UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

TROY KELVIN CURRY-PENNAMON,

Petitioner,

vs. Case No. 3:18-cv-1528-J-25PDB

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

I. INTRODUCTION

Petitioner Troy Kelvin Curry-Pennamon, through counsel, is challenging a state court (Duval County) conviction for attempted murder in the second degree in his Amended Petition (Petition) (Doc. 4) pursuant to 28 U.S.C. § 2254. Respondents filed an Answer to Federal Habeas Corpus Petition (Response) (Doc. 6).[1] Petitioner filed a Reply to State's Response to 2254 Petition (Doc.

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[1] Respondents provide an Index to Appendix (Doc. 6 at 49-51). In this opinion, the Court references the document and page numbers assigned by the electronic filing system.

12). Respondents calculate the Petition is timely and concede timeliness. Response at 19-20.

II. PETITION

Petitioner raises five grounds in the Petition:

> GROUND ONE: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments where trial counsel failed to request a complete and accurate jury instruction regarding the justifiable use of force and as a result, negated Defendant's only defense.
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> 1-A: Trial counsel failed to request a complete and accurate instruction concerning carrying a concealed weapon where a statutory exception applied and where Mr. Curry-Pennamon was entitled to lawfully possess his weapon.
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> 1-B: Trial counsel failed to request a "prior threats" instruction as part of the trial court's instruction on justifiable use of deadly force where the evidence clearly supported giving the instruction.
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> 1-C: Trial counsel failed to object to the trial court's failure to instruct the jury that justifiable use of deadly force applied to the lesser-included charges, including attempted second-degree murder, and the failure negated Defendant's sole defense theory.

GROUND TWO: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments where trial counsel failed to file a motion to dismiss count two pre-trial, there was no reasonable justification for the omission, and as a result, Mr. Curry-Pennamon was prejudiced.

GROUND THREE: Mr. Curry-Pennamon received ineffective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments arising out of counsel's failure to raise on direct appeal an issue of fundamental error, where the trial court erroneously issued an improper jury instruction which negated the appellant's sole defense.

GROUND FOUR: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments, arising out of his counsel's failure to object to Florida Statutes, Section 776.013(3), which instructed the jury that Mr. Curry-Pennamon had no right to use deadly force during the commission of a[n] unlawful activity and instead should have argued for an instruction under section 776.012(1) which gave Mr. Curry-Pennamon the right to use deadly force whether in commission of unlawful activity or not and imposed no duty to retreat.

> GROUND FIVE: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments, arising out of his counsel's failure to invoke the Rule of Completeness after the state moved to admit a misleading portion of a statement Mr. Curry-Pennamon gave during a police interrogation, when the entire statement should have been admitted under the Rule of Completeness; the partial statement was used to mislead the jury to believe that Mr. Curry-Pennamon had the intent to kill the victim, whereas the complete statement in context would have demonstrated that he did not have such intent.

Petition at 18-19 (some capitalization omitted).

Petitioner admits he failed to exhaust two grounds of ineffective assistance of trial counsel, grounds four and five. Petition at 10. He asks this Court, however, to excuse his procedural default of grounds four and five pursuant to Martinez v. Ryan, 566 U.S. 1 (2012), claiming his post-conviction counsel provided ineffective assistance by failing to raise these claims in the Rule 3.850 motion. Petition at 10.

III. HABEAS REVIEW

In his Petition, Petitioner claims he is detained "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The Court recognizes its authority to award habeas corpus relief to state prisoners "is limited-by both statute and Supreme Court precedent." Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1330 (11th Cir. 2019), petition for cert. filed, (U.S. Apr. 20, 2019) (No. 19-8341). The Antiterrorism and Effective Death Penalty Act (AEDPA) governs a state prisoner's federal petition for habeas corpus and "prescribes a deferential framework for evaluating issues previously decided in state court[,]" Sealey v. Warden, Ga. Diagnostic Prison, 954 F.3d 1338, 1354 (11th Cir. 2020) (citation omitted), limiting a federal court's authority to award habeas relief. See 28 U.S.C. § 2254; Shoop v. Hill, 139 S. Ct. 504, 506 (2019) (per curiam) (recognizing AEDPA imposes "important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases"). As

such, federal courts may not grant habeas relief unless one of the claims: "(1)'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) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)." Nance v. Warden, Ga. Diagnostic Prison, 922 F.3d 1298, 1300-1301 (11th Cir. 2019), cert. denied, 140 S. Ct. 2520 (2020).

In Knight, the Eleventh Circuit explained:

> A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams [v. Taylor, 529 U.S. 362 (2000)] at 413, 120 S. Ct. 1495. A state court decision involves an unreasonable application of federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. To justify

> issuance of the writ under the "unreasonable application" clause, the state court's application of Supreme Court precedent must be more than just wrong in the eyes of the federal court; it "must be 'objectively unreasonable.'" Virginia v. LeBlanc, --- U.S. ----, 137 S. Ct. 1726, 1728, 198 L.Ed.2d 186 (2017)(quoting Woods v. Donald, --- U.S. ---, 135 S. Ct. 1372, 1376, 191 L.Ed.2d 464 (2015)); see also Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L.Ed.2d 914 (2002) (explaining that "an unreasonable application is different from an incorrect one.").

Knight, 936 F.3d at 1330-31.

To obtain habeas relief, the state court decision must unquestionably conflict with Supreme Court precedent, not dicta. Harrington v. Richter, 562 U.S. 86, 102 (2011). If some fair-minded jurists could agree with the lower court's decision, habeas relief must be denied. Meders v. Warden, Ga. Diagnostic Prison, 911 F.3d 1335, 1351 (11th Cir.), cert. denied, 140 S. Ct. 394 (2019). Therefore, unless the petitioner shows the state-court's ruling was so lacking in justification that there was error well understood and comprehended in

existing law beyond any possibility for fair-minded disagreement, there is no entitlement to habeas relief. Burt v. Titlow, 571 U.S. 12, 19-20 (2013).

This Court must accept that a state court's finding of fact, whether a state trial court or appellate court, is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). "The state court's factual determinations are presumed correct, absent clear and convincing evidence to the contrary." Sealey, 954 F.3d at 1354 (quoting 28 U.S.C. § 2254(e)(1)). This presumption of correctness, however, applies only to findings of fact, not mixed determinations of law and fact. Brannan v. GDCP Warden, 541 F. App'x 901, 903-904 (11th Cir. 2013) (per curiam) (recognizing the distinction between a pure question of fact from a mixed question of law and fact), cert. denied, 573 U.S. 906 (2014).

Where there has been one reasoned state court judgment rejecting a federal claim followed by an unexplained order upholding that judgement, federal

habeas courts employ a "look through" presumption: "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018) (Wilson).

The reviewing federal court's habeas corpus consideration of a petition under AEDPA is a guard against extreme malfunctions in the state criminal justice systems, not a mechanism for ordinary error correction. Richter, 562 U.S. at 102-103 (citation and quotation marks omitted). As noted in Sealey, 954 F.3d at 1354 (citations omitted), when reviewing whether there has been an unreasonable application of federal law, "[t]he key word is 'unreasonable,' which is more than simply incorrect." Consequently, state-court judgments will not easily be set aside due to the applicability of the highly deferential AEDPA standard that is intentionally difficult to meet. See Richter, 562 U.S.

at 102. Although a high hurdle, this high standard does not impose a complete bar to issuing a writ, but it severely limits those occasions to those "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with Supreme Court precedent. Id.

IV. PROCEDURAL HISTORY

A brief procedural history will be provided to provide context for Petitioner's claims. Petitioner was charged by information with attempted murder in the first degree and carrying a concealed firearm. (Doc. 6-2 at 33-34). These crimes were alleged to have occurred on December 26, 2011 in Duval County. Id. at 33. The record includes a Custodian of Records Statement, dated March 8, 2013, from Whitney M. Shiver, Records Custodian of the Florida Department of Agriculture and Consumer Services, stating Petitioner has not applied for or been issued a concealed weapon or firearm license. (Doc. 6-3 at 28). After a jury trial was conducted on July 17 and July 18, 2013 (Doc. 6-5) (Doc. 6-6) (Doc. 6-7) (Doc.

6-8), the jury found Petitioner guilty of attempted murder in the second degree, a lesser-included offense, and found Petitioner actually possessed and discharged a firearm causing great bodily harm during the commission of that offense, and also found Petitioner guilty of carrying a concealed weapon, as charged in the information. (Doc. 6-3 at 36-38).

The trial court entered its judgment and sentence on August 29, 2013.[2] (Doc. 6-3 at 83-90). As to count one, Petitioner was sentenced to 25 years in prison with a 25-year minimum mandatory term. Id. at 86. As to count two, he was sentenced to five years in prison to run concurrently with count one. Id. at 87-88. On direct appeal, the First District Court of Appeal (1st DCA) affirmed the conviction for attempted murder in the second degree but reversed the conviction and sentence

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2 Of note, the judgment incorrectly refers to a conviction for attempted murder in the first degree, not second degree. (Doc. 6-3 at 83). The judgment was eventually re-recorded to correctly reflect the conviction for attempted murder in the second degree. (Doc. 6-20).

for carrying a concealed firearm.[3] (Doc. 6-12). The 1st DCA agreed with Petitioner's argument that possession of the firearm in the Walmart parking lot was authorized by § 790.01(2), Fla. Stat., because as a Walmart employee on duty, he lawfully possessed the firearm at his place of business under the exception for possessing firearms at his place of business pursuant to § 790.25(3)(n), Fla. Stat. (Doc. 6-12 at 3-4). The court referred to state court precedent and opined that the place of business exception applies to employees and to the property surrounding the business, including parking lots. Id. at 4. As such, the state appellate court found the trial court erred by denying Petitioner's motion for judgment of acquittal on that charge. Id. at 5.

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3 On appeal, Petitioner raised three claims challenging the second degree murder conviction: (1) the trial court's justifiable use of deadly force jury instruction amounted to fundamental error because the instruction negated Appellant's only defense and because it told the jury that self-defense only applied to the charged crime of attempted first degree murder; (2) the trial court erred fundamentally in failing to instruct the jury that justifiable use of deadly force was a defense to the lesser included offense of attempted second degree murder; and (3) the trial court erred in denying Appellant's motion for judgment of acquittal as to count I of the information. (Doc. 6-9 at 3).

In a Motion for Rehearing, appellate counsel requested the 1st DCA rehear the matter because it overlooked an erroneous instruction dealing with justifiable use of deadly force which constituted fundamental error as to the attempted murder in the second degree count. (Doc. 6-13 at 2). Noting the 1st DCA reversed the conviction and sentence for carrying a concealed firearm, Petitioner claimed, "the fact that Appellant was carrying a concealed firearm did not apply in the jury's consideration of whether Appellant had a duty to retreat when he acted in self-defense." Id. Petitioner asserted it was error to instruct the jury that Petitioner carrying a concealed weapon constituted an unlawful activity and therefore, Petitioner had a duty to retreat. Id. at 3. Petitioner argued, since he was in lawful possession of the firearm and was not engaged in any unlawful activity at the time he acted in self-defense, it constituted reversible error for the lower court to give an instruction that negated his only defense. Id. at 3-4.

