

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ISAAH NAPOLI,

Petitioner,

vs.

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

Respondents.

Case No. 6:15-cv-1372-Orl-41GJK

Oral Argument Requested

**PETITIONER'S REPLY TO RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, Isaiah Napoli, respectfully replies to Respondents' response to the petition for writ of habeas corpus (Doc. 10). The Court should grant the petition for three reasons. First, trial counsel was ineffective when he failed to discuss the details of an 18-year plea offer with Mr. Napoli before it expired. Second, the record indicates the State extended Mr. Napoli a 20-year plea offer, which trial counsel failed to communicate to him. Third, the record suggests Mr. Napoli was forced to wear shackles and a red inmate identification band during trial in violation of his due process rights, and trial counsel did not object. The Court should grant the petition or an evidentiary hearing on ground one and convene an evidentiary hearing on grounds two and three.

STATEMENT OF THE CASE AND FACTS

Course Of Proceedings

By information, the State charged Mr. Napoli with one count of first-degree felony burglary of a dwelling with a battery in violation of Fla. Stat. § 810.02(2)(b) and one count of second-degree felony possession of a firearm by a convicted felon in violation of Fla. Stat. § 790.23. Doc. 11.1 at 5.

A jury found Mr. Napoli guilty of burglary, and he was sentenced to life. Doc. 11.1 at 407-09. The State dismissed the firearm charge. Doc. 11.1 at 412. Mr. Napoli timely appealed (Doc. 11.1 at 419-29, 431-53), and the Fifth District Court of Appeal affirmed without opinion on August 22, 2012 (Doc. 11.1 at 455). Mr. Napoli did not seek rehearing or petition for a writ of certiorari, so his conviction became final 90 days later on November 20, 2012.¹

252 days later,² Mr. Napoli timely filed a counseled motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on July 30, 2013. Doc. 11.1 at 459-70. In response, the State recommended an evidentiary hearing. Doc. 11.1 at 473. After the evidentiary hearing, the post-conviction court denied relief on April 14, 2014. Doc. 11.1 at 548-51.

¹ See *Gonzalez v. Thaler*, 132 S. Ct. 641, 653-54 (2012) (when petitioners do not seek direct review in a state's highest court, "the judgment becomes final at the 'expiration of the time for seeking such review'—when the time for pursuing direct review . . . in state court, expires").

² The filing of his post-conviction motion paused AEDPA's federal habeas clock. *E.g.*, *San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011).

On May 13, 2014, Mr. Napoli timely appealed. Doc. 11.1 at 550-51; 553-72. On April 28, 2015, the Fifth District affirmed *per curiam*. Doc. 11.2 at 10. On May 5, 2015, Mr. Napoli timely moved for rehearing (Doc. 11.2 at 12-16) and for a written opinion (Doc. 11.2 at 18-20). On May 29, 2015, the Fifth District denied both motions. Doc. 11.2 at 22. Mr. Napoli did not petition for a writ of certiorari, so the denial of post-conviction relief would have become final 90 days later on August 27, 2015. *See supra* note 1.

But before the time to petition expired, on August 11, 2015 via the mailbox rule, Mr. Napoli filed his federal habeas petition in this Court. Doc. 1. At that point, 252 days of his federal habeas clock had expired. Respondents conceded the petition was timely and responded on the merits. Doc 10.

Statement Of Facts

A. Mr. Napoli's Physical Appearance At Trial

At trial, Mr. Napoli partially disrobed and displayed his neck and arm tattoos to the jury (Doc. 11.1 at 321, 349, 359), his girlfriend, Briana Eiland (Doc. 11.1 at 224), and a victim, Dather Tewari (Doc. 11.1 at 181-82). Additionally, several testifying witnesses had a clear view of Mr. Napoli and identified him by his clothing. Doc. 11.1 at 150, 159-60, 187, 210, 233.

