluating the Petitioner twice. Like the previous two psychologists, Dr. Riordan diagnosed depression and Borderline Personality Disorder. However, in sharp contrast to the first two, Dr. Riordan found the Plaintiff insane – with the one exception of the kidnapping offense. (The reason why Dr. Riordan did not find the Petitioner insane as to the kidnapping charge underlies his present claim of ineffective assistance of counsel.) In finding the Petitioner insane as to the other offenses, Dr. Riordan concluded that the Petitioner's mental infirmities had rendered him unable to distinguish right from wrong, to appreciate what he was doing, to consider the consequences, or to refrain from his impulses.

8. On January 14, 2004 the Public Defender filed a Notice of Intent to Rely on the Defense of Insanity with the trial court. On January 26, 2004 the prosecutor filed an Amended Information, adding the charge of sexual battery with great force. The record shows that there was much conflicting evidence over whether the apparent sexual encounter was recent and whether it was consensual.

9. On May 5, 2004 Bruce Baillie, Esq., a privately hired attorney, took over the Petitioner's representation from the Public Defender's Office. He is the attorney subject of the Petitioner's present claims of ineffective assistance of counsel.

10. On August 9, 2004 the Petitioner signed a written plea agreement. He thereby pled no contest to the two counts of attempted first degree murder (Count I) and kidnapping with a deadly weapon (Count III). In return the prosecutor agreed to "nolle pros" the other charges. The agreement expressly left the parties free to argue any appropriate sentence at the sentencing hearing, and the Petitioner affirmed his understanding that the maximum possible sentence on *each* count was life imprisonment. Of note, the Petitioner also denied ever having been found insane or incompetent, and he denied past mental health hospitalization except for a six week period in 1997. The Petitioner did not expressly waive an insanity defense in the written agreement, as he now emphasizes, but he effectively did so at the subsequent plea hearing.

11. A Change of Plea Hearing was held August 11, 2004. Over the course of that plea colloquy, the Petitioner affirmed the factual basis of the subject two counts, his understanding of the terms and consequences of his guilty plea, and his satisfaction with his legal representation. This included his awareness of the loss of the right to trial and of the exploration of all possible defenses, specifically mental illness-based. This also included his awareness of

the maximum possible sentence of a life sentence as to *each* count; that the prosecutor would be recommending a life sentence; and that parole would not be available.

12. For sentencing purposes, the minimum sentence that the Petitioner was facing was 10.9 years. Past misdemeanors for battery and DUI contributed to this calculation. At the sentencing hearing, the trial court heard evidence of the crime and of the victim's circumstances. (The prosecutor added how in the past, the Petitioner would use force or threats of suicide to coerce girlfriends not to leave the relationship. The trial court expressly excluded the allegations regarding earlier relationships from its consideration.) The Petitioner accepted full responsibility for the crime and asked for leniency in the form of a less-than-life sentence. The trial court imposed two concurrent life sentences.

13. The Petitioner filed a Motion to Withdraw Plea pursuant to Rule 3.170, Fla.R.Crim.P. The Petitioner filed his Motion pro se, arguing that his guilty plea was invalid for several different, generalized reasons. He said that he was mentally weak and under duress. He said that he was uninformed of the full legal ramifications and consequences of his guilty plea, and he said that his defense counsel had coerced him. Later, with the benefit of counsel (the same counsel who represents him now), he amended his Motion. There he repeated only one argument from his initial, pro se Motion: that his counsel had badgered him into pleading guilty (to avoid three life

sentences) while he was mentally and emotionally vulnerable and taking psychotropic medications.

14. He now raised new arguments critical of his attorney's handling of his defense. He argued that his counsel did not fully investigate or advise him of a possible mental illness-based defense. The Petitioner alleged both that his counsel did not discuss the issue with him at all and that his counsel did not follow through on his request to investigate his mental health history, two inconsistent arguments. He alleged that his counsel did not advise him of Dr. Riordan's report (although obviously the Petitioner personally would have known of Dr. Riordan's two evaluations of him). He complained about the only strategy that his attorney did pursue: to seek the court's mercy in order to get a less than life sentence (and thereby the possibility of parole). While he conceded that he knew a life sentence was possible, his attorney had assured him that it would not be imposed. At sentencing his attorney proffered no mitigating evidence, including mental health-related evidence, as he had expected his attorney to do.