In its response to the motion, the state argued that the 1st DCA did not overlook a claim as the Appellant was raising a new claim on rehearing concerning trial court error in providing an erroneous jury instruction that dealt with Petitioner having a duty to retreat because he was engaged in the unlawful activity of carrying a concealed firearm. (Doc. 6-15 at 2-3). The state, relying on Rule 9.330(a), Fla. R. App. P., asserted the motion for rehearing should be denied for failure to adhere to the rule that a motion for rehearing shall not present issues not previously raised. (Doc. 6-15 at 3).

Additionally, the state argued the claim was not preserved at trial; therefore, the 1st DCA would have to review the claim for fundamental error since the issue was waived at trial as counsel did not object to the jury instructions. Id. at 3-6. Alternatively, the state argued fundamental error did not occur, because, regardless of whether or not Petitioner had a duty to retreat, the evidence overwhelmingly showed Petitioner

did not reasonably believe he needed to use deadly force as the victim was running away with his back turned as Petitioner was shooting. Id. at 7-11.

The state relied on Garrett v. State, 148 So. 3d 466 (Fla. 1st DCA 2014), review dismissed, 192 So. 3d 470 (Fla. June 9, 2016), a Florida decision in which the court found the trial was not fundamentally unfair even though the jury was improperly instructed that the defendant was engaged in an unlawful activity because the defendant was a convicted felon in possession of a firearm as there was ample evidence that the defendant did not have a reasonable belief that deadly force was necessary to prevent an imminent threat, particularly since the victim dropped his rifle and the defendant continued to shoot. (Doc. 6-15 at 11-12). The Garrett court surmised, if there was a reasonable belief that the defendant was under threat of imminent death or great bodily harm or the imminent threat of a forcible felony, the erroneous instruction would not affect the jury's ultimate responsibility of determining whether there was

an imminent threat in which retreat would be futile and deadly force justified, irrespective of whether the defendant was engaged in an unlawful activity at the time. (Doc. 6-15 at 12).

Finally, the state argued that Petitioner received a necessity instruction, which if the jury had believed, Petitioner would have had a defense to the crime of carrying a concealed firearm. Id. at 13. The state argued the inclusion of this instruction afforded Petitioner the ability to present his theory of defense. Id.

On March 25, 2015, the 1st DCA denied rehearing without explanation. (Doc. 6-16). The mandate issued on April 10, 2015. (Doc. 6-17). The circuit court entered a Judgment of Acquittal on the carrying a concealed firearm count on May 3, 2015. (Doc. 6-18).

In his Rule 3.850 motion, Petitioner exhausted the claims of ineffective assistance of trial counsel raised in grounds 1A, 1B, 1C, and 2 of the Petition. (Doc. 6-23 at 1-26). The trial court denied the post-conviction

motion. Id. at 132-41. Petitioner appealed. Id. at 165-66. The 1st DCA per curiam affirmed on August 8, 2018. (Doc. 6-24). Petitioner moved for rehearing (Doc. 6-25), and on October 8, 2018, the 1st DCA denied rehearing. (Doc. 6-26). The mandate issued on October 29, 2018. (Doc. 6-27).

Proceeding pro se, Petitioner filed a state petition alleging ineffective assistance of appellate counsel. (Doc. 6-34). He exhausted ground three of the federal Petition by presenting it in Issue Two of his state court petition. Id. at 24-29.

On July 1, 2016, the 1st DCA denied the state petition on its merits. (Doc. 6-38). Petitioner moved for rehearing (Doc. 6-39). The 1st DCA denied rehearing on August 15, 2016. (Doc. 6-40).

V. EVIDENTIARY HEARING

"In a habeas corpus proceeding, the burden is on the petitioner to establish the need for an evidentiary hearing." Jones v. Sec'y, Fla. Dep't of Corr., 834 F.3d 1299, 1318 (11th Cir. 2016) (citations omitted), cert.

denied, 137 S. Ct. 2245 (2017). See Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011) (opining a petitioner bears the burden of establishing the need for an evidentiary hearing with more than speculative and inconcrete claims of need), cert. denied, 565 U.S. 1120 (2012); Dickson v. Wainwright, 683 F.2d 348, 351 (11th Cir. 1982) (same). A petitioner must make a specific factual proffer or proffer evidence that, if true, would provide entitlement to relief. Jones, 834 F.3d at 1319 (citations omitted). Conclusory allegations will not suffice. Id.

In this case, the pertinent facts are fully developed in this record or the record otherwise precludes habeas relief; therefore, the Court can "adequately assess [Petitioner's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), cert. denied, 541 U.S. 1034 (2004).

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner raises several claims of ineffective assistance of trial counsel. To prevail on a Sixth

Amendment claim of ineffective assistance of trial counsel, a petitioner must satisfy the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 688 (1984), requiring that he show both deficient performance (counsel's representation fell below an objective standard of reasonableness) and prejudice (there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). See Brewster v. Hetzel, 913 F.3d 1042, 1051-52 (11th Cir. 2019) (reviewing court may begin with either component).

The two-part Strickland standard applies to Petitioner's claim of ineffective assistance of appellate counsel as well:

> An ineffective assistance of appellate counsel claim is "governed by the same standards applied to trial counsel under Strickland." Brooks v. Comm'r, Ala. Dep't of Corr., 719 F.3d 1292, 1300 (11th Cir. 2013) (internal quotation marks omitted). To show a meritorious Sixth Amendment claim of ineffective assistance of appellate counsel, a petitioner must demonstrate (1) deficient performance, indicating

that the attorney failed to function as required by the Sixth Amendment; and (2) that counsel's deficient performance prejudiced the petitioner. Strickland, 466 U.S. at 687, 104 S. Ct. 2052.

"Under the first prong, [the petitioner] must show that his direct appellate counsel's performance 'fell below an objective standard of reasonableness.'" Brooks, 719 F.3d at 1300 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. 2052). There exists "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S. Ct. 2052. Further, "[a]ppellate counsel has no duty to raise every non-frivolous issue and may reasonably weed out weaker (albeit meritorious) arguments." Overstreet v. Warden, 811 F.3d 1283, 1287 (11th Cir. 2016). "Under Strickland's second prong, [the petitioner] must show that there 'is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Brooks, 719 F.3d at 1300 (quoting Strickland, 466 U.S. at 694, 104 S. Ct. 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (internal quotation marks omitted). "'The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.'"

> Overstreet, 811 F.3d at 1287 (quoting Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011)). Under this "double deference," then, "the question becomes whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1268 (11th Cir. 2012) (internal quotation marks omitted).

Corales-Carranza v. Sec'y, Fla. Dep't of Corr., 768 F. App'x 953, 957 (11th Cir. 2019) (per curiam). See Garcia v. Sec'y, Dep't of Corr., No. 5:17-CV-121-OC-39PRL, 2020 WL 708139, at *11 (M.D. Fla. Feb. 12, 2020) (recognizing the applicability of the two-part Strickland standard to a claim of ineffective assistance of appellate counsel).

VII. THE GROUNDS

> GROUND ONE: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments where trial counsel failed to request a complete and accurate jury instruction regarding the justifiable use of force and as a result, negated Defendant's only defense.

1-A: Trial counsel failed to request a complete and accurate instruction

concerning carrying a concealed weapon where a statutory exception applied and where Mr. Curry-Pennamon was entitled to lawfully possess his weapon.

Petitioner exhausted this claim of ineffective assistance of counsel by raising it in his postconviction Rule 3.850 motion. (Doc. 6-23 at 11-13). Petitioner argued defense counsel performed deficiently when counsel failed to object when the trial court instructed the jury that carrying a concealed weapon was an unlawful activity in its instructions and failed to request an instruction explaining the statutory exception contained in § 790.25(3)(n), Fla. Stat., allowing for an employee to possess arms at his place of business, including parking lots. (Doc. 6-23 at 11-12). Petitioner argued he was prejudiced because his self-defense theory was negated because his right to stand his ground depended upon his being engaged in a lawful activity. Id. at 12. He explained:

> Under this theory of self-defense, Mr. Curry-Pennamon, who was engaged in a lawful activity, had no duty to retreat and could meet force with force,

> even deadly force, to prevent Holloway from striking him a second time (after he sucker-punched him) while on the ground and defenseless to prevent the commission of a forcible felony (aggravated battery). By failing to seek a complete and accurate instruction on carrying a concealed weapon, the jury was told Mr. Curry-Pennamon was engaged in unlawful activity and thus Stand Your Ground was unavailable to him. He was left without any way to present his only defense at trial.

Id. at 12-13.

The trial court, applying the two-pronged Strickland standard, denied this ground.[4] (Doc. 6-23 at 133-34). After succinctly describing Petitioner's claim that trial counsel was ineffective for failing to request an instruction concerning a concealed weapon where a statutory exception applied, the court inquired as to whether counsel's representation fell below an objective standards of reasonableness, applying the first prong of the Strickland standard. (Doc. 6-23 at 135). The trial

4 The 1st DCA affirmed. (Doc. 6-24).

court concluded Petitioner did not satisfy the first prong. Id. The court explained that it came to this conclusion because trial counsel did make a motion for judgment of acquittal on count two, the carrying a concealed firearm count, arguing Petitioner was not carrying unlawfully because he was an employee carrying a firearm outside of his business but the trial court denied the motion, and even when trial counsel renewed the motion, the court again denied counsel's motion even though counsel argued Petitioner's actions fell within the statutory exception. Id.

In denying the post-conviction motion, the circuit court found, under these circumstances, defense counsel's performance cannot be deemed deficient as the trial court had already concluded the statutory exception and related case law was inapplicable to the facts of Petitioner's case. As such, the court concluded: "[t]rial counsel cannot be deemed ineffective for failing to prevail on an issue raised and rejected." Id. at 135-36. Noting that the trial court had previously held the statutory

exception inapplicable on two occasions during the trial, the Rule 3.850 court found there was no indication that the trial court would have given the instruction had counsel requested it as the argument that Petitioner fell within the statutory exception had been soundly rejected by the trial court. Id. at 136.

The trial record demonstrates, during the course of the trial, defense counsel did make a motion for judgment of acquittal, arguing Petitioner fell within the statutory exception as a person possessing arms at his place of business. (Doc. 6-6 at 168-70). In response, the state argued that the intent of the statute was to allow persons to defend their homes or businesses, and in Petitioner's case, he was not protecting the business. Id. at 171-72. The court denied the motion for judgment of acquittal, concluding Petitioner was outside the business and the gun was not deployed in a manner defending the business. Id. at 173.

The record also shows defense counsel renewed the motion for judgment of acquittal. (Doc. 6-7 at 41). The

state again argued Petitioner was on his break, armed himself, and was not attempting to defend the business. Id. at 42. In reply, defense counsel pointed out that Petitioner was walking back to the business from the parking lot, other employees were present, and the physical altercation was brought to the business. Id. Even so, the court denied the renewed motion for judgment of acquittal. Id. at 42-44.