B. Post-Conviction Proceedings

1. The Rule 3.850 Motion

On June 28, 2010, Mrs. Tewari reported a home invasion. Doc. 11.1 at 172-73. She claimed two men had entered her bedroom, battered her and her husband, and stole her husband's firearms and various medications before fleeing. Doc. 11.1 at 169-178. When Mr. Napoli was arrested and arraigned, the trial judge appointed a public defender. Doc. 11.1 at 480. Through counsel, Mr. Napoli pled not guilty. *See* Doc. 11.1 at 407.

On November 4, 2010, the State sent a written plea offer to the public defender, Andrew Clark. Doc. 11.2 at 37. The offer specified an 18-year sentence in exchange for pleading guilty to armed burglary. Doc. 11.2 at 37. By its written terms, Mr. Napoli had until December 3, 2010 to accept or it would expire. Doc. 11.2 at 37.

At Mr. Napoli's docket sounding on December 1, 2010, Mr. Clark orally informed Mr. Napoli about the plea offer for the first time. Doc. 11.1 at 480-83, 487, 507. Mr. Clark also handed his own letter to Mr. Napoli, which reiterated the plea offer and indicated the State had extended its expiration date to December 6, 2010. Doc. 11.2 at 36. During the docket sounding, however, Mr. Clark was too busy speaking to dozens of other clients in court to explain the offer's details, so he told Mr. Napoli he would visit him in jail to discuss it before it expired. Doc. 11.1 at 483-84, 506-07.

In response, Mr. Napoli told Mr. Clark he was interested in the 18-year offer and specifically asked him to visit the jail before it expired to discuss its details. Doc. 11.1 at 484-86, 509-10. Unbeknownst to Mr. Napoli, at some time before December 7, 2010, Mr. Clark reached out to the State, either by email or voicemail, and indicated Mr. Napoli would accept the offer at his next court date on December 7, 2010. Doc. 11.1 at 500-01, 510-12.³

On December 7, 2010, the day after the State's 18-year plea offer was set to expire, Mr. Clark came to the jail to discuss Mr. Napoli's case with him. Doc. 11.1 at 486-88, 500-04.⁴ During the visit, Mr. Napoli asked Mr. Clark about the plea because he wanted to accept it. Doc. 11.1 at 486-87. In response, Mr. Clark stated, "it's still early . . . there's probably better offers . . . it's still early." Doc. 11.1 at 486.⁵

On March 1, 2011, the State extended a second plea offer, which proposed a 22-year sentence in exchange for a plea of guilty to armed burglary of

³ See *infra* Statement Of Facts B.2.

⁴ The record does not indicate whether Mr. Clark accepted the 18-year offer at the December 7 hearing or whether the hearing even occurred. Even if the hearing took place, the record also does not indicate whether it occurred before or after the December 7 jail meeting. Accordingly, the Court should convene an evidentiary hearing to determine (1) if there was a December 7 hearing, (2) if it took place before or after the jail meeting, and (3) if Mr. Clark accepted the plea at the hearing. See *infra* Argument I.B.

⁵ See *infra* Statement of Facts B.2. Mr. Clark testified differently at the post-conviction evidentiary hearing. Doc. 11.1 at 549. He claimed Mr. Napoli rejected the State's offer during his December 7 jail visit. Doc. 11.1 at 549. Importantly, Mr. Clark could not recall whether he informed Mr. Napoli the offer's expiration date had been extended past December 6, 2010. Doc. 11.1 at 511.

a dwelling. Doc. 11.2 at 38-39. On March 8, 2011, Mr. Napoli's new attorney, Mr. Culver, conveyed it to Mr. Napoli. Doc. 11.1 at 514-19. Mr. Napoli told Mr. Culver he wanted to accept the 18-year plea offer. Doc. 11.1 at 515. Mr. Culver, however, told Mr. Napoli that offer had expired and the State refused to re-offer it. Doc. 11.1 at 515. Thereafter, a jury found Mr. Napoli guilty of burglary, and he was sentenced to life in prison. Doc. 11.1 at 390.