15. However these were not the focus of the Petitioner's Motion. His Motion focused instead on the later added count of sexual battery. The Petitioner argued that his counsel did not ask Dr. Riordan about his sanity with respect to that offense or hired an expert witness to review the prosecution's forensic evidence of recent sexual activity. The Petitioner does not raise this issue now. The focus of the instant

Petition instead concerns his attorney's advice regarding the insanity defense.

16. A second hearing on the Motion was held in March 2008 at which time Dr. Riordan testified. It was during the course of his testimony when the doctor realized that he had misunderstood one detail of the alleged crime. Dr. Riordan initially believed that the Petitioner had kidnapped the victim *before* he attacked her. This assumption had led Dr. Riordan to opine that the Petitioner was sane with respect to the kidnapping. The correct sequence of events, however, was that the Petitioner kidnapped her *after* he had attacked her. Dr. Riordan explained that this scenario plausibly would support a finding that the Petitioner was insane with respect to the kidnapping. However Dr. Riordan did not go so far as to affirmatively reverse his prior opinion.

17. Dr. Riordan's explanation of the nature of the Petitioner's Borderline Personality Disorder shows why he felt that the Petitioner could have been insane as to all the offenses. It is a matter of timing. The effects of the disorder, plus his past familial and relationship experiences, mean that the Petitioner finds the threatened loss of an important relationship very emotionally stressful. The loss of a relationship can trigger emotional stress – in the form of impulsivity, intense fear, anger, and panic – to such a degree that it overrides his capacity for logical, rational thought. In effect the stress triggers a state of psychosis. Dr. Riordan opined that the initial assault – as well as subsequent acts such as possibly the

kidnapping – occurred during this state of psychosis. However had the Petitioner stalked the victim and planned the attack – thus acting in a deliberative rather than psychotic, emotionally reactive state – then he probably was sane at the time.

18. This discrepancy of whether the Petitioner was insane at the time of the kidnapping was material to the Petitioner's defense. He needed a medical opinion that he was insane for all the charged offenses to make viable an insanity defense. So long as he was deemed sane as to the kidnapping offense (or any one offense that imposed a maximum life sentence), the insanity defense was unhelpful.

19. This unexpected clarification changed the focus of the Petitioner's Motion. Now he squarely was faulting his counsel for not pursuing an insanity defense and for not advising him of it. This Court observes however that his arguments still remained inconsistent: He faults his counsel (the Public Defender and Mr. Baillie) both for leaving him uninformed of the defense and for repeatedly advising him that the defense was unavailable to him. Nor does the Petitioner account for the fact that he did know of the insanity defense (learning of its possibility when he read a newspaper article about his case) or the fact that the Public Defender had filed a Notice of Intent to pursue an insanity defense. Nor does he account for the multiple plea conferences, both with the Public Defender and with his private counsel, or for the active involvement of several friends in developing his defense, friends who knew of his mental

health problems. Lastly he accused his counsel of misadvising him about the availability of parole.

20. The state court – the same one that had convicted and sentenced him – denied his Motion to Withdraw Plea. In that order the state court reviewed the full record evidence, including all of the testimonial evidence taken over the course of the hearings. Thereafter the state court found that the Petitioner had been fully aware of all material issues leading up to his guilty plea. To the extent the Petitioner's testimony conflicted with that of his defense attorney, Mr. Baillie, the court credited Mr. Baillie. Lastly the court found that the Petitioner knowingly had entered an open plea with the possibility of the maximum sentence being imposed. The Fourth District Court of Appeal affirmed without an opinion the Petitioner's conviction and sentence as well as the denial of his Rule 3.170(1) Motion to Withdraw Plea.