This Court's inquiry is not whether the state court's legal determination is incorrect or erroneous. Williams v. Taylor, 529 U.S. 362, 411 (2000). At this juncture, "[t]he pivotal question is whether the state court's application of the Strickland standard was unreasonable." Richter, 562 U.S. at 101. "Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. The state

court's ruling was not so lacking in justification that there was "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. Fairminded jurists could disagree on the correctness of the state court's decision. As such, Petitioner is not entitled to habeas relief.

As the state court reasonably determined the facts and reasonably applied federal law to those facts in rejecting the claim of ineffective assistance of counsel, Petitioner is not entitled to habeas relief. The 1st DCA affirmed. The state court's ruling denying relief is entitled to AEDPA deference as its decision is not inconsistent with United States Supreme Court precedent including Strickland and its progeny, and the adjudication of this claim is not contrary to or an unreasonable application of United States Supreme Court law or based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief on his claim of ineffective assistance of counsel raised in ground 1A of the Petition.

Alternatively, Petitioner has failed to demonstrate deficient performance of counsel under these circumstances. During the trial, defense counsel twice argued the statutory exception was applicable to Petitioner based on the statute and relevant case law, and the trial court rejected this contention on both occasions, finding the statutory exception inapplicable to Petitioner's case. Although the 1st DCA eventually found the trial court erred in making its decision concerning the applicability of the statutory exception to Petitioner's situation of being an employee in the parking lot of his place of business with a concealed firearm, this does not mean defense counsel's performance fell below an objective standard of reasonableness when he failed to request jury instructions based on an argument that had twice been soundly rejected by the trial court. Petitioner's counsel did not make errors so serious that he was not functioning as the type of counsel guaranteed under the Sixth Amendment. Upon review of the entire record before this Court, his

performance was well within the wide range of reasonable professional assistance under Strickland.

1-B: Trial counsel failed to request a "prior threats" instruction as part of the trial court's instruction on justifiable use of deadly force where the evidence clearly supported giving the instruction.

Petitioner exhausted this particular claim of ineffective assistance of counsel by raising it in his Rule 3.850 motion. (Doc. 6-23 at 13-14). The prior threats instruction provides that if a defendant, who because of prior difficulties with the victim, has reasonable grounds to believe he was in danger of death or great bodily harm at the hands of the victim, he has the right to arm himself. Id. at 13. Petitioner claimed defense counsel performed deficiently because counsel did not request this special instruction. Id. at 14. Petitioner argued he was prejudiced because his self-defense theory was negated because of the lack of a complete and accurate instruction. Id.

Applying the Strickland test for ineffective assistance of counsel claims, the circuit court denied this ground.[5] (Doc. 6-23 at 136-38). The record shows the court addressed Petitioner's claim that, "[t]rial counsel was ineffective for failing to request a 'prior threats' instruction as part of the trial court's instruction on justifiable use of deadly force." Id. at 136 (capitalization omitted). For this claim, the court addressed the second prong of the Strickland two-part test, the prejudice prong. (Doc. 6-23 at 136). See Brewster, 913 F.3d at 1051-52 (reviewing court may begin with either component). The court found Petitioner could not establish prejudice by the performance of counsel in not requesting a prior threats instruction "when the jury was allowed to consider the prior threats themselves, and was instructed to consider the circumstances surrounding

5 The 1st DCA affirmed. (Doc. 6-24).

the Defendant at the time he used force, and the danger facing the Defendant[.]" Id. at 138.

Without satisfying the prejudice component, a petitioner cannot prevail on a claim of ineffective assistance of counsel. See Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1151 (11th Cir. 2017), cert. denied, 138 S. Ct. 2681 (2018). Finding Petitioner did not satisfy the second prong of the Strickland test, the circuit court denied relief. The 1st DCA affirmed. (Doc. 6-24). The 1st DCA's decision, although unexplained, is entitled to AEDPA deference. Applying the look through presumption described in Wilson, the state court's ruling is based on a reasonable determination of the facts and a reasonable application of the law.

The Florida court's decision is not inconsistent with Supreme Court precedent, including Strickland, and the state court's adjudication of the claim is not contrary to or an unreasonable application of Strickland or based

on an unreasonable determination of the facts. Accordingly, ground 1B is due to be denied.

Alternatively, applying the Strickland test, Petitioner has failed to demonstrate any failure on counsel's part to request a "prior threats" instruction as part of the trial court's instruction resulted in prejudice sufficient for Strickland purposes. As such, Petitioner cannot prevail on his claim of ineffective assistance of counsel since he has failed to satisfy one of the Strickland prongs: the prejudice prong. Brewster, 913 F.3d at 1056.

Upon review, there is no reasonable probability that the outcome of the case would have been different if trial counsel had taken the action suggested by Petitioner. Petitioner is not entitled to habeas relief on this claim of ineffective assistance of counsel.

1-C: Trial counsel failed to object to the trial court's failure to instruct the jury that justifiable use of deadly force applied to the lesser-included charges, including attempted second-degree murder, and the failure negated Defendant's sole defense theory.

Petitioner exhausted ground 1C by raising it in his Rule 3.850 motion. (Doc. 6-23 at 14-15). The trial court denied the claim, finding it refuted by the record and without merit. Id. at 138-39. The 1st DCA affirmed per curiam. (Doc. 6-24).

The record shows the trial court instructed, in pertinent part:

> As to count one, attempted murder in the first degree, includes the lesser crimes of attempted murder in the second degree, attempted voluntary manslaughter and aggravated battery, all of which are unlawful.
>
> An attempted killing that is excusable or was committed by the justifiable - the use of justifiable deadly force is lawful.
>
> If you find that there was an attempted killing of Jaquan Holloway by Troy Kelvin Curry-Pennamon, you will then consider the circumstances surrounding the attempted killing in deciding if it was attempted first degree murder or attempted second degree murder or attempted voluntary manslaughter or aggravated battery or whether the attempted killing was

> excusable or resulted from the justifiable use of deadly force.

(Doc. 6-8 at 71-72).

In denying Petitioner's claim of ineffective assistance of counsel, the post-conviction court noted that the trial court, after the attempted first degree murder instruction, instructed the jury as to the lesser-included offenses and provided the self-defense instruction, as requested by defense counsel. (Doc. 6-23 at 139). The court also looked to defense counsel's closing argument to support its conclusion that the claim was without merit. Id. Of import, in closing argument, trial counsel argued that, as the court would instruct, the self-defense instruction applied to the lesser-included offenses:

> And as you apply justifiable use of deadly force, that is where and that is what you apply when looking at the charge that's brought before Mr. Curry-Pennamon of attempted first degree murder and when you look at all the lessers. **This applies to lessers as well.**

(Doc. 6-8 at 47).

As the state court reasonably determined the facts and reasonably applied federal law to those facts in rejecting the claim of ineffective assistance of counsel, Petitioner is not entitled to habeas relief. The 1st DCA affirmed the trial court's decision. The state court's ruling denying relief is entitled to AEDPA deference as its decision is not inconsistent with United States Supreme Court precedent, and the adjudication of this claim is not contrary to or an unreasonable application of United States Supreme Court law or based on an unreasonable determination of the facts. Alternatively, Petitioner is not entitled to habeas relief on his claim of ineffective assistance of counsel raised in ground 1C of the Petition as it is without merit.

GROUND TWO: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments where trial counsel failed to file a motion to dismiss count two pre-trial, there was no reasonable justification for the omission, and as a result, Mr. Curry-Pennamon was prejudiced.

Petitioner exhausted ground 1C by raising it in his supplemental Rule 3.850 motion. (Doc. 6-23 at 20-24). The circuit court denied the claim employing the Strickland standard of review for the claim of ineffective assistance of counsel and recognizing that the court, in its review, must attempt to eliminate the distorting effects of hindsight. (Doc. 6-23 at 139) (citing Strickland, 466 U.S. at 689). In its decision, the circuit court found neither deficient performance nor prejudice. (Doc. 6-23 at 140).

While recognizing that the 1st DCA, on direct appeal, concluded Petitioner met the statutory exception and should not have been convicted of carrying a concealed firearm, the circuit court rejected the contention that defense counsel was ineffective for failure to raise the matter pretrial because the trial court definitively rejected counsel's contention that Petitioner met the statutory exception when raised in the motions for judgment of acquittal. As such, the circuit court found

Petitioner failed to establish a reasonable probability that the outcome of the proceeding, "the trial court's ruling on the issue," would be different if the argument of Petitioner's meeting the statutory exception had been made pre-trial rather than through motions for judgment of acquittal. Id.

The 1st DCA affirmed per curiam the decision of the circuit court. (Doc. 6-24). As the state court reasonably determined the facts and reasonably applied federal law to those facts in rejecting the claim of ineffective assistance of counsel, Petitioner is not entitled to habeas relief. The record shows the 1st DCA affirmed the decision of the trial court, and the Court presumes that the appellate court adjudicated the claim on its merits, as there is an absence of any indication of state-law procedural principles to the contrary. Since the last adjudication is unaccompanied by an explanation, it is Petitioner's burden to show there was no reasonable basis for the state court to deny relief and he has not satisfied his burden.

The state court's ruling is entitled to AEDPA deference as its decision is not inconsistent with Supreme Court precedent, and the adjudication of this claim is not contrary to or an unreasonable application of Supreme Court law or based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief on ground two, the claim of ineffective assistance of counsel.

Alternatively, Petitioner is not entitled to habeas relief on this ground. Pursuant to Strickland, to prevail on this Sixth Amendment claim, a petitioner must satisfy both prongs of the two-pronged test requiring a petitioner show both deficient performance and prejudice. In this regard, counsel's errors must be so great that they adversely affect the defense. Thus, in order to satisfy the prejudice prong, the reasonable probability of a different result must be a probability sufficient to undermine confidence in the outcome.

Here, Petitioner fails on both prongs. Counsel did not perform deficiently by raising the matter in the

motions for judgment of acquittal rather than pre-trial, and there is not a reasonable probability that the outcome of the proceeding, the trial court's ruling on the issue, would have been different if the argument of Petitioner's meeting the statutory exception had been made pre-trial instead of during the course of the trial. Thus, ground two is due to be denied.

GROUND THREE: Mr. Curry-Pennamon received ineffective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments arising out of counsel's failure to raise on direct appeal an issue of fundamental error, where the trial court erroneously issued an improper jury instruction which negated the appellant's sole defense.

Petitioner contends:

> Only after the Florida First District Court of Appeal had issued its written opinion vacating count two did appellate counsel realize the full significance of her own argument, that is, that if cou[n]t two were improperly before the jury, then the jury instructions on justifiable use of deadly force and duty to retreat had been given in error, albeit without objection from defense at trial. Once this realization was achieved then and

> only then did appellate counsel argue - in a motion for rehearing - that the jury instruction given was fundamental error in light of the Court of Appeals ruling on count two.

Petition at 26-27.