The sole ground in Mr. Napoli's post-conviction motion was that Mr. Clark was ineffective when he allowed the State's 18-year offer to expire. Doc. 11.1 at 465-69. Mr. Napoli claimed Mr. Clark's ineffective communication deprived him of the opportunity to accept the State's 18-year offer, which he would have otherwise accepted. Doc. 11.1 at 465-69. Instead, he went to trial, was convicted, and was sentenced to life imprisonment. Doc. 11.1 at 465-69.

2. The Post-Conviction Evidentiary Hearing

At the post-conviction evidentiary hearing, Mr. Clark and Mr. Napoli agreed on many things. They agreed the State had offered Mr. Napoli an 18-year plea deal on November 4, 2010 and Mr. Clark conveyed it by letter dated December 1, 2010. Doc. 11.1 at 492-93, 496, 498, 500; 11.2 at 37. They agreed the offer was then set to expire on December 6, 2010. Doc. 11.1 at 500. They agreed the first time Mr. Clark discussed the offer with Mr. Napoli was at the docket sounding on December 1, 2010. Doc. 11.1 at 480. They agreed Mr. Clark lacked time to then discuss the offer in detail, but Mr. Napoli expressed

interest in it, and Mr. Clark promised to see Mr. Napoli in jail before it expired on December 6, 2010. Doc. 11.1 at 549-50. They agreed Mr. Clark was unable to see Mr. Napoli until December 7, 2010. Doc. 11.1 at 485-86.

When Mr. Clark realized he was unable to visit Mr. Napoli at jail before the offer would expire on December 6, he testified he informed the State that Mr. Napoli would accept it. Doc. 11.1 at 499-500. Mr. Clark said he had no written or oral communication with Mr. Napoli between the December 1 docket sounding and the December 7 jail meeting. Doc. 11.1 at 508.

Mr. Clark and Mr. Napoli, however, gave differing accounts of their December 7 jail meeting. Mr. Clark testified Mr. Napoli declined the offer. Doc. 11.1 at 503-04. But he could not recall whether he informed Mr. Napoli that he had told the State Mr. Napoli would accept the offer, or whether he told Mr. Napoli that the December 6 expiration date for the offer was no longer applicable. Doc. 11.1 at 511. In contrast, Mr. Napoli testified Mr. Clark told him the offer had expired but better offers would be forthcoming because the State's witnesses were not cooperating. Doc. 11.1 at 486.

Mr. Culver also testified. Doc. 11.1 at 515-20. He confirmed Mr. Napoli had asked him to convince the State to re-issue the 18-year offer. Doc. 11.1 at 515. It is therefore uncontradicted that Mr. Napoli was interested in the State's 18-year offer on December 1, 2010 and in March 2011 when Mr. Culver had inherited the case from Mr. Clark.

3. The Order Denying Post-Conviction Relief

In its order, the post-conviction court found Mr. Clark's testimony was more credible than Mr. Napoli's. Doc. 11.1 at 550. Specifically, the post-conviction court could not believe Mr. Napoli would accept an 18-year offer when he was unwilling to accept a 22-year offer despite facing life in prison. Doc. 11.1 at 550. The post-conviction court did not explain how that choice was unreasonable. Moreover, in making this finding, the post-conviction ignored Mr. Culver's uncontradicted testimony that Mr. Napoli had in fact requested to resolve his case by accepting an 18-year sentence. Doc. 11.1 at 550.

Additionally, the post-conviction court could not believe Mr. Clark would go out and discuss an expired offer with Mr. Napoli on December 7, 2010. Doc. 11.1 at 550. But the post-conviction court did not consider the lack of testimony concerning whether during the December 7, 2010 jail visit, Mr. Clark had informed Mr. Napoli that the offer was still available.

TIMELINESS AND STANDARD OF REVIEW

As to ground one, the parties agree the petition is timely. Doc. 10 at 5-6. As to grounds two and three, the parties agree Mr. Napoli did not exhaust his post-conviction remedies in state court. Doc. 10 at 6. Nevertheless, Mr. Napoli contends he was not required to exhaust grounds two and three under the rule of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). As to all three grounds, the parties agree the standard for habeas review under the Antiterrorism

and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254(d), is deferential. Doc. 10 at 11.

