

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL ENRIQUE CAMACHO,
Petitioner,

v.

WENDY KELLEY, Director, Arkansas Department of Corrections,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

BRUCE D. EDDY
Federal Public Defender
Western District of Arkansas

Anna M. Williams

Anna M. Williams
Assistant Federal Public Defender
Office of the Federal Public Defender
Counsel of Record
3739 Steele Blvd., Ste. 280
Fayetteville, Arkansas 72703
(479) 442-2306
anna_williams@fd.org

QUESTIONS PRESENTED FOR REVIEW

- I. Whether trial counsel was ineffective for failing to determine if Mr. Camacho was competent to enter a guilty plea in light of a psychiatric report that revealed significant cognitive impairment.
- II. Whether Mr. Camacho's guilty plea was voluntary and knowing when he was not informed of the defense of mental disease or defect supported by the psychiatric report.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW.....	ii
LIST OF PARTIES.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	v
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE PETITION.....	16
CONCLUSION.....	29
CERTIFICATE OF SERVICE.....	31

INDEX TO APPENDICES

APPENDIX A	<i>Camacho v. Kelley</i> , 888 F.3d 389 (8th Cir. 2018).....	1a
APPENDIX B	<i>Camacho v. Kelley</i> , No. 5:12-CV-5069, 2017 WL 2124477 (W.D. Ark. May 16, 2017).....	7a
APPENDIX C	<i>Camacho v. Kelley</i> , No. 12-5069, 2016 WL 11260877 (W.D. Ark. Nov. 29, 2016).....	12a

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Cooper v. Oklahoma</i> , 517 U.S. 348 (1996).....	18
<i>Droepe v. Missouri</i> , 420 U.S. 162 (1975).....	25
<i>Dusky v. United States</i> , 362 U.S. 402 (1960).....	18
<i>Ford v. Bowersox</i> , 256 F.3d 783 (8th Cir. 2001).....	20
<i>Forsyth v. Ault</i> , 537 F.3d 887 (8th Cir. 2008)	20
<i>Gibson v. Klinger</i> , 232 F.3d 799 (10th Cir. 2000)	24
<i>Godinez v. Moran</i> , 509 U.S. 389 (1993).....	18-19, 24-25
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	17
<i>Hunter v. Bowersox</i> , 172 F.3d 1016 (8th Cir. 1999)	24-25
<i>Jefferson v. Welborn</i> , 222 F.3d 286 (7th Cir. 2000)	24
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986).....	16
<i>King v. Kemna</i> , 266 F.3d 816 (8th Cir. 2001)	21
<i>LaRette v. Delo</i> , 44 F.3d 681 (8th Cir. 1995)	21
<i>Mateo v. United States</i> , 310 F.3d 39 (1st Cir. 2002)	24
<i>McCarthy v. United States</i> , 394 U.S. 459 (1969)	25
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	24
<i>Nolan v. Armontrout</i> , 973 F.2d 615 (8th Cir. 1992)	17
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970)	25
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	22
<i>Sechrest v. Ignacio</i> , 549 F.3d 789 (9th Cir. 2008)	24
<i>Sidebottom v. Delo</i> , 46 F.3d 744 (8th Cir. 1995)	21

<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	24
<i>Stanley v. Lockhart</i> , 941 F.2d 707 (8th Cir. 1991)	22
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	<i>passim</i>
<i>United States v. Martinez</i> , 466 F.3d 878 (8th Cir. 2006)	18
<i>United States v. Pacheco</i> , 641 F.3d 970 (8th Cir. 2011)	21
<i>White v. Helling</i> , 194 F.3d 937 (8th Cir. 1999)	17
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	19, 22
Statutes	
Ark. Code Ann. § 5-2-301	11
Ark. Code Ann. § 5-2-301(6)(a)(iii).....	27
Ark. Code Ann. § 5-2-312	2-3, 20, 27
Ark. Code Ann. § 5-2-403(a).....	3, 26
Ark. Code Ann. § 5-10-101	1, 2, 26
28 U.S.C. § 2253	23
28 U.S.C. § 2253(c)(2).....	23
28 U.S.C. § 2254	1, 23
Secondary Sources	
Ark. Model Crim. Jury Inst. 2d 1001.	27

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On April 24, 2018, the United States Court of Appeals for the Eighth Circuit issued its judgment affirming the district court's denial of Manuel Enrique Camacho's habeas petition under 28 U.S.C. § 2254, which challenged his conviction for being an accomplice to capital murder in violation of Ark. Code Ann. § 5-10-101. *See Camacho v. Kelley*, 888 F.3d 389 (8th Cir. 2018). Therefore, it affirmed the district court's order determining that defense counsel was not ineffective in its failure to determine Mr. Camacho's competency to enter a guilty plea after receiving a psychiatric report that outlined Mr. Camacho's cognitive impairment. A copy of the opinion is attached at Appendix ("App.") A.