21. The Petitioner then filed a Rule 3.850, Fla.R.Crim.P. Motion for Post-Conviction Relief in state court. There the Petitioner challenged the voluntariness of his open plea on the basis that his counsel had failed to investigate an insanity defense. In conjunction with this Motion, the Petitioner underwent another psychological evaluation, this time with Dr. Chacko. Although he had not yet written a report, at the time the Petitioner filed his Motion for Post-Conviction Relief, Dr. Chacko was prepared to testify that during the commission of all six of the charged offenses, the Petitioner was suffering a psychotic episode and was insane. The Petitioner

cited Dr. Chacko's opinion as bolstering Dr. Riordan's opinion and demonstrating prejudice from his attorney's failure to develop an insanity defense.

22. A different state court circuit judge denied the Motion. That judge found that the issue already had been raised, rejected, and affirmed on appeal and thus procedurally barred. It was after the state court's decision when Dr. Chacko issued his written report.

23. The Fourth District Court of Appeal affirmed the denial of post-conviction relief. In its written opinion, *Kessell v. State,* 96 So.3d 1031 (Fla. 4th DCA 2012), the appellate court set forth two reasons why the Petitioner's Motion fails. The appellate court discussed first the procedural bar that the state court judge had highlighted. The appellate court found that the Petitioner raised no truly new or distinct claims in his Motion for Post-Conviction Relief. The appellate court reasoned that his present claim of ineffective assistance of counsel was in effect the same claim that his plea was involuntary. Consequently all issues already had been addressed in the prior Motion to Withdraw Plea.

24. The appellate court next considered the merits of the Petitioner's present claim for relief. Even on the merits, the appellate court found that his claim of ineffective assistance of counsel failed. The appellate court found no prejudice because Dr. Riordan did not actually change his opinion. The doctor only speculated that he would change his

opinion after a review of the new facts, speculation which the appellate court found insufficient to warrant post-conviction relief. Furthering the point, the appellate court stated the possibility that Dr. Riordan might persist in his original opinion that the Petitioner was sane at the time of the kidnapping. The appellate court noted that at the time of his evaluations, Dr. Riordan already had the correct sequence of events before him – as supplied by the police report and the Petitioner's own recollections.

25. Nor did the appellate court find deficient performance. The appellate court found that defense counsel (1) was aware of the possibility of an insanity defense, (2) based on the total facts and experts' opinions, concluded that an insanity defense was weak, and (3) discussed and explained this issue with the Petitioner. As for the Petitioner, the appellate court found that he knew about the possibility of an insanity defense when he pled guilty and that he voiced no desire for further legal advice or investigation into the matter.

26. The appellate court concluded that "[d]efense counsel and Kessell were aware when he entered the plea that there was some support for an insanity defense, but at least two experts would have disagreed." This Court adds at this juncture that the appellate court also accounted for the later submitted evaluation by Dr. Chacko "who would testify that Kessell was insane as to all counts", evidence which the Petitioner submitted to support his claim that but for his counsel's misadvice and failure to investigate,

he would not have pled guilty but rather would have proceeded to trial on an insanity defense. The appellate court found that the Petitioner had no basis to question the two unfavorable expert opinions and that his defense counsel did not err in believing that the Petitioner's better chance to avoid a life sentence was to plead guilty – and not to pursue the insanity defense.

27. The Petitioner now seeks federal habeas corpus relief. The Respondent argues that the instant Petition is untimely. The Petitioner replies with his own calculation of the tolled time, one that shows that he filed his Petition in less than 365 days and thus timely. To support his time calculation the Petitioner cites *Diaz v. Tucker,* 2012 WL 5512282 (S.D.Fla. 2012). For instant purposes, this Court assumes that the Petition is timely and will consider the Petition on its merits.