A. Ineffective Assistance of Counsel

Strickland v. Washington established the two-pronged test for analyzing “[a] convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence.” 466 U.S. 668, 687 (1984). Under *Strickland*, the defendant must first “show that counsel’s performance was deficient.” *Id.* Next, “the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

B. Federal Habeas Review

Generally, AEDPA permits habeas relief in two circumstances. *Reed v. Sec’y, Fla. Dep’t Corr.*, 767 F.3d 1252, 1260 (11th Cir. 2014). First, district courts may “grant habeas relief [if] the state court’s decision was ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” *Id.* (quoting 28 U.S.C. § 2254(d)(1)); accord *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014).⁶

⁶ “Under § 2254(d)(1)’s ‘contrary to’ clause, [federal courts may] grant relief only 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.” *Reed*, 767 F.3d at 1260 (internal punctuation and citation omitted).

Second, district courts may also grant habeas relief if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Reed*, 767 F.3d at 1260 (quoting 28 U.S.C. § 2254(d)(2)). In that regard, federal courts may "overturn factual findings by the state [post-conviction] court only when a petitioner produces 'clear and convincing evidence' that those findings are erroneous." *Id.* (quoting 28 U.S.C. § 2254(e)(1)).

Either way, "[t]o clear the § 2254(d) hurdle, a habeas petitioner 'must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Grounds one and two allege trial counsel were ineffective when they failed to discuss the details of an 18-year and a 20-year plea offer with Mr. Napoli before they expired. Doc. 1 at 5-16. Accordingly, in addition to *Strick-*

The "unreasonable application' clause" permits federal courts to "grant relief only '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.* (quoting *Jones v. GDCP Warden*, 735 F.3d 1171, 1182 (11th Cir. 2014) (alteration in original)). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 410, 412 (2000)); see *Reed*, 767 F.3d at 1260-61. "The state court's application of clearly established law must be objectively unreasonable." *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 409). Under this standard, "even clear error will not suffice." *Reed*, 767 F.3d at 1261 (citation and internal punctuation omitted).

land, the clearly established law that controls grounds one and two is *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (applying *Strickland* to trial counsel's failure to timely communicate a plea offer), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (setting standard for determining the requirements a habeas petitioner must meet to demonstrate trial counsel's failure to timely communicate a plea offer was ineffective under *Strickland*). Ground three alleges trial counsel was ineffective when he failed to object to displaying Mr. Napoli to the jury in shackles. Doc. 1 at 17-20. The clearly established law that controls ground three is *Deck v. Missouri*, 544 U.S. 622, 624 (2005).

ARGUMENT

I. GROUND 1: THE POST-CONVICTION COURT UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW AND DETERMINED THE FACTS WHEN IT CONCLUDED TRIAL COUNSEL WAS EFFECTIVE DESPITE FAILING TO TIMELY DISCUSS THE 18-YEAR PLEA OFFER

Respondents argue Mr. Napoli “does not allege and makes no showing that the denial of his” Rule “3.850 motion and affirmance on appeal by the State court ‘resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.’” Doc. 10 at 15. Respondents further contend Mr. Napoli “failed to allege or establish that the denial of his claim of ineffective assistance of counsel ‘resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” Doc. 10 at 15. The sub-

stance of Mr. Napoli's ineffective assistance of counsel claim, however, refutes these assertions. *See* Doc. 1 at 8-10, 11.

A. The Denial Of Post-Conviction Relief Was Contrary To, Or An Unreasonable Application Of, Clearly Established Federal Law

Respondents incorrectly contend Mr. Napoli did not allege or establish the post-conviction court's and Fifth District's rulings constitute an unreasonable application of federal law. First, Mr. Napoli and Respondents disagree whether *Strickland* is the only clearly established law that controls Mr. Napoli's ineffective assistance of counsel claim. Because ground one pertains to counsel's failure to timely communicate the 18-year plea offer dated November 4, 2010 (Docs. 1 at 5-10; 11.2 at 37), it is governed by *Frye* and *Lafler*.