JURISDICTION

The Eighth Circuit's judgment was entered on April 24, 2018. Neither the Petitioner nor the Government sought rehearing. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following constitutional and statutory provisions:

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Ark. Code Ann. § 5-10-101. Capital Murder

(a) A person commits capital murder if:

(10) The person:

(A) Purposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable structure that he or she knows or has good reason to believe to be occupied by a person; and

(B) Thereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

Ark. Code Ann. § 5-2-312. Lack of criminal responsibility—Affirmative defense

(a) (1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked criminal responsibility.

- (2) When the affirmative defense of lack of criminal responsibility is presented to a jury, prior to deliberations the jury shall be instructed regarding the disposition of a defendant acquitted due to the defendant's lack of criminal responsibility as described under § 5·2-314.
- (b) When a defendant is acquitted on a ground of lack of criminal responsibility, the verdict and judgment shall state that the defendant was acquitted on a ground of lack of criminal responsibility.

Ark. Code Ann. § 5·2-403(a). Accomplice—Definition

- (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:
 - (1) Solicits, advises, encourages, or coerces the other person to commit the offense;
 - (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or
 - (3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.
- (b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:
 - (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result;
 - (2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or
 - (3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.

STATEMENT OF THE CASE

Mr. Camacho was charged by criminal information as an accomplice to capital murder for a road rage incident that occurred on May 6, 2006. Tim Buckley was appointed as Mr. Camacho's counsel and Kent McLemore was appointed to primarily handle matters related to a potential capital penalty phase. The State of Arkansas was seeking the death penalty for Mr. Camacho.

On June 6, 2008, approximately one month prior to trial, the trial court entered an order finding that a mental health examination was necessary not only to evaluate Mr. Camacho for mitigation purposes, but also to "determine his capacity to understand the proceedings against him and to assist effectively in his own defense, and to determine the extent, if any, to which the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Moreover, the declaration by Dr. Pablo Stewart, M.D., a forensic psychiatrist, attached to Mr. Camacho's Motion to Continue stated that Dr. Stewart was retained to present psychiatric evidence in the defense's case-in-chief.

On or about July 5, 2008, prior to the commencement of the jury trial, Dr. Stewart completed his report evaluating Mr. Camacho and submitted it to trial counsel, revealing deficits in Mr. Camacho's cognitive ability. Dr. Stewart found that Mr. Camacho's mental health conditions contributed to his inability to act "knowingly" and "purposely" at the time of the offense. Mr. Buckley informed the trial court that he had this report but did not intend to use it in his case-in-chief.

On July 11, 2008, prior to a jury being empaneled, Mr. Camacho entered a guilty plea to accomplice to capital murder and is currently serving a life sentence without the possibility of parole. Mr. Camacho filed his federal habeas petition on April 13, 2012, raising the following claims:¹

- 1) His guilty plea was not voluntary and knowing;
- 2) His trial counsel was ineffective by:
 - a) Failing to provide an interpreter at each court proceeding and during discussions with him,
 - b) failing to ensure that mental-health evaluations were completed prior to entry of a guilty plea to determine competency to stand trial,
 - c) coercing him to enter a guilty plea,
 - d) failing to conduct an adequate pre-trial investigation, and
 - e) failing to move to dismiss the charge on speedy-trial grounds;
- 3) He was actually and constructively denied counsel due to a delay in consular notification; and
- 4) The State engaged in prosecutorial misconduct by failing to disclose to the defense until jury selection had begun the fact that a gun had been located in a bag in the victim's car.

The magistrate judge determined that an evidentiary hearing was "necessary to determine the mental capabilities of Mr. Camacho to enter a knowing and voluntary plea and to, at least, make the psychiatric report part of the record." The court further ruled that "the record needs to be further developed concerning the State's disclosure

¹ On November 6, 2013, the district court dismissed the petition as having been untimely filed. The Court of Appeals for the Eighth Circuit reversed the dismissal on appeal, vacated the district court's dismissal, and remanded the case for further proceedings.

of the fact that a loaded weapon was found in the victim's car and evidence on how that might be relevant."