STANDARD OF REVIEW

28. The Eleventh Circuit recently discussed the § 2254(d) standard of review in the case of *Evans v. Sec'y, Dep't of Corrections,* 703 F.3d 1316 (11th Cir. 2013). As the *Evans* court discusses in greater detail, the 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA") amendments to § 2254(d) narrowed the scope of review. A § 2254 petitioner must show not only that his or her constitutional claim, itself, is meritorious, but that the state court's resolution of that same claim was contrary to clearly established

federal law, as determined by the Supreme Court of the United States; resulted from an unreasonable application of federal law; or was based on an unreasonable determination of the facts. As for a state court's evidentiary rulings and findings of fact, they are presumed correct. *See* 28 U.S.C. § 2254(e). Thus in practice a petitioner must show that the state court's decision was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. This means in effect a highly deferential standard of review, with the state court being given the benefit of the doubt. *See id.* at 1325-26. *See also, McNabb v. Ala. Dept. of Corrections,* 2013 WL 4535704, *4 (11th Cir. Aug. 28, 2013). The federal court reviews in essence the decision of the state court and not the merits of the claims de novo. *See Putman v. Head,* 268 F.3d 1223, 1240 (11th Cir. 2001).

29. The above § 2254(d) standard of review implies that the state court already adjudicated the federal law issue on its merits. Indeed a § 2254 petitioner is required to exhaust his or her federal claims for relief in state court before seeking relief in federal court. A § 2254 petitioner must have presented the federal claim to the state court fairly and sufficiently enough to have given that court a meaningful opportunity to consider it. Exhaustion likewise requires review by the state appellate and post-conviction courts. *See Mason v. Allen,* 605 F.3d 1114 (11th Cir. 2010) and *Herring v. Sec'y, Dep't of*

Corrections, 397 F.3d 1338 (11th Cir. 2005). Except where specifically noted to the contrary below, the Petitioner meets this exhaustion prerequisite.

30. Lastly the federal court should defer to the state court's full and fair adjudication on the merits of a federal habeas corpus claim. This deference applies to the state court's decision, not necessarily its analysis.

DISCUSSION

31. With this standard of review in mind, this Court turns next to the Petitioner's claims of counsel ineffectiveness. Implicit in the Sixth Amendment's guarantee of legal representation in a criminal proceeding is the guarantee of minimally competent representation. The U.S. Supreme Court has "established a two-prong test for deciding whether a defendant has received ineffective assistance of counsel. The defendant must show (1) that counsel's performance failed to meet 'an objective standard of reasonableness,' and (2) that the defendant's rights were prejudiced as a result of the attorney's substandard performance." *Gomez-Diaz v. U.S.,* 433 F.3d 788, 791 (11th Cir. 2005) (citing the seminal *Strickland v. Washington,* 466 U.S. 668 (1984), case) (internal citations omitted). *See also, Gordon v. U.S.,* 518 F.3d 1291, 1297 (11th Cir. 2008). The defendant – here, called the Petitioner – therefore must demonstrate both professional error and a prejudicial effect on the

proceedings, and the failure to demonstrate either is fatal to the request for relief.

32. Moreover a petitioner must overcome the deference given to counsel, especially to counsel's strategic-based decisions. This deference applies with particular force in this case where counsel and the Petitioner were faced with two less-than-ideal options: a weak insanity defense or pleading guilty to serious felony offenses. Thus the Petitioner now challenges what was a strategic decision. Additionally the attorney is well-experienced in criminal law, another reason for deferring to his choices.

33. As noted above, this Court does not apply the *Strickland* standard de novo. Rather the Petitioner's claims of ineffective assistance of counsel must be viewed through the prism of the above discussed § 2254(d) deference. "Thus, under this doubly deferential standard, the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. [ ] And if, at a minimum, fairminded jurists could disagree about the correctness of the state court's decision, the state court's application of *Strickland* was not unreasonable and [§ 2254(d)] precludes the grant of habeas relief." *Morris v. Sec'y, Dep't of Corrections,* 677 F.3d 1117, 1126 (11th Cir. 2012).

34. The Petitioner's extensive arguments – much of which are raised in his Reply and thus after the Respondent had responded – boil down to one core issue: whether the Petitioner's defense counsel

was ineffective for not pursuing an insanity defense and instead for allowing him to plead guilty. This issue has been addressed at length in the state court proceedings. Even without the deference accorded to the state court findings and rulings – as extensive and on-point as they were – the Petitioner still fails to show a *Strickland* or due process error.