Mr. Napoli received ineffective assistance of counsel. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 132 S. Ct. at 1408. Moreover, counsel generally must make a "*meaningful* attempt to inform the defendant of a written plea offer before the offer expire[s]." *Id.* (emphasis added). Although *Frye* did not "try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process," it did recognize "codified standards of professional practice . . . can be important guides." *Id.* at 1408. In Florida, "A lawyer shall explain a matter to the extent reasonably necessary to permit

the client to make informed decisions regarding the representation.” R. Regulating Fla. Bar 4-1.4. Mr. Clark’s failure to fully communicate the 18-year plea offer’s details was ineffective because it deprived Mr. Napoli of the opportunity to make an informed decision whether to accept it.

The facts here are distinguishable from *Frye* to the extent Mr. Clark informed Mr. Napoli of the existence of the 18-year offer, whereas Frye’s counsel did not inform Frye of the plea offers. *Frye*, 132 S. Ct. at 1409. Nevertheless, *Frye* controls the result here because Mr. Clark testified he could not recall whether he told Mr. Napoli that the offer had been extended past the expiration date of December 6, 2010. Doc. 11 at 514.

This component of the December 7, 2010 discussion at the jail is critical to the question whether Mr. Clark’s performance was deficient. To qualify as a “meaningful attempt” within *Frye*’s meaning, counsel’s explanation of the plea offer must have been sufficient to “permit the client to make informed decisions regarding the representation.” R. Regulating Fla. Bar 4-1.4. Here, Mr. Clark did not explain he had accepted the offer on Mr. Napoli’s behalf and that it was therefore still available on December 7, 2010. Doc. 11.1 at 500. Without knowing whether the offer was still viable on December 7, 2010, Mr. Napoli could not have made an informed decision whether to accept it. Indeed, Mr. Napoli testified he did not accept the offer because he thought it had expired. *See supra* Statement Of Facts B.2. Accordingly, Mr. Clark’s

communication regarding the 18-year offer was not “meaningful” and his performance was thus ineffective under *Frye’s* interpretation of *Strickland*.

Counsel’s deficient performance also resulted in *Strickland* prejudice. “In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.” *Lafler*, 132 S. Ct. at 1384 (citation omitted). When defense counsel is ineffective under *Strickland* because his deficient performance led to the defendant’s failure to timely accept a plea offer, “the correct remedy . . . is to order the state to reoffer the plea agreement.” *Id.* at 1391.

“[O]ther circuits have pointed to the disparity between the plea offer and the potential sentence exposure as strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer, despite earlier protestations of innocence.” *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003); *Magana v. Hofbauer*, 263 F.3d 542, 552-53 (6th Cir. 2001) (noting substantial difference between 10-year and 20-year plea offers); *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998) (disparity between 10-year plea offer and 17.5-year sentence actually imposed was “objective evidence . . . to support a finding of prejudice under *Strickland*”).

Had Mr. Clark explained the 18-year plea offer remained available on December 7, 2010, Mr. Napoli would have accepted it, and the result of the proceedings would have been different. *See* Doc. 11.1 at 487-88, 550. Indeed,

Mr. Napoli and Mr. Culver both testified Mr. Napoli was interested in accepting the 18-year offer. Doc. 11.1 at 515, 550. In making its contrary credibility determination, however, the post-conviction court found Mr. Napoli would not have accepted the 18-year offer because he declined a 22-year offer when facing life in prison. Doc. 11.1 at 550. But if a 7.5-year disparity between two prison sentences is considered “objective evidence . . . to support a finding of prejudice,” *Gordon*, 156 F.3d at 381, then it was unreasonable to conclude four years in prison is too trivial a timespan to justify a defendant’s decision to take his chances at trial. Accordingly, this Court should order the State to re-offer the 18-year plea agreement.