Notably, in appellate counsel's Motion for Rehearing, counsel claimed the 1st DCA "overlooked an erroneous instruction dealing with justifiable use of deadly force[.]" (Doc. 6-13 at 2). The instruction at issue dealt with the defendant having a duty to retreat if he were engaging in an unlawful activity of carrying a concealed firearm. Id. Appellate counsel argued, since the 1st DCA reversed the conviction and sentence for carrying a concealed firearm, the instruction that carrying a concealed firearm constituted an unlawful activity and therefore Petitioner had a duty to retreat based on that factor should not have been given by the trial court. Id. Furthermore, appellate counsel noted, "duty to retreat" was a highly contested issue and over-emphasized by the state. Id. at 3. Finally, appellate counsel urged the 1st DCA to find, since Petitioner was

in lawful possession of the firearm and not engaged in any unlawful activity at the time he acted in self-defense, it was reversible error for the lower court to give an instruction that totally negated Petitioner's only defense. Id. at 3-4.

In pertinent part, the trial court instructed:

> **If the defendant was not engaged in an unlawful activity** and was attacked in any - - in any place where he had a right to be, **he had no duty to retreat** and he had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony.
>
> **Carrying a concealed weapon constitutes unlawful activity.**

(Doc. 6-8 at 83-84) (emphasis added).

The court defined the crime of carrying a concealed firearm as having two elements: (1) the defendant knowingly carried on or about his person a firearm, and (2) the firearm was concealed from the ordinary sight of another person. Id. at 85. The trial record

demonstrates Petitioner retrieved his gun from the holster in the glovebox of his car and eventually placed the gun in his pants' pocket. (Doc. 6-6 at 191-92). Petitioner admitted he did not have a permit to carry a concealed weapon. (Doc. 6-7 at 12-13).

Respondents assert Petitioner's contention that appellate counsel failed to raise the claim that the trial court erroneously issued an improper jury instruction which negated the appellant's sole defense in the initial brief is mistaken, arguing that the initial brief on appeal raised the contention there were conflicting instructions concerning the duty to retreat. Response at 37-39. In short, Respondents submit that appellate counsel sufficiently argued the instructions were improper and conflicting. Id.

Upon review of the initial brief on appeal, appellate counsel raised the following claim: the trial court's justifiable use of deadly force jury instruction amounted to fundamental error because the instruction negated appellant's only defense and because it told the jury

that self-defense only applied to the charged crime of attempted first degree murder. (Doc. 6-9 at 23). After summarizing the pertinent instructions given at trial, appellate counsel argued the trial court gave conflicting instructions regarding duty to retreat versus standing your ground. Id. at 25. Appellate counsel urged the 1st DCA to find the conflicting jury instructions negated each other, "negating their possible application" to the defense. Id. at 26.

This is not the same claim as that raised on rehearing. On rehearing, appellate counsel, after noting the appellate court correctly reversed the conviction and sentence for carrying a concealed firearm, argued "[s]ince [Petitioner] was in the lawful possession of the firearm and was not engaged in any unlawful activity at the time that he acted in self-defense, it constituted reversible error for the lower court to give an instruction that totally negated his only defense at trial." (Doc. 6-13 at 3-4). Based on the reversal of the second count, appellate counsel argued that the fact

Petitioner was carrying a concealed firearm "did not apply in the jury's consideration of whether Appellant had a duty to retreat when he acted in self-defense." Id. at 2.

The Court is not convinced by Respondents' argument that Petitioner is mistaken in his assertion that appellate counsel failed to raise the current claim until rehearing. Although there was some discussion of the confusing nature of the instructions in the initial brief on appeal, appellate counsel did not raise the specific claim (Petitioner was in the lawful possession of the firearm and was not engaged in any unlawful activity at the time that he acted in self-defense and it constituted reversible error for the lower court to give an instruction that totally negated his only defense at trial) until rehearing. As such, the Court will address the question of whether reasonably competent appellate counsel would have made the argument (as Petitioner was in the lawful possession of the firearm and was not engaged in any unlawful activity at the time he acted in

self-defense it constituted reversible error for the lower court to give an instruction that totally negated the only defense at trial) in the initial brief on appeal, and if counsel had done so, would the argument have been successful and the conviction on count one reversed.

Respondents, assuming arguendo the instructions were confusing, submit that the giving of the Necessity Defense instruction cured any perceived deficiencies or confusion caused by the instructions given by the trial court. Response at 39-40. The fundamental weakness of this argument is the instruction of necessity went solely to count two, the carrying a concealed firearm charge, not count one, the attempted first degree murder charge. (Doc. 6-8 at 85). The necessity instruction necessarily presumes Petitioner was committing the crime of carrying a concealed weapon but "acted out of necessity" in committing the crime. Id. The jury was instructed that it was a defense to the charge of carrying a concealed weapon if the defendant acted out of necessity. Id.

At trial, the state repeatedly said Petitioner unlawfully concealed the firearm, making the "duty to retreat" a feature of the state's case. For instance, in the opening statement, the state pointed out Petitioner did not retreat and made the choice to retrieve his gun and conceal it unlawfully. (Doc. 6-5 at 185). The state called Detective Eric Jones to testify Petitioner did not have a concealed weapons permit at the time of the incident. (Doc. 6-6 at 148). Petitioner testified he put the gun in his pocket. Id. at 192. On cross-examination, the prosecutor asked if Petitioner had a permit, and Petitioner responded in the negative. (Doc. 6-7 at 12).

More importantly, during closing, the state argued Petitioner failed to retreat (he could have gone into the store but chose not to; he could have gotten into his car and driven away). (Doc. 6-8 at 12). In final closing argument, the state argued:

> Again, he had all those other options before he decided to carry that weapon concealed. And the harm he avoided

> must outweigh the harm caused by the shooting. He's not entitled to necessity. There was no reason for him to arm himself at that point. Mainly because he could have avoided the danger.

Id. at 64. The state asserted Petitioner had to use every reasonable means of escape, like running into the store or getting into his car, before resorting to deadly force. Id. at 66. The state passionately argued:

> And this is the part that Mr. Gropper [defense counsel] glossed over again. **If the defendant was not engaged in unlawful activity and was attacked in a place where he had a right to be, he doesn't have the duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he believed, reasonably believed, that it was necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a felony.**
>
> **The problem is carrying that concealed firearm constitutes unlawful activity. So again, he has a duty to retreat. He has a duty to go into that Wal-Mart. He has a duty to go into his vehicle and drive away. He has a duty to get into that security vehicle and drive off before the law allows him to resort to deadly force.**

Id. at 67.

The state further argued, "and this is where he wants you to believe the danger is so real that he has to break the law and put that gun concealed out of necessity." Id. at 68. Again, the state argued to the jury that Petitioner could have gotten into his vehicle and driven away, but he chose not to drive away and to arm himself and conceal the firearm. Id. Finally, the state asked, "[w]hy didn't he just drive away as the law requires him to do so?" Id. at 69.

Based on the 1st DCA's ruling on direct appeal, Petitioner had no duty to retreat because he lawfully carried the concealed firearm at his place of business. Although appellate counsel raised the matter on rehearing, Petitioner submits the issue was procedurally barred under Florida's rules of appellate procedure, negating appellate counsel's attempt to have the issue addressed on its merits and have the judgment on count

one reversed on appeal, although it was an issue warranting reversal. Id.

In the State's Response to Court's Order (the response to Petitioner's motion for rehearing), the state argued Petitioner "never raised this as an issue in his initial brief and now seeks to raise it for the first time in his Motion for Rehearing." (Doc. 6-15 at 2-3). The state pointed out that the court did not "overlook" the issue as it was not raised. Id. at 3. Further, the state asserted Petitioner failed to file a reply brief and a motion for rehearing is an improper vehicle to raise a new issue on direct appeal. Id. The state asserted the motion for rehearing failed to comply with Rule 9.330(a), Fla. R. App. P., which states issues may not be presented on rehearing if not previously raised.[6] (Doc. 6-15 at 3).

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6 "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. The motion shall not present issues not previously raised in the proceeding." Rule 9.330(a)(2)(A), Fla. R. App. P.

In addition, the state asserted the claim was not preserved at the trial level, so the claim could only be reviewed for fundamental error. Id. The state argued it was not fundamental error because Petitioner "did not reasonably believe that he needed to use deadly force against the victim[.]" Id. at 7. The state relied on Garrett, 148 So. 3d 466 (finding the conviction was not fundamentally unfair even though the jury was improperly instructed that the defendant was engaged in unlawful activity because he was a convicted felon in possession of a firearm). (Doc. 6-15 at 11). Of import, it was noted that, in Garrett, the trial court provided an additional instruction protecting the defendant from unfairness. Id. at 12. The court instructed:

> Antonio Garrett cannot justify the use of force likely to cause death or great bodily harm unless he used every available means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that Antonio Garrett was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the use of that

> force. **However, if Antonio Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.**

Garrett, 148 So. 3d at 469 (emphasis added).

Notably, in Garrett, the 1st DCA found that failure to raise the issue at trial meant Garrett had failed to preserve it for appellate review, leaving the 1st DCA to limit its review to fundamental error. Id. In undertaking its review, the 1st DCA recognized that while the trial court improperly instructed that Garrett had a duty to retreat, it also instructed that if Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable. Id. at 471-72. Based on the combination of instructions given, the 1st DCA reasoned that the jury had the option to find Garrett's use of deadly force was justified and he had

no duty to retreat as retreat would be futile given the imminence of the danger. Id. at 472. In sum, the 1st DCA concluded there was no fundamental error because the erroneous instruction "did not affect the jury's ultimate responsibility to determine whether the threat faced by Garrett was *imminent*, in which case retreat would be futile and his use of deadly force would be justified, irrespective of whether he was engaged in unlawful activity . . . ." Id. at 472-73.

Comparing the instructions given in Garrett to those given in Petitioner's case and the facts of the two cases, there are some glaring differences. As noted by the 1st DCA, reading the erroneous instruction in context, the effect of the erroneous instruction was quelled in Garrett, 148 So. 3d at 469, because the trial court also instructed that if the defendant were placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger if he were to retreat, then the force likely to cause death or great bodily harm was justifiable. Of note, this instruction

was not given in Petitioner's case. Petitioner's case is also distinguishable from Garrett's as Petitioner's claim is based on § 776.013, Fla. Stat., not § 776.012, Fla. Stat. (Use of Force in Defense of Person). Based on these fundamental differences between the two cases, the Court is not convinced that the instructions or the factual scenario in Petitioner's case are similar enough to those in Garrett to be assured that the erroneous instruction at issue did not affect the jury's ultimate responsibility.

Next, the Court must address whether Petitioner received the ineffective assistance of appellate counsel based on counsel's failure to raise the claim that since Petitioner was in the lawful possession of the firearm and was not engaged in any unlawful activity at the time he acted in self-defense, it constituted reversible error for the lower court to give an instruction that negated his only defense at trial. This is a much more difficult question.