35. The record taken on the whole shows that an insanity defense always was in consideration – both by the Public Defender and by later hired counsel. "This is not a situation", as the appellate court stressed, "where a defendant did not know of the existence of a possible defense". *Kessell,* 96 So.3d at 1034. The fact that *three* psychological evaluations were undertaken shows the seriousness of the inquiry. It should also be noted that the Petitioner had other advantages in preparing his defense. He had the benefit of much time to make pre-trial preparations, and he had the assistance of friends who were active in his defense.

36. The issue confronting the Petitioner and his defense counsel was the strength of the insanity defense and how it weighed against other possible defense strategies. The Petitioner had few good defense options. The crime was especially violent and his role as the perpetrator was in no doubt. He was largely defenseless against the charges. His only two options were an insanity defense or a negotiated guilty plea.

37. Defense counsel did not regard the insanity defense as a viable option. Two of the three psychologists who had evaluated the Petitioner found him sane as to all of the subject offenses. The third one, Dr. Riordan, found him sane as to one of the subject offenses, kidnapping. Although Dr. Riordan's report was ostensibly favorable – having found him insane as to all the other offenses – defense counsel had other reasons to regard it as helpful. Altogether, two findings of sanity as to all offenses and one questionable report as to insanity as to all but one offense – provided a poor foundation upon which to build the defense. As the appellate court summarized, "[c]ounsel was not confident in Riordan's report, and he did not think that Kessell had a viable insanity defense." Moreover counsel had another strategic point to consider. In addition to its factual weakness, counsel had to take into account the jury's expected skepticism. Simply put, defense counsel did not consider the potential insanity defense strong enough to take it to trial.

38. The other option was to plead guilty. That is what the Petitioner did, and he did derive concrete benefit from it. Although the Petitioner was facing a range of felony counts, his guilty plea limited him to convictions on just two: attempted murder and kidnapping. This meant that the Petitioner now was facing just two life sentences as opposed to three. In a practical sense this still left the Petitioner exposed to a very severe sentence. However there still was the

possibility that the sentence would be imposed in a way that might allow for release at some later point.

39. This Court adds at this juncture the issue of whether the Petitioner's attorney correctly advised him about the possibility of parole. The Petitioner mentions this particular point in his pleadings. However he does not formally raise it as a ground for habeas corpus relief. Consequently the point is not fully developed as to whether defense counsel actually erred much less whether that error was of constitutional dimension. In any event this Court sees no basis for relief. The Petitioner did not formally seek state court relief on this point, thereby precluding § 2254 relief. Nor does it change the fact that the ultimate goal of the negotiated plea was to obtain less than the maximum sentence, whether achieved by parole or the imposition of a less than life sentence.

40. In light of the overall circumstances, this Court cannot conclude that the Petitioner's defense counsel performance was deficient or prejudicial. To the contrary, defense counsel would have been remiss had he not brought the plea option forward.

41. Then there is the added wrinkle posed by Dr. Riordan's later testimony about being mistaken about the crime's time line. Had he known of the kidnapping's occurrence after the assault, he might have found the Petitioner insane as to that offense, as well. The Petitioner faults the defense counsel for not catching this apparent mistake sooner, thereby depriving him of a better insanity defense. (The

Petitioner thereby implicitly concedes the weakness of his insanity defense as was available at the time of his guilty plea.) This Court is unconvinced that any such oversight by defense counsel was deficient, much less deficient enough to constitute a *Strickland* violation. Indeed the Petitioner's present attorney did not even catch this apparent mistake himself.