B. The Denial Of Post-Conviction Relief Was Based On An Unreasonable Determination Of The Facts In Light Of The Evidence Presented

Additionally, the post-conviction court’s determination of the facts was unreasonable because it lacked certain findings that were crucial to its capacity to reach a legally sufficient conclusion whether Mr. Clark was ineffective during the plea bargaining phase.

Respondents claim the post-conviction court’s ruling was “fully supported by the record.” Doc. 10 at 16. The post-conviction court did make several factual determinations regarding the 18-year plea offer. *See* Docs. 10 at 15-16; 11.1 at 549-50. In making these findings, however, the post-conviction court failed to determine whether Mr. Clark had told Mr. Napoli the 18-year

offer was still viable on December 7 because Mr. Clark had accepted it on Mr. Napoli's behalf.⁷ Mr. Napoli testified he would have accepted the 18-year offer if he had known it was still available. Doc. 11.1 at 487-88. Because this critical fact determination is dispositive yet absent from the record, the post-conviction court unreasonably denied relief.

“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.” *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Absent a determination whether Mr. Napoli knew the 18-year offer was viable on December 7, 2010, this Court cannot adequately review the post-conviction court's application of *Strickland*. Accordingly, this Court should hold an evidentiary hearing to resolve whether Mr. Clark told Mr. Napoli that he had accepted the 18-year offer on Mr. Napoli's behalf and that it was still viable.

II. GROUND 2: TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO COMMUNICATE THE 20-YEAR PLEA OFFER

Although Mr. Napoli did not raise ground two in his Rule 3.850 motion, this Court should excuse that procedural default pursuant to *Martinez*

⁷ See *supra* Statement Of Facts B.2. Mr. Napoli testified that during the December 7, 2010 jail meeting, Mr. Clark told him the offer had expired but better offers would be forthcoming. Doc. 11.1 at 486. Mr. Clark testified he did not recall whether or not he informed Mr. Napoli he had already told the State that Mr. Napoli would accept the offer, or whether he told Mr. Napoli that the December 6, 2010 expiration date for the offer was no longer applicable. Doc. 11.1 at 511.

v. *Ryan*, 132 S. Ct. 1309 (2012). The record suggests the State extended Mr. Napoli a 20-year plea offer (*see* Doc. 11.2 at 39), which trial counsel failed to communicate to him (*see* Doc. 1 at 13-15). Because counsel's failure to timely communicate a plea offer would be ineffective, this Court should convene an evidentiary hearing to determine whether (1) the State made a 20-year offer, and (2) Mr. Culver failed to communicate it to Mr. Napoli before it expired. *See Frye*, 132 S. Ct. at 1408; *Lafler*, 132 S. Ct. at 1384.

A. *Martinez* Excuses The Procedural Default Of Ground Two Because Under Florida Law, Ineffective Assistance of Counsel Claims Must be Raised In An Initial-Review Collateral Proceeding

“Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez*, 132 S. Ct. at 1320. Respondents concede *Martinez* could excuse procedural defaults of “substantial” ineffectiveness claims. Doc. 10 at 8-10, And it is undisputed that under Florida law, ineffectiveness claims must be raised in a collateral proceeding, not on direct appeal. *See* Fla. R. Crim. P. 3.850; *Baker v. State*, 878 So. 2d 1236, 1242 (Fla. 2004). Nevertheless, Respondents argue in cart-before-the-horse fashion that ground two is not “substantial” because Mr. Napoli cannot now prove his trial counsel failed to communicate a 20-

year plea offer. Doc. 10 at 8-9. But this Court must convene an evidentiary hearing before determining whether Mr. Napoli can prove facts in support of his otherwise legally sufficient allegations.