Appellate counsel raised four grounds on direct appeal and managed to obtain the reversal of count two of Petitioner's conviction in claiming that the trial court erred in denying the appellant's motion for judgment of acquittal as to count two, carrying a concealed firearm. (Doc. 6-9 at 3, Issue 4). Appellate counsel also raised a claim that the trial court's jury instruction on the justifiable use of deadly force amounted to fundamental error because the instruction negated the defense of self-defense, Petitioner's only defense to the charged crime of attempted first degree murder. Id., Issue 1. In the body of this ground, appellate counsel quoted both the justifiable use of deadly force instruction with the Stand Your Ground instruction given by the trial court. Id. at 23-25. Noting these conflicting instructions, stating Petitioner had a duty to retreat and he did not have a duty to retreat if he was not committing an unlawful act, id. at 25-26, the claim presented was: "the trial court's justifiable use of deadly force jury instruction

amounted to fundamental error" because the instruction deprived Petitioner of his only defense. Id. at 27.

In order to prevail on his claim of ineffective assistance of appellate counsel, Petitioner "must demonstrate both that his attorney's effort fell below constitutional standards, and that he suffered prejudice as a result." Jackson v. McNeil, No. 09-60033-CIV, 2010 WL 732015, at *11 (S.D. Fla. Feb. 26, 2010) (not reported in F.Supp.2d) (citing Strickland, 466 U.S. 668 (1984)). The Sixth Amendment does not require an appellate attorney "to press every non-frivolous issue" as long as counsel uses professional judgment in making the determination as to which issues to raise. Id. (citing Jones v. Barnes, 463 U.S. 745 (1983)). Deference is to be given to appellate counsel's judgment as well. Id. As to the prejudice prong, "the courts must review the merits of the omitted claim and, if it is concluded that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial because it affected the outcome of the

appeal." Id. (citing Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001). Pursuant to Strickland, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and a reasonable probability is one sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

Case law demonstrates that a failure to argue on appeal that jury instructions were fundamentally erroneous can constitute ineffective assistance of appellate counsel. See Dooley v. State, 206 So. 3d 87, 88 (Fla. 2nd DCA 2016) (per curiam) (recognizing that conflicting instructions that create confusion for the jury and are exacerbated by the prosecutor's closing argument, and which negate the sole defense, may constitute fundamental error if, had the issue been brought to the appellate court's attention, the result of the appeal would have been favorable to the defendant); Barnes v. State, 993 So. 2d 1012, 1013 (Fla. 2d DCA 2008). It is difficult to demonstrate counsel

was incompetent for failure to raise a particular claim, but it is not impossible. Smith v. Robbins, 528 U.S. 259, 288 (2000). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) (relied on in Smith v. Robbins).

In this instance, the presumption has been overcome. Based on the record, appellate counsel did not realize the significance of the claim raised on rehearing (Petitioner was in the lawful possession of the firearm and was not engaged in unlawful activity at the time he acted in self-defense and it constituted reversible error for the lower court to give an instruction that negated his defense) until appellate counsel had prevailed on Issue 4 of the appeal, concerning count two of the conviction, the charge of carrying a concealed firearm. As a result, appellate counsel did not raise the clearly strongest claim to attack the attempted murder in the second degree conviction until she presented it in a

motion for rehearing. Her performance in this regard was deficient, amounting to constitutionally ineffective assistance of appellate counsel. Counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance. Thus, the Court finds Petitioner received the ineffective assistance of appellate counsel.

Pursuant to Florida law, a motion for rehearing shall not raise issues not previously raised. Rule 9.330(a)(2)(A), Fla. R. App. P. "This Court cannot presume that a Florida court ignores its own procedural rules when the Court issues only a one-sentence denial of relief[.]" Scarborough v. Crosby, No. 8:02CV476-T-30TBM, 2005 WL 1051096, at *5 (M.D. Fla. 2005) (not reported in F.Supp.2d) (citing Coleman v. Thompson, 501 U.S. 722, 735-36 (1991)). Therefore, assuming the 1st DCA followed its own procedural rules, when the 1st DCA summarily denied rehearing (Doc. 6-16), it did not do so on the merits. Instead, it rejected the claim as improperly brought in a motion for rehearing.

There is another issue this Court must address as there is a qualifying state court decision on the claim of ineffective assistance of appellate counsel from the 1st DCA. This Court must ask: is the 1st DCA's opinion denying the state petition for writ of habeas corpus entitled to deference? Under AEDPA, a federal court's review is both greatly circumscribed and highly deferential to the state courts. Brooks v. Comm., Ala. Dep't of Corr., 719 F.3d 1292, 1299-1300 (11th Cir. 2013) (quoting Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc)), cert. denied, 572 U.S. 1018 (2014).

Petitioner raised a comparable claim of ineffective assistance of appellate counsel in Issue Two of the state petition. (Doc. 6-34 at 24-29). Petitioner argued the incorrect and improper "unlawful activity" exception jury instruction served to confuse and mislead the jury, negating Petitioner's defense as he had legally armed himself and used deadly force in self-defense, and appellate counsel was ineffective for failure to comb the record and brief the issue that the trial court committed

fundamental error by giving the improper instruction. Id. at 28-29. The state responded that appellate counsel was not ineffective because appellate counsel raised the issue on rehearing.[7] (Doc. 6-36 at 20). Alternatively, the state argued fundamental error did not occur because, "regardless of whether or not Appellant had a duty to retreat, the evidence overwhelmingly showed that Appellant did not reasonably believe that he needed to use deadly force against the victim, who was running away with his back turned when Appellant started shooting at him." Id. at 24.

The state argued that no juror could have come to the conclusion that Petitioner reasonably believed that it was necessary to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony to shoot at the victim, who was fleeing out of the parking lot with his back turned. Id. at 25.

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7 Respondents' contention is without merit as the raising of the issue on rehearing was improper under Florida law and could not demonstrate effective assistance of counsel.

The state said all of the state's witnesses, except Waters, testified the victim ran away as soon as he saw the gun. Id. The state noted that Waters said it took a few shots before the victim ran away. Id. at 26. Petitioner testified that the victim tried to come back into the parking lot. Id. Petitioner also admitted he took the firearm out of its holster from the glove box in his car after he saw the victim coming back toward the car. Id. In brief, the state argued the evidence showed Petitioner shot the victim to administer street justice, not because he was acting in self-defense; therefore, any confusion about whether or not Petitioner had a duty to retreat did not affect the verdict. Id. at 28. The 1st DCA denied the petition alleging ineffective assistance of appellate counsel on its merits. (Doc. 6-38).

The record shows the following. The victim, Jaquan Holloway, testified that after he punched Petitioner and Petitioner fell, Mr. Holloway saw the gun and turned around and ran and shots rang out. (Doc. 6-6 at 8). He ran out of the parking lot onto the back street behind

the store and never turned back around. Id. at 9. The surveillance video from the Walmart parking lot was played for the jury. Id. at 13 (videotape played with no audio). Tequila Scott, Mr. Holloway's girlfriend at the time of the incident, testified that after Petitioner was punched and fell to the ground, something fell out of his pocket, Mr. Holloway began to run, and Petitioner picked the gun off of the ground and chased Mr. Holloway out of the parking lot. Id. at 58. Mr. Holloway never turned back around once the gun came out. Id. at 59. She testified the initial shooting stopped and it started back again. Id. at 59-60.

Prudence Edwards, the closing store manager, testified she was attempting to break up the argument between Mr. Holloway and Petitioner, and she had her assistant and support manager attempting to escort Mr. Holloway off the premises while she was escorting Petitioner inside the building. Id. at 76. Ms. Edwards and Petitioner were walking side by side to the entrance of the store. Id. at 77. About ten feet from the door,

Mr. Holloway told Petitioner he could end him. Id. Petitioner turned around and pointed his hand in Mr. Holloway's face and said I'm not scared of you. Id. at 77-78. When asked if Petitioner made contact with Mr. Holloway, Ms. Edwards said no, because she was still between the two of them. Id. at 78. Ms. Edwards explained that Mr. Holloway maneuvered between them by either pushing her out of the way or pushing through to punch Petitioner. Id. Petitioner fell and was stunned for a few seconds. Id. at 79. Ms. Edwards testified Petitioner reached in his pocket, pulled out a firearm, and started shooting. Id. She said she saw the firearm approximately ten seconds after Petitioner fell to the ground. Id. Ms. Edwards said Mr. Holloway took off running and she heard at least five shots. Id. She explained that when Mr. Holloway saw the gun, he took off running. Id. Ms. Edwards testified that she did not recall Mr. Holloway turning back around. Id. Ms. Edwards described Mr. Holloway running in a zig-zag pattern until he exited the parking lot. Id. Ms.

Edwards said Petitioner, as he was shooting the gun in the direction of Mr. Holloway, took maybe ten steps in Mr. Holloway's direction and then stopped. Id.

On cross-examination, Ms. Edwards testified that although Mr. Holloway started to walk away with the assistant managers who were attempting to lead Mr. Holloway away, he came back and approached Ms. Edwards and Petitioner. Id. at 84-85. Ms. Edwards described Mr. Holloway's threats as serious. Id. at 85-86. Ms. Edwards described Mr. Holloway's threats as being in the nature of death, indicating he could kill Petitioner, or something like that. Id. at 87. Ms. Edwards testified Petitioner put his hand up and then Mr. Holloway knocked him down to the ground. Id. at 87-88. Ms. Edwards said after Mr. Holloway punched Petitioner, Mr. Holloway did not turn right around and try to leave the situation. Id. at 89. Ms. Edwards described Petitioner as aiming down with the firearm and he did not stop and then continue the firing of the gun. Id. at 89-90.

Ralph Javon Waters, Jr., testified he was an employee of Walmart at the time of the incident. Id. at 94-95. He described Mr. Holloway as drunk with red eyes yelling death threats to Petitioner. Id. at 98. Petitioner pointed his finger at Mr. Holloway and Mr. Holloway struck Petitioner to the side of the face and Petitioner stumbled to the ground. Id. Mr. Waters testified: "[as he rises up, there's a weapon at his - out of his side pocket. . . . And there were shots that were fired." Id. at 99. Mr. Waters said Petitioner did not make contact with Mr. Holloway when he pointed his finger. Id. at 99. Mr. Waters attested he saw Petitioner stumble and then 30 to 45 seconds passed before he rose back up to his feet. Id. at 100. Mr. Waters testified after the gun came out, Mr. Holloway, after the first couple of shots, proceeded to retreat. Id. Mr. Waters testified that Petitioner ran behind Mr. Holloway and shot two or three more times and then stopped. Id. Mr. Waters described Mr. Holloway as retreating until he jumped the fence. Id. at 101.

Mr. Waters testified that after Petitioner was struck and stumbled, Mr. Holloway stood over Petitioner for 30 to 45 seconds until Petitioner got back on his feet and pulled out a weapon. Id. at 106. Mr. Waters said Petitioner moved about five feet in Mr. Holloway's direction while shooting. Id. at 107.

Petitioner also testified at trial. He said Mr. Holloway approached his car and Petitioner told Mr. Holloway he did not have anything to do with Mr. Holloway's girlfriend. (Doc. 6-6 at 188). Mr. Holloway was upset and yelled in Petitioner's face, such that Petitioner thought Mr. Holloway was going to hit him in the face. Id. Petitioner testified, as Mr. Holloway walked away, he said I better not see you around my girl and threatened to kick Petitioner's ass. Id. at 189. Petitioner said Mr. Holloway came back to Petitioner's car and got in Petitioner's face again. Id. Mr. Holloway said he would have Petitioner killed or he would kill Petitioner. Id. at 190. Petitioner attested he took the threats seriously. Id.