An evidentiary hearing was conducted on November 8, 2016, in which Dr. Stewart, Benton County Circuit Judge Tom Keith, Mr. Buckley, and Mr. McLemore testified. By that time, Mr. Camacho had conceded that several of his initial claims were meritless and only pursued claims involving ineffective assistance of counsel for failure to investigate the gun found in the victim's vehicle, counsel's failure to address his competency prior to entry of a guilty plea, and whether or not his guilty plea was knowing and voluntary in light of a mental defect defense that was not shared with him prior to his guilty plea.

At the evidentiary hearing, Mr. Camacho called Dr. Stewart, a forensic psychiatrist hired by trial counsel in January of 2008, to testify regarding the mental evaluation report he submitted to trial counsel just prior to the entry of Mr. Camacho's guilty plea. Dr. Stewart had referred trial counsel to Dr. Antonio Puente, a bilingual and bicultural neuropsychologist, to obtain an objective evaluation of Mr. Camacho's cognitive functioning. Dr. Stewart testified that there were serious questions about Mr. Camacho's cognitive functioning, which were based on interviews with Mr. Camacho, the mitigation specialist's social gathering of information on his family and background, and Dr. Puente's report. Specifically, he opined that Mr. Camacho suffered from post-traumatic stress disorder ("PTSD"), major depressive disorder, poly-substance dependence on drugs and alcohol, which resulted in diminished mental capacity and significant impairment in his cognitive

function. Extensive early childhood abuse and neglect, progressing through his adolescence, where he was in a gang-infested area, affected his brain's ability to process information and caused PTSD. He testified that "the neuropsychological testing done by Dr. Puente confirmed the fact that Mr. Camacho had significant brain damage, cognitive dysfunction." While Dr. Puente's report showed that Mr. Camacho's IQ fell on the low average range and did not show significant intellectual deficits, it also measured the frontal lobe functioning, which revealed that he scored in the bottom first percentile.

Dr. Stewart opined that in July of 2008, Mr. Camacho was not competent to enter a guilty plea, as he did not have a rational degree of understanding to assist counsel in his own defense. When he provided this report to counsel, he did not "feel [Mr. Camacho] was competent to enter a plea," and he fully expected counsel to consult with him about the report. Generally, in a capital murder case, Dr. Stewart claimed that there would be more discussions between trial counsel and himself. In the declaration signed on June 5, 2008, he stated that he was specifically expected to present psychiatric evidence for the defense's case-in-chief as well as mitigation evidence. However, Dr. Stewart subsequently received a call from Mr. McLemore stating that Mr. Camacho had entered a guilty plea. After reviewing the change of plea transcript, Dr. Stewart maintained that Mr. Camacho did not show that he was competent to enter a guilty plea because he provided two-word answers to the questions asked. In cases of PTSD, such limited answers negate a showing of understanding and did not reveal that he understood the questions.

Judge Tom Keith testified that it was his standard practice to order a preliminary review on the issue of competency; however, Mr. Buckley convinced him it was unnecessary. Judge Keith supported his belief that Mr. Camacho was competent to proceed to trial by stating that Mr. Camacho clearly did not require a Spanish interpreter. He also based his assessment on observing Mr. Camacho's reactions in court and his communications with his co-defendant. Judge Keith found his responses in court to be appropriate although short. He testified the June 6, 2008 order for a mental evaluation was most likely drafted by a clerk and he "signed it without paying attention." The order provided that Mr. Camacho was to undergo an examination at the Arkansas State Hospital to determine, among other things, his capacity to understand the proceedings against him and to assist effectively in his own defense. Judge Keith admitted that he trusted the judgment of defense counsel as to Mr. Camacho's mental health and that if counsel had raised the issue as to his competency to stand trial or enter a guilty plea, he would have suspended proceedings and ordered an evaluation.

Notably, Judge Keith testified that if he had read the portion of Dr. Stewart's report that stated Mr. Camacho had not been able to act knowingly and purposely with respect to his conduct at the time of his alleged offenses, it would likely have "affected my decision in regard to proceeding to trial. I'm not sure, I can't say for sure that it would have affected my decision on whether to accept his plea of guilty, because I had the opportunity to observe him during the process. . . if the death

penalty had still been on the table, I would very definitely have ordered him evaluated."

Next, Mr. Buckley testified that he informed Mr. Camacho that any plea offer was likely to be a term of life without parole. He believed that Mr. Camacho understood the charges against him and what a plea entailed. Mr. Buckley never considered sending Mr. Camacho to the state hospital for an evaluation because "we've never gotten a report from the state hospital on a capital client that gave us anything good to work with." Mr. Buckley opined that he had witnessed occasions where the state evaluation also attributed other "things" to a defendant. In addition, Mr. Buckley felt that through his contact with Mr. Camacho, he was not concerned about his competency and ability to understand the proceedings. Counsel reviewed the stipulated facts in the plea agreement with Mr. Camacho and he agreed to it.