B. The Court Should Hold An Evidentiary Hearing To Determine Whether Mr. Napoli’s Ineffective Assistance Of Post-Conviction Counsel Claim Is “Substantial”

Respondents argue ground two is not “substantial” within the meaning of *Martinez* because it has no factual merit. Doc. 10 at 8-10. There is insufficient record evidence regarding post-conviction counsel’s ineffective assistance for the Court to determine whether the ineffective assistance of post-conviction counsel claim raised in ground two is substantial. Therefore, the appropriate remedy is for the Court to hold an evidentiary hearing to determine whether (1) the State offered a 20-year plea, and (2) Mr. Culver failed to communicate it to Mr. Napoli before it expired. *See Schriro*, 550 U.S. at 474.⁸

“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the

⁸ *See also* Gary R. Proctor, *The New Role of Federal Habeas Courts in Guaranteeing the Right to Effective Assistance of Counsel*, 89 FLA. BAR J. 80, 83 (2015) (when “there has been no state-court adjudication on the merits, . . . [f]ederal courts may conduct a de novo review of the substance of the [*Martinez*-excused claims] and hold an evidentiary hearing if the petitioner alleges a violation of constitutional law”); *Dickens v. Ryan*, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (“Because § 2254(e)(2) by its terms does not prevent consideration of the substantive evidence of [a *Martinez*-excused claim] to the extent necessary to determine if [petitioner] [had] successfully proven ‘cause,’ [petitioner was entitled to] a fair opportunity to show cause and prejudice so as to overcome the procedural bar of the otherwise defaulted claim.”).

petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.” *Id.* But a federal court must also take “the deferential standards prescribed by” AEDPA into account when “deciding whether an evidentiary hearing is appropriate.” *Id.* Accordingly, “if the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.” *Id.* But, “a petitioner cannot be said to have ‘failed to develop’ relevant facts [under 28 U.S.C. § 2254(e)(2)] if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings.” *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir. 2002).

1. An Evidentiary Hearing Would Enable Mr. Napoli To Prove The Factual Allegations Raised In Ground Two, Which Entitle Him To Federal Habeas Relief

Respondents claim “the letter attached to the habeas petition stating that the 20 year plea offer had expired clearly contains a typographical error, as there was no 20 year plea offer.” Doc. 10 at 9. To justify this rank speculation, Respondents point to post-conviction testimony showing Mr. Napoli was offered an 18-year and a 22-year plea and ask the Court to infer there was no 20-year offer. *See* Doc. 10 at 9.

But the only record evidence regarding the 20-year offer—i.e., the letter itself—directly contradicts this claim. Doc. 11.2 at 39. Accordingly, Mr. Napoli is entitled to an evidentiary hearing under § 2254(e)(2) to determine

whether the State made a 20-year plea offer, which Mr. Culver failed to communicate to Mr. Napoli. *See Pope v. Sec’y, Dep’t of Corr.*, 680 F.3d 1271, 1294 (11th Cir. 2012) (reversing denial of evidentiary hearing where court could not ascertain “veracity of [petitioner’s] claims because [he had] never been afforded an opportunity to develop their factual basis in the crucible of an evidentiary hearing—nor, just as importantly, has the State had the opportunity to challenge them in an adversarial hearing”). If, after such a hearing, the Court resolves the facts surrounding the 20-year offer in Mr. Napoli’s favor, he would be entitled to habeas relief. *See supra* Argument I.A.

2. Ground Two’s Factual Predicate Could Not Have Been Previously Discovered Through The Exercise of Due Diligence

Normally, AEDPA prohibits district courts from granting an evidentiary hearing when the petitioner “has failed to develop the factual basis of a claim in State court proceedings.” 28 U.S.C. § 2254(e)(2). An exception exists, however, when an “applicant shows . . . a factual predicate that could not have been previously discovered through the exercise of due diligence.” *Id.* § 2254(e)(2)(A)(ii). To that end, Mr. Napoli diligently sought to present evidence of the 20-year plea offer at each stage of post-conviction proceedings.