Petitioner testified that he did not have the firearm on him when Mr. Holloway initially approached him. Id. at 191. When Mr. Holloway re-approached Petitioner, Petitioner took the gun out of the glove compartment and put it on the seat of the car. Id. On the third time Mr. Holloway walked away from Petitioner's car, Petitioner took the gun and put it in his pocket. Id. at 191-92. Mr. Holloway returned to Petitioner's car and threatened to kill Petitioner. Id. at 192. Petitioner said he got loud hoping to raise the attention of his co-workers and the security person. Id. at 193. Mr. Holloway started to walk off after the other employees approached the scene. Id. at 194. Petitioner felt it was safe to go back to the store with the employees. Id. at 195. Petitioner said he did not feel safe without the assistance of others because when Mr. Holloway first threatened Petitioner, "[Mr. Holloway] made a gesture as if he had a firearm on [sic] something on him[.]" Id. Petitioner described Mr. Holloway as "grabbing his hip around his waistband with his right

hand and like saying what you want to do." Id. Petitioner was under the impression Mr. Holloway may have a firearm. Id.

Petitioner testified that when he was struck by Mr. Holloway, Petitioner fell face forward to the ground and panicked, thinking that Mr. Holloway was going to carry out his threats to kill him. Id. at 198. Petitioner said he saw Mr. Holloway out of his peripheral and he looked like he was either going for something or coming towards Petitioner. Id. at 199. Petitioner reacted by pulling out the firearm and shooting. Id. Petitioner said he shot four shots instantly, believing Mr. Holloway intended to kill him and "might return shots." Id. Petitioner said after the four shots, Mr. Holloway was running so Petitioner stopped shooting, assuming the police were on their way. Id. at 200. Petitioner said he did not keep running past his car firing the gun. Id. Petitioner said he went to put the gun away, grabbing the holster and putting the strap on it, but then he saw Mr. Holloway coming back towards the cars,

so Petitioner ran after him for about 15 yards but he did not discharge the firearm at that point. Id. at 201.

Although the Court has concluded that appellate counsel performed deficiently by failing to raise the issue on direct appeal, Petitioner must also demonstrate prejudice. This Court must consider the merits of the omitted claim on direct appeal, and the performance is considered prejudicial if "the neglected claim would have a reasonable probability of success on appeal[.]" Id. at 1300 (quoting Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991)). In Petitioner's case, the matter was not preserved in the trial court as there was no objection from the defense at trial. Since Petitioner failed to preserve it for appellate review, review is limited to fundamental error. In order to consider whether there was fundamental error, the Court must ask whether the jury was precluded from considering Petitioner's sole defense of self-defense due to the erroneous instruction. More particularly, the inquiry is whether the error in instructing the jury that Petitioner's action of carrying

a concealed weapon constituted an unlawful activity and therefore Petitioner had a duty to retreat, considered in the context of the other instructions given, the evidence adduced at trial, and the arguments and trial strategies of counsel, is such that the jury's verdict of guilty to attempted murder in the second degree could not have been obtained without the assistance of the error, thus amounting to fundamental error.

The Court has carefully reviewed the trial court's instructions and the entire trial court record. Petitioner was entitled to the Stand Your Ground instruction and received the instruction. But, "the extraordinary self-defense privilege afforded by the 'Stand Your Ground' law[,]'" Garrett, 148 So. 3d at 471, reserved for law-abiding citizens only, was completely negated by the erroneous instructions of the court as Petitioner was painted as a non-law-abiding citizen who had a duty to retreat and not stand his ground because

he was engaged in the unlawful activity of carrying a concealed firearm without a permit.[8]

In contrast, the trial record shows Petitioner had no prior convictions. He was employed, at work, and was in the parking lot of the store where he was employed. His personal firearm was in a holster in the glove box of his car in the store parking lot. Stating he felt threatened, Petitioner retrieved his gun and placed it in his pocket. There is no question in the record that Mr. Holloway (who was shot) reached over a female employee escorting Petitioner back to the store and Mr. Holloway struck Petitioner, described as a "sucker-punch" by the prosecutor, which knocked Petitioner to the ground. (Doc. 6-8 at 12). Mr. Holloway then stood over Petitioner as he laid on the ground. Indeed, Mr. Holloway was arrested and prosecuted for his battery of Petitioner. (Doc. 6-6 at 11).

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8 Unlike the instructions in Garrett, no instruction was given that use of force likely to cause death or great bodily harm was justifiable if it would have increased the defendant's own danger to retreat.

The trial record demonstrates the prosecution hammered home the state's position that Petitioner was engaged in an unlawful activity of carrying a concealed firearm, argued he had no right to stand his ground because he was engaged in an unlawful activity, and Petitioner thus had a duty to retreat. The Court is convinced, based on the evidence adduced at trial, the arguments and trial strategies of counsel, and all of the instructions given at trial, there was fundamental error as the jury was precluded from considering Petitioner's sole defense of self-defense due to the erroneous instructions of the court. As such, "a verdict of guilty could not have been obtained without the assistance of the alleged error." Porter v. Crosby, 840 So. 2d 981, 984 (Fla. 2003) (per curiam) (internal quotation marks and citation omitted).

As Petitioner was in the lawful possession of the firearm and not engaged in any unlawful activity at the time he acted in self-defense, it constituted reversible error for the lower court to give an instruction that

negated his only defense at trial to the charge of attempted murder in the first degree. The instructions given to the jury were fundamentally erroneous as these instructions negated Petitioner's sole defense of self-defense.

The Court concludes appellate counsel's performance fell below constitutional standards for failure to raise the claim in the initial brief on appeal. Petitioner suffered prejudice as a result because the omitted claim would have had a reasonable probability of success on appeal had it properly been raised in the initial appeal brief. As Petitioner stated:

> Reasonably competent criminal appellate counsel would not have waited and reserved this argument for a motion for rehearing, where it was procedurally barred under Florida's rules of appellate procedure, but would have made the argument in the initial appeal brief, and had she done so the argument would have been successful and the conviction on count one would also have been reversed.

Petition at 27.

There is a reasonable probability, one sufficient to undermine confidence in the outcome, that, but for counsel's failure to properly raise the claim in the initial brief on direct appeal, the result of the appellate proceeding would have been different. Indeed, there is a reasonable likelihood of a more favorable outcome on appeal had the claim been properly raised in the direct appeal brief.

Since the 1st DCA provided one line that the state petition raising the claim of ineffective assistance of appellate counsel was denied on its merits, the Florida court did not identify the relevant Supreme Court law of Strickland in its determination. Considering the documents submitted to the 1st DCA by the parties, both Petitioner and Respondents referenced the Strickland standard. Petitioner referred to Strickland in his petition (Doc. 6-34 at 20, 38). The state in its response, set forth the two-prong test in Strickland, and stated an ineffective assistance of appellate counsel claim is analyzed under that two-part test. (Doc. 6-36

at 12-14). Assuming the Florida court relied on the briefing before it, the 1st DCA would have utilized the Strickland standard of review. Assuming arguendo that is the case, the question remains as to whether the 1st DCA's decision was contrary to or an unreasonable application of Strickland, as "[t]he two-prong Strickland test is equally applicable in assessing counsel's performance in appellate proceedings." Marshall v. Tucker, No. 12-20557-Civ-SEITZ, 2012 WL 9570403, at *19 (S.D. Fla. Dec. 31, 2012) (not reported in F.Supp.2d) (citing Smith v. Robbins, 528 U.S. 259, 285-86 (2000) & Grubbs v. Singletary, 120 F.3d 1174, 1176 (11th Cir. 1997)), report and recommendation adopted by 2013 WL 6388615 (S.D. Fla. Dec. 5, 2013).

Petitioner claims that because his direct appellate counsel ineffectively neglected to present a winning claim during Petitioner's direct appeal, he was prejudiced such that he would have prevailed on direct appeal and received the reversal of his conviction for attempted second degree murder and the case would have

been remanded to the trial court. Based on the strength of the omitted claim Petitioner's appellate counsel failed to raise on direct appeal, failure to bring the claim both rendered counsel's performance deficient and resulted in prejudice. Although appellate counsel raised several important claims on direct appeal, she failed to include the clearly stronger claim than those presented attacking count one, the attempted murder count. Clearly, based on the record, this was not a strategic decision to winnow out the weaker arguments as evidenced by the fact that once appellate counsel realized the serious omission on her part, she attempted to raise the strongest claim on rehearing. The record demonstrates she realized the strength of the claim once she prevailed on the claim attacking the second count, the carrying a concealed firearm count. However, under Florida law, she could not raise the new claim on rehearing. Thus, her performance was deficient in this regard, and it resulted in prejudice:

> To demonstrate ineffective assistance of appellate counsel, the defendant must prove a specific error or omission committed by appellate counsel that had a prejudicial impact on the appeal. See Johnson v. Wainwright, 463 So.2d 207, 209 (Fla.1985) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)). The error or omission must fall outside the range of professionally acceptable performance, and compromise the appellate process, thus, undermining the confidence in the fairness and correctness of the outcome. Id.

Shepard v. Crosby, 916 So. 2d 861, 862 (Fla. 4th DCA 2005) (per curiam).

This Court concludes that the decision of the 1st DCA denying the state habeas petition raising the claim of ineffective assistance of appellate counsel is in conflict with clearly established federal law or based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Under these circumstances, the Court concludes the AEDPA deference is not warranted. Indeed, the Court will not give deference to the decision of the 1st DCA as the

decision was contrary to clearly established federal law with respect to the claim of ineffective assistance of appellate counsel. The decision of the 1st DCA was contrary to clearly established law because it did not arrive at its conclusion consistent with Supreme Court and 11th Circuit precedent. Reutter v. Sec'y for Dep't of Corr., 232 F. App'x 914, 917 (11th Cir. 2007) (per curiam). To the extent the state court utilized the correct governing legal principle, the state court's decision involved an unreasonable application of federal law to the facts of Petitioner's case or an unreasonable refusal to apply the principle to the facts of the case.

As stated previously, counsel's failure to include the claim fell outside the wide range of professional assistance and was unreasonable under prevailing professional norms. Judging appellate counsel's advocacy in its entirety, the record as a whole reveals appellate counsel failed to raise the key claim to challenge the conviction for attempted murder. This was not a "weaker argument," selected to be winnowed out.

Here the instruction given improperly negated the self-defense claim. Failure of appellate counsel to present the claim that Petitioner was in the lawful possession of the firearm and was not engaged in any unlawful activity at the time he acted in self-defense and it constituted reversible error for the lower court to give an instruction that totally negated his only defense at trial amounted to ineffective assistance of appellate counsel. The deficiency of counsel's performance compromised the appellate process to the extent as to undermine confidence in the fairness and correctness of the appellate result. As such, the Court will grant the Petition, reverse the conviction for attempted murder in the second degree, and issue the writ conditional to the state's right to provide a new trial within ninety days. See Orazio v. Dugger, 876 F.2d 1508, 1510, 1514 (11th Cir. 1989) (finding ineffective assistance of appellate counsel and remanding to the district court for the entry of the judgment recommended by the magistrate judge to grant the petition, vacate the

conviction, and that the petitioner be afforded a new trial within a short time).