42. The Petitioner's present argument rests heavily on the assumption that Dr. Riordan in fact would have deemed him insane as to the kidnapping (and thus insane as to all counts). The record belies such certainty. For one, Dr. Riordan, himself, declined to reverse his opinion, even after being informed of the correct time line and otherwise discussing the Petitioner's case in detail. Secondly, Dr. Riordan may have had the correct time line all along, as the appellate court noted. Had Dr. Riordan the correct information before him, then defense counsel would have had even less reason to doubt his report. Third, defense counsel still had to weigh Dr. Riordan's report against the two preceding unfavorable reports. As defense counsel explained, they already had other reasons to doubt the value of Dr. Riordan's report, and they had a majority of unfavorable reports to contend with. Lastly, there is the matter of Dr. Chacko's report. The Petitioner proffers Dr. Chacko's report in order to lend strength to Dr. Riordan's report. Even if it does buttress Dr. Riordan's report, it remains largely irrelevant to the quality of the legal representation rendered well beforehand. In any event defense counsel and the Petitioner would have

faced the same strategic choice between pursuing an insanity defense or negotiating a plea.

43. Even as a matter of de novo review, this Court cannot find a *Strickland* violation. This Court sees no error in the defense counsel's performance, much less error that vitiates the fairness of the criminal proceeding. Nor does the Petitioner make a persuasive showing of prejudice: that he would have gone to trial. Had he gone to trial and lost – which was the expected outcome given the strength of the State's case against him and the problems with the insanity defense – he would have had no chance at a less than true life sentence. By pursuing a negotiated plea, he did have that chance at least. The sentence imposed was more the function of the crime's nature; given the lack of good defense options, counsel cannot be faulted.

44. Of course, the governing standard is not one of de novo review. The governing standard is one that is highly deferential to the prior state court rulings. This deference only dissuades against § 2254 relief further. This very same issue has been thoroughly addressed in the state courts – twice. First it was raised in the context of a Motion to Withdraw Plea and later in a Motion for Post-Conviction Relief. Indeed it was the thoroughness of the prior ruling on the Motion to Withdraw Plea that led to the denial of his Motion for Post-Conviction Relief on procedural grounds. The State argued in response to the Motion for Post-Conviction Relief that the Petitioner already had raised the issue of his trial counsel's effectiveness

in the prior proceeding and that the issue had been decided on the merits by the trial court and affirmed on appeal. Thus, citing *Thompson v. State,* 759 So.2d 650 (Fla. 2000) and *Ethridge v. State,* 766 So.2d 413 (Fla. 4th DCA 2000), the State argued that the issues raised in the Motion for Post-Conviction Relief were foreclosed from re-litigation. The trial court adopted this reasoning in its Order denying the Motion for Post-Conviction Relief.

45. Not only have the legal issues been addressed, but there have been thorough fact-finding, as well. Given that the Petitioner had the opportunity to develop the factual record and indeed did so, there is no legal basis for holding an evidentiary hearing now on the Petition. *See* 28 U.S.C. § 2254(e)(2). This Court notes the Petitioner's objections to what he characterizes as improper fact-finding by the state appellate court. This Court sees no error. The factual record of the case already had been developed by that point. The appellate court's discussion was drawn from that underlying factual record. The only new fact issue presented was Dr. Chacko's written report, but it was of limited value in a *Strickland*-based case anyway. However there is some inconsistency between the Petitioner's objection to "fact finding" by the appellate court and his proffer of this new item of evidence on appeal for that same court's consideration.

CONCLUSION

46. The Petitioner fails to show how the state post-conviction court's denial of his claims of ineffective assistance of counsel were contrary to, or the product of an unreasonable application of, clearly established federal law. Nor does the Petitioner show that his guilty plea otherwise was invalid.

ACCORDINGLY, this Court recommends to the District Court that the Petition for Writ of Habeas Corpus (DE 1) be **DENIED**.

The parties shall have fourteen (14) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Donald L. Graham, the United States District Judge assigned to this case.

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this 5th day of November, 2013.

/s/ Frank J. Lynch, Jr.
FRANK J. LYNCH, JR.
UNITED STATES
MAGISTRATE JUDGE

cc: Hon. Donald L. Graham
Daniel D. Mazar, Esq.
Gray R. Proctor, Esq.
Laura Fisher, AAG