“Following trial, [Mr. Napoli] requested documentation from the prosecutor’s office regarding any formal pleas made during pre-trial process.” Doc. 1 at 13. In response, he received a letter signed by the prosecutor, which stat-

ed, “[t]he earlier plea offer involving 20 years as a habitual felony offender has expired.” Docs. 1 at 13; 11.2 at 39. Mr. Napoli now claims he identified trial counsel’s failure to communicate the 20-year plea offer as a substantial ground for relief during the initial stages of the post-conviction proceedings. Doc. 1 at 15. Because post-conviction counsel rendered ineffective assistance by failing to raise this ground in the counseled Rule 3.850 motion, however, Mr. Napoli had no opportunity to develop the facts surrounding the 20-year plea offer. *See supra* Argument II.A.

Therefore, the appropriate remedy here is for the Court to conduct an evidentiary hearing to determine whether (1) the State did in fact extend Mr. Napoli a 20-year offer, and (2) trial counsel failed to timely communicate it. *See* 28 U.S.C. § 2254(e)(2); *Landrigan*, 550 U.S. at 474; *Martinez*, 132 S. Ct. at 1320; *Breedlove*, 279 F.3d at 960; *Pope*, 680 F.3d at 1294. Only after such a hearing can the Court decide whether Mr. Napoli is entitled to habeas relief.

III. GROUND 3: TRIAL COUNSEL WAS INEFFECTIVE WHEN HE ALLOWED MR. NAPOLI TO BE REQUIRED TO WEAR SHACKLES AND A RED INMATE IDENTIFICATION BAND DURING TRIAL

Respondents argue ground three was procedurally defaulted. Doc. 10 at 8-9. As with ground two, however, *Martinez* excuses the procedural default. *See supra* Argument II.A.

Again, Respondents concede *Martinez* could excuse the procedural default, but argue ground three is not “substantial” because it has no merit.

Doc. 10 at 9. Because post-conviction counsel was ineffective, however, the record is insufficient whether (1) Mr. Napoli was shackled and wore a red inmate identification band during trial, and (2) trial counsel failed to object. Only an evidentiary hearing can determine those facts. *See* Argument II.B.

“[T]he Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is justified by an essential state interest.” *Deck*, 544 U.S. at 624. Indeed, shackling a defendant during trial is “inherently prejudicial” and violates the defendant’s Fifth and Fourteenth Amendment rights. *Id.* at 628-29 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)).

The habeas petition alleges Mr. Napoli was forced “to stand trial in shackles and a bright red identification band,” which identified him “as a jail inmate” and “marked [him] as a dangerous criminal.” Doc. 1 at 18. Accordingly, he argues his due process rights were violated (*see Deck*, 544 U.S. at 624) and trial counsel was ineffective for failing to object (Doc. 1 at 18-20).

Respondents argue Mr. Napoli’s claim is speculative because the record does not indicate the jury “heard his shackles rattling and saw his red wristband identifying him as an inmate.” Doc. 10 at 10. But, the record indicates Mr. Napoli partially disrobed and displayed his neck and arm tattoos to the jury (Doc. 11.1 at 321, 349, 359), Ms. Eiland (Doc. 11.1 at 224, 220-21), and Mrs. Tewari (Doc. 11.1 at 181-82). Other witnesses had a clear view of Mr.

Napoli and were able to identify him by his clothing. Doc. 11.1 at 150, 159, 187, 210, 233. Thus, the record suggests the jury more likely than not could perceive Mr. Napoli's appearance during the trial proceedings.

Nevertheless, Mr. Napoli had no post-conviction opportunity to fully develop these facts. If his allegations are true, he would be entitled to habeas relief. *See Deck*, 544 U.S. at 624; *see supra* Argument II.B. As such, this Court should convene an evidentiary hearing. *See supra* Argument II.B.

LOCAL RULE 3.01(J) REQUEST FOR ORAL ARGUMENT

Mr. Napoli respectfully requests 30 minutes of oral argument.

CONCLUSION

For the foregoing reasons, the Court should grant the petition or convene an evidentiary hearing. Alternatively, the Court should grant a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1); Rule 11, Rules Governing § 2254 Cases in the United States District Courts.

Respectfully submitted,

/s/ Thomas Burns

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Respondents

AAG Linda C. Matthews

/s/ Thomas Burns

Thomas A. Burns