> **GROUND FOUR: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments, arising out of his counsel's failure to object to Florida Statutes, Section 776.013(3), which instructed the jury that Mr. Curry-Pennamon had no right to use deadly force during the commission of a[n] unlawful activity and instead should have argued for an instruction under section 776.012(1) which gave Mr. Curry-Pennamon the right to use deadly force whether in commission of unlawful activity or not and imposed no duty to retreat.**

The doctrine of procedural default requires the following:

> Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the

> prisoner failed to abide by a state procedural rule. See, e.g., Coleman,[9] supra, at 747-748, 111 S. Ct. 2546; Sykes,[10] supra, at 84-85, 97 S. Ct. 2497. A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. See, e.g., Walker v. Martin, 562 U.S. ----, ----, 131 S. Ct. 1120, 1127-1128, 179 L.Ed.2d 62 (2011); Beard v. Kindler, 558 U.S.---, ----, 130 S. Ct. 612, 617-618, 175 L.Ed.2d 417 (2009). The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. See Coleman, 501 U.S., at 750, 111 S. Ct. 2546.

Martinez, 566 U.S. at 9-10.

A petition for writ of habeas corpus should not be entertained unless the petitioner has first exhausted his state court remedies. Castille v. Peoples, 489 U.S. 346,

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9 Coleman v. Thompson, 501 U.S. 722 (1991).

10 Wainwright v. Sykes, 433 U.S. 72 (1977).

349 (1989); Rose v. Lundy, 455 U.S. 509 (1982). A procedural default arises "when 'the petitioner fails to raise the [federal] claim in state court and it is clear from state law that any future attempts at exhaustion would be futile.'" Owen v. Sec'y, Dep't of Corr., 568 F.3d 894, 908 n.9 (11th Cir. 2009) (quoting Zeigler v. Crosby, 345 F.3d 1300, 1304 (11th Cir. 2003)), cert. denied, 558 U.S. 1151 (2010).

There are, however, allowable exceptions to the procedural default doctrine; "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." Martinez, 566 U.S. at 10 (citing Coleman, 501 U.S. at 750). To demonstrate cause, a petitioner must show some objective factor external to the defense impeded his effort to properly raise the claim in state court. Wright v. Hopper, 169 F.3d 695, 703 (11th Cir.), cert. denied, 528 U.S. 934 (1999). If cause is established, a petitioner must demonstrate prejudice. To demonstrate prejudice, a petitioner must show "there

is at least a reasonable probability that the result of the proceeding would have been different had the constitutional violation not occurred." Owen, 568 F.3d at 908.

Alternatively, a petitioner may obtain review of a procedurally barred claim if he satisfies the actual innocence "gateway" established in Schlup v. Delo, 513 U.S. 298 (1995). The gateway exception is meant to prevent a constitutional error at trial from causing a miscarriage of justice and conviction of the actually innocent. Kuenzel v. Comm'r, Ala. Dep't of Corr., 690 F.3d 1311, 1314 (11th Cir. 2012) (per curiam) (quoting Schlup, 513 U.S. at 324), cert. denied, 569 U.S. 1004 (2013).

Respondents assert ground four is unexhausted. Response at 26. Conceding default, Petitioner argues his procedural default should be excused based on the reasoning of Martinez because his post-conviction counsel provided ineffective assistance of counsel by failing to raise this ground in his original Rule 3.850 motion.

Petition at 10. Petitioner submits that the procedural default was caused by his post-conviction counsel's ineffective assistance, the collateral proceeding in which counsel erred was the first opportunity to raise the procedurally defaulted claim, and the procedurally defaulted claim has some merit.[11] Id.

In relying on the holding in Martinez, 566 U.S. at 8, Petitioner contends ground four has some merit, asserting he can demonstrate the underlying ineffective-assistance-of-counsel claim is a substantial one. Martinez provides a narrow, equitable, non-constitutional exception to the holding in Coleman. To the extent Petitioner claims his procedural default should be excused based on the narrow exception under Martinez, Petitioner must demonstrate the underlying ineffectiveness claim is substantial. Petitioner has failed to establish his claim is "substantial." To meet this requirement, Petitioner must demonstrate the claim

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11 The record demonstrates Petitioner had counsel for the filing of his post-conviction Rule 3.850 motion. (Doc. 6-23).

has some merit. Martinez, 566 U.S. at 14. In this instance, the underlying ineffectiveness claim raised in ground four lacks merit; therefore, Petitioner has not demonstrated he can satisfy an exception to the procedural bar. To explain, the Court provides a merits analysis.

Petitioner argues:

> Binding appellate precedent at the time of Mr. Curry-Pennamon's trial had held that a defendant's unlawful activity did *not* preclude the use of self-defense and did not include a duty to retreat under then section 776.02(1), Florida Statutes. Little v. State, 111 So. 3d 214 (Fla. 2nd DCA April 10, 2013) (Mr. Curry-Pennamon's trial was conducted in July 2013. Little was the only decision on point at the time of the trial and therefore under Florida appellate rules, it was binding precedent in all districts, including the First District in which Mr. Curry-Pennamon's trial was held.)

Petition at 28.

Petitioner asserts his trial counsel was ineffective for failure to properly request a jury instruction under § 776.012(1), Fla. Stat., relying on Little v. State, 111

So. 3d 214 (Fla. 2nd DCA April 10, 2013). Petition at 28. Initially, the Court notes that Little was not a decision of the 1st DCA but of the Second District Court of Appeal (2nd DCA). Also, "[b]ecause Little was a felon in illegal possession of a firearm, his use of force did not fall with the protections of section 776.013, and therefore, he could not obtain immunity under that statute." Little, 111 So. 3d at 222. Petitioner was not a felon in possession of a firearm; therefore, he did not have the same concerns as Little. Indeed, Petitioner's trial counsel moved for a judgment of acquittal based on the fact that Petitioner was lawfully carrying a concealed weapon at his place of employment, and, eventually, the 1st DCA adopted counsel's position and reversed Petitioner's conviction for illegally carrying a concealed firearm.

In Little, the 2nd DCA explained the history of the relevant legislature:

> In 2005, the legislature enacted the Stand Your Ground law which amended sections 776.012 and .031 and created

sections 776.013 and .032. Ch. 2005-27, §§ 1-4, at 200-02, Laws of Fla. Section 776.012 still permits the justifiable use of deadly force if a person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony." § 776.012(1). But the Stand Your Ground law added language permitting the justifiable use of deadly force "[u]nder those circumstances permitted pursuant to s. 776.013." § 776.012(2). It also eliminated the common law duty to retreat for persons justifiably using deadly force under either section 776.012(1) or 776.013.

Section 776.012, which is entitled "Use of force in defense of person," now provides as follows:

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to

prevent the imminent commission of a forcible felony; or

(2) Under those circumstances permitted pursuant to s. 776.013.

As for section 776.013, it is entitled "Home protection; use of deadly force; presumption of fear of death or great bodily harm." Subsections (1), (2), (4), and (5) of section 776.013 expand the "castle" to include a dwelling, residence, or occupied vehicle. These subsections all work together to provide for presumptions that make it easier for a person in the "castle" to establish the justifiable use of deadly force. Subsection (1) sets forth a presumption of "a reasonable fear of imminent peril of death or great bodily harm." § 776.013(1). Subsection (2) sets forth four circumstances in which the presumption in subsection (1) does not apply, including when "[t]he person who uses defensive force is engaged in an unlawful activity." § 776.013(2)(c). Subsection (4) sets forth a presumption that "[a] person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence." § 776.013(4). And subsection (5) defines "dwelling," "residence," and "vehicle." § 776.013(5).

> Subsection (3), which is the subsection on which the State focuses, applies to "[a] person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be." § 776.013(3). It eliminates the duty to retreat for this law-abiding person. It also provides for the use of deadly force by this law-abiding person based upon the reasonable belief "it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony." Id.

Little, 111 So. 3d at 220-21.

In Little, the 2nd DCA issued a Certification of Conflict and Question for Resolution by Supreme Court to the extent that the Fourth District Court of Appeal's (4th DCA) decision in State v. Hill, 95 So. 3d 434 (Hill I) (Fla. 4th DCA Aug. 15, 2012) (finding the crime of possession of a firearm by a convicted felon qualified as unlawful activity under section 776.013(3), and the defendant was not entitled to immunity), can be read to hold that a defendant who is engaged in an unlawful activity is not entitled to immunity under section

776.032(1). Little, 111 So. 3d at 222. The 2nd DCA presented this question of great public importance: "Is a defendant who establishes by a preponderance of the evidence that his use of deadly force is permitted in section 776.012(1), Florida Statutes (2009), entitled to immunity under section 776.032(1) even though he is engaged in an unlawful activity at the time he uses deadly force?" Id. at 222-23.

As imparted by the Court in Reyes v. Sec'y, Dep't of Corr., No. 5:17-cv-231-Oc-39PRL, 2020 WL 3542651, at *10 (M.D. Fla. June 30, 2020), the relevant law was unsettled "until at least 2014." This Court explained:

> Given the controversy engendered by the 2005 law, in 2013, the Second DCA certified a question to the Florida Supreme Court, which pinpointed a perceived inter-district conflict. See Little, 111 So. 3d at 222-23. In Little, the court held the defendant was entitled to immunity under section 776.012(1) even though his use of force was not permitted under section 776.013(3) because the "unlawful activity" exception applied. Id. at 222. The Second DCA noted that a Fourth DCA decision, Hill I, could be read broadly as holding the opposite - "that

> a defendant who is engaged in an unlawful activity is not entitled to immunity under section 776.032(1)," which incorporates by reference section 776.012. Id. (emphasis added).

Reyes, 2020 WL 3542651, at *9.

This Court, in Reyes, recognized there was a flurry of case law and statutory changes that followed Little concerning the controversy engendered by the 2005 law. Id. at 10. Of import, the 4th DCA, in Bragdon v. State, 123 So. 3d 654 (Fla. 4th DCA Oct. 9, 2013) (per curiam), certified that its decision denying the petition for writ of prohibition or certiorari expressly conflicts with Little on the issue of whether a defendant engaged in "unlawful activity" is precluded from asserting self-defense immunity. As a consequence, the Supreme Court of Florida, in Bragdon v. State, 147 So. 3d 521 (Fla. July 2, 2014) (Table), accepted jurisdiction of the case and ordered briefing on the merits. Shortly thereafter, on July 16, 2014, the 4th DCA, sitting en banc, receding from its statement in Hill I that a felon in possession of a firearm cannot claim self-defense immunity under the

Stand Your Ground law because the statement "unintentionally went beyond the statutory provision at hand - section 776.013(3)" and was considered to travel under 776.012(1). Hill v. State, 143 So. 3d 981, 985 (Hill II) (Fla. 4th DCA July 16, 2014) (en banc) (footnote omitted). Shortly thereafter, in Bragdon, the respondent filed a motion to dismiss, conceding that any further proceedings should be conducted in the district court in accordance with the en banc decision in Hill II, and the Supreme Court of Florida discharged its jurisdiction. Bragdon v. State, 160 So. 3d 892 (Fla. Dec. 22, 2014) (Table).

Meanwhile, in State v. Wonder, 162 So. 3d 59, 64 (Fla. 4th DCA Aug. 13, 2014), on a motion for rehearing, rehearing en banc and for certification, the 4th DCA concurred with the 2nd DCA's analysis and found no conflict between the provisions in sections 776.012(1) and 776.013(3). Also, after the en banc decision in Hill II, the 1st DCA issued its decision Garrett, 148 So. 3d 466 (Fla. 1st DCA Aug. 22, 2014). In Garrett, the court

found Garrett was entitled to claim immunity under section 776.012, like Little, and it was error for the trial court to instruct the jury regarding Garrett's unlawful conduct, but the error did not render the trial fundamentally unfair. Id. at 471.

It is also important to recognize that, effective June 20, 2014, the legislature amended section 776.012(2), clarifying and providing that a "person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground *if the person using or threatening to use the deadly* force *is not engaged in a criminal activity . . . .*" Wonder, 162 So. 3d at 62 n.3 (emphasis in original) (quoting § 776.012(2), Fla. Stat. 2014). Thus, a defendant engaged in a criminal activity would not get the benefit of the Stand Your Ground provision under the amendment. Dorsey v. State, 149 So. 3d 144, 146 n.2 (Fla. 4th DCA October 8, 2014) (per curiam).

The record shows Petitioner went to trial on July 18-19, 2013. Although the trial occurred after the decision in Little, due to the unsettled nature of the law interpreting the pre-2014 Stand Your Ground law, and based on the questionable wording and structure of the law itself, "Petitioner fails to demonstrate his trial counsel's performance was deficient under Strickland simply because counsel failed to know in [July, 2013] what Florida appellate courts did not make clear until at least 2014." Reyes, 2020 WL 3542651, at *10. Little recognized the conflict between the 2nd and the 4th District Courts of Appeal.[12] It was not until Hill II (July 16, 2014), a year after Petitioner's trial in July 2013, that the 4th DCA receded from its statement in Hill I (Aug. 15, 2012).

Petitioner argues that since Little was the only decision on point at the time of the trial, under Florida

12 Of import, in Bragdon (Oct. 9, 2013), the 4th DCA certified its decision expressly conflicts with the 2nd DCA's decision in Little.

appellate rules, the decision in Little was binding precedent in all districts, including the 1st DCA, in which Petitioner's trial was held.[13] Petition at 28. The Florida Supreme Court has stated: "'[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.' Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980). Thus, in the absence of inter-district conflict, district court decisions bind all Florida trial courts. Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla.1985)." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992).

Based on the state of the law in 2013, with a perceived inter-district conflict at the time, Petitioner's failure to argue for an instruction under section 776.012(1) was reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000) (finding the relevant question is not whether counsel's choices were strategic but whether they were reasonable). Indeed, the

13 The 1st DCA had not issued an opinion on the matter.

Strickland standard does not demand that counsel "be legal trailblazers or statutory interpretation scholars." Reyes, 2020 WL 3542651, at *10. See Bates v. Sec'y, Fla. Dep't of Corr., 768 F.3d 1278, 1295 (11th Cir. 2014) (the Strickland test does not ask what the best lawyers would have done or even what good lawyers would have done), cert. denied, 136 S. Ct. 68 (2015). "We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc), cert. denied, 516 U.S. 856 (1995). Certainly, Petitioner's counsel could have argued that section 776.012 was applicable, but any failure to do so in July 2013 was reasonable.

Failing to demonstrate trial counsel's performance was deficient, Petitioner has failed to show that the underlying claim has some merit. Based on the above, Petitioner has failed to show he falls within the narrow parameters of the ruling in Martinez, in which the Supreme Court recognized a narrow exception for

ineffective assistance of counsel/absence of counsel at initial-review collateral proceedings. As Petitioner failed to demonstrate the underlying ineffective assistance of counsel claim is a substantial one, he does not fall within this narrow exception. Thus, he has failed to establish cause for the procedural default of his claim of ineffective assistance of trial counsel raised in ground four.

Also, Petitioner has failed to show cause, and he does not meet the prejudice or manifest injustice exceptions. Although a petitioner may obtain review of the merits of a procedurally barred claim if he satisfies the actual innocence gateway, Petitioner has not done so. The fundamental miscarriage of justice exception is only available in extraordinary cases upon a showing of "'actual' innocence" rather than mere "'legal' innocence." Johnson v. Ala., 256 F.3d 1156, 1171 (11th Cir. 2001) (citations omitted), cert. denied, 535 U.S. 926 (2002). Petitioner has failed to identify any fact

warranting the application of the fundamental miscarriage of justice exception.

In conclusion, the Court finds the claim raised in ground four is unexhausted and procedurally defaulted. As Petitioner has failed to establish cause and prejudice or any factors warranting the application of the fundamental miscarriage of justice exception to overcome the default, the court deems the claim raised in ground four procedurally defaulted, and Petitioner is procedurally barred from raising the unexhausted claim raised in ground four in this proceeding.

> **GROUND FIVE: Mr. Curry-Pennamon received ineffective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments, arising out of his counsel's failure to invoke the Rule of Completeness after the state moved to admit a misleading portion of a statement Mr. Curry-Pennamon gave during a police interrogation, when the entire statement should have been admitted under the Rule of Completeness; the partial statement was used to mislead the jury to believe that Mr. Curry-Pennamon had the intent to kill the victim, whereas the complete statement in context would have**

demonstrated that he did not have such intent.

Respondents assert ground five is unexhausted. Response at 26. Conceding default, Petitioner argues his procedural default should be excused based on the reasoning of Martinez because his post-conviction counsel provided ineffective assistance of counsel by failing to raise this ground in his original Rule 3.850 motion. Petition at 10. Petitioner contends this procedural default was caused by his post-conviction counsel's ineffective assistance, the collateral proceeding in which counsel erred was the first opportunity to raise the procedurally defaulted claim, and the procedurally defaulted claim has some merit. Id.

Relying on the holding in Martinez, 566 U.S. at 8, Petitioner contends ground five has some merit, asserting he can demonstrate the underlying ineffective-assistance-of-counsel claim is a substantial one. To the extent Petitioner claims his procedural default should be excused under Martinez, Petitioner must

demonstrate the underlying ineffectiveness claim is substantial. Petitioner has failed to establish his claim is "substantial." The Court concludes the underlying ineffectiveness claim raised in ground five lacks merit; therefore, Petitioner has not demonstrated he can satisfy an exception to the procedural bar.

A merits analysis of ground five follows. Petitioner claims, had his trial counsel argued for the admission of the complete interrogation statement, it would have been admitted under the rule of completeness, and the complete statement would have demonstrated that Petitioner did not act "with intent to kill, an essential element of the charged offense of attempted first-degree murder." Petition at 29.

Although the charged offense has an actual intent to kill element, the jury did not find Petitioner intended to kill Mr. Holloway.[14] In finding Petitioner guilty of

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14 The trial court instructed the jury, to prove the crime of attempted first degree premeditated murder, the state had to prove three elements beyond a reasonable doubt: (1) Petitioner did some act intended to cause the death of Mr. Holloway that went beyond just thinking or talking about it; (2) Petitioner acted with a

attempted second degree murder, the jury necessarily found that the state proved two elements beyond a reasonable doubt: (1) Petitioner intentionally committed an act which would have resulted in the death of Mr. Holloway except that someone prevented Petitioner from killing Mr. Holloway or Petitioner failed to do so, and (2) the act was imminently dangerous to another and demonstrating a depraved mind without regard for human life. (Doc. 6-8 at 76). The jury returned a verdict finding Petitioner guilty of attempted murder in the second degree, a lesser included offense. Id. at 118.

Under these circumstances, there is no merit to ground five of the Petition. The defense was successful in convincing the jury that Petitioner did not have intent to kill, as demonstrated by the jury's decision to find Petitioner guilty of the lesser-included offense. Thus, any failure of counsel to move for the admission

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premeditated design to kill Mr. Holloway; and (3) the act would have resulted in the death of Mr. Holloway except that someone prevented Petitioner from killing Mr. Holloway or Petitioner failed to do so. (Doc. 6-8 at 73).

of the complete interrogation statement did not constitute deficient performance and there was no prejudice. As such, ground five is without merit and remains procedurally barred.

Failing to demonstrate deficient performance or prejudice, Petitioner has failed to show that the underlying claim has some merit. Based on the reasons stated above, Petitioner has failed to show he falls within the narrow parameters of the ruling in Martinez. Since Petitioner failed to demonstrate the underlying ineffective assistance of counsel claim raised in ground five is a substantial one, he does not fall within the Martinez exception. Petitioner has failed to establish cause for the procedural default of his claim of ineffective assistance of trial counsel raised in ground five.

The Court finds the claim raised in ground five is unexhausted and procedurally defaulted. As Petitioner has failed to establish cause and prejudice or any factors warranting the application of the fundamental

miscarriage of justice exception to overcome the default, the court deems the claim raised in ground five procedurally defaulted, and Petitioner is procedurally barred from raising the unexhausted claim raised in ground five in this proceeding.

Therefore, it is now

ORDERED AND ADJUDGED:

1. The Amended Petition for Writ of Habeas Corpus (Doc. 4) is **GRANTED IN PART AND DENIED IN PART.**

2. The writ of habeas corpus will be **conditionally GRANTED** as to ground three for the reasons discussed above, within **NINETY (90) DAYS** from the date of this Order, unless the State of Florida initiates new trial proceedings in state court consistent with the law. The Court **DENIES with prejudice** grounds one (A, B, C), two, four, and five.

3. Petitioner's conviction for attempted murder in the second degree is **VACATED**, and Respondents are directed to forthwith take all action necessary to ensure that the state trial court is apprised of this ruling and

that a new trial (or other appropriate disposition) is ordered in an expeditious fashion.

4. The **Clerk** shall enter judgment conditionally granting relief in favor of Petitioner as to **ground three**, and in favor of Respondents on all remaining claims and close the case.

5. The **Clerk** shall send a copy of this Order to the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida.

6. If Petitioner appeals the denial of his Amended Petition for Writ of Habeas Corpus (Doc. 4), **the Court denies a certificate of appealability as to grounds one (A, B, C), two, four, and five.**[15] Because this Court has

[15] This Court should issue a certificate of appealability only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.

determined that a certificate of appealability is not warranted, the **Clerk** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

7. Respondents, **no later than December 18, 2020,** shall notify the Court as to the date of the new trial or other disposition of Petitioner's case.

DONE AND ORDERED at Jacksonville, Florida, this 30th day of September, 2020.

UNITED STATES DISTRICT JUDGE

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c:
Counsel of Record
Circuit Court (4th Judicial Circuit, Duval, County, Florida)