Mr. Buckley conceded that he did not have any formal training on identifying mental health issues, but relied on his own experience. He felt a mental disease or defect issue was not raised because Dr. Martin Faitak's² report did not reveal a mental defect and Dr. Stewart did not state directly that there were mental disease or defect issues. He contended the inability to act knowingly and purposely might be an argument for diminished capacity, but it did not rise to the level of a mental defect.

Mr. Buckley admitted that in March of 2008, he moved for a medical examination of Mr. Camacho due to his declining health while incarcerated at the

² Dr. Faitak was the first neuropsychologist hired by counsel to conduct tests to determine IQ and other cognitive issues. Because Dr. Faitak was neither bilingual or bicultural, counsel hired Dr. Puente to conduct a second evaluation.

Benton County jail. Within the motion, he contended that Mr. Camacho's declining health inhibited his ability to assist in his own defense. He did not ask Dr. Stewart to opine as to whether Mr. Camacho was fit to proceed or competent to stand trial because he expected that information to be included in the report, and he only contemplated the report would be used for mitigation purposes. Once Mr. Camacho pleaded guilty and the death penalty was no longer an option, he felt there was nothing further to mitigate, as being convicted of capital murder had only two options—the death penalty or life without parole.

Lastly, Mr. McLemore testified regarding Dr. Faitak's report assessing Mr. Camacho's IQ to be 91, which was conducted in English and not normed for a Spanish-speaking defendant. Mr. McLemore commented that Dr. Faitak expressed concern over the validity of his test results because of the language barrier. Because Dr. Stewart's report did not provide a conclusion that Mr. Camacho could not appreciate the criminality of his conduct, Mr. McLemore assumed that nothing in Dr. Stewart's report met the threshold of an affirmative defense for mental disease or defect. He stated that the lack of the mental state required to commit the offense of murder was not an affirmative defense of mental disease or defect and was suitable only for mitigation in the penalty phase.

Instead, Mr. McLemore opined that an affirmative defense might be a diagnosis of "schizophrenia or bipolar disorder and concluded that, as a result, the client could not appreciate the criminality of his conduct at the time of the offense, we would have had something to run with there, but he didn't reach any such

conclusion.” After counsel evaluated the report, they believed it was best suited for the penalty phase of the trial. Mr. McLemore testified that after having three experts evaluate Mr. Camacho, none concluded that he suffered from a mental disease or defect to the extent that he could not appreciate the criminality of his conduct.

Mr. McLemore explained that he had numerous meetings with Mr. Camacho in which he discussed the elements of the offense and accomplice liability, as well as what defenses may be available. Mr. McLemore reasoned that Mr. Camacho changed his plea during voir dire because jurors appeared willing to give him a death sentence, in addition to statements provided by the co-defendants implicating Mr. Camacho. Mr. McLemore determined it was “not a case that we wanted to go to trial on, and we thought that the chance that our client would be convicted and receive a death sentence was significant and substantial and worth trying to avoid.”

Mr. McLemore stated that he asked Dr. Stewart to perform a general psychological evaluation. Although Dr. Stewart’s report revealed significant impairment in cognitive functioning acquired as a result of a brain injury, which can constitute mental disease or defect under Ark. Code Ann. § 5-2-301, Mr. McLemore stated that it was not to the extent that it negated Mr. Camacho’s ability to appreciate the criminality of his conduct. While Mr. McLemore conceded that the report used terms and drew conclusions regarding cognitive functioning impairment and brain injury, he did not speak with Dr. Stewart about Mr. Camacho’s competence to plead guilty because it was never a concern and the report did not specifically address

competency. He contended that Dr. Stewart's report was essentially a social history narrative that included a little psychiatric terminology.

In rebuttal to Mr. McLemore's testimony, Dr. Stewart stated:

the report is very clear about the mental disease or defect that . . . Mr. Camacho was suffering from at the time. And if they would have really read the report, the reason that this particular report is so heavily containing social history, that's the information that's used to support the basis of the post traumatic stress disorder diagnosis. . . . it's the only psychiatric condition or disease or defect as characterized in the law that is determined by something that happens to an individual. . . . Post traumatic stress disorder is something that is external to an individual which they have little to no control over. That's why this report was written the way it was, to demonstrate that all of the documented episodes of trauma. . . . Post traumatic stress disorder is a very serious condition that has very profound . . . effects on a person's brain.

Dr. Stewart stated that he is usually asked by counsel whether the findings can be used to establish an insanity or diminished capacity or other mental health defense, but he was not in the instant case. “[F]rom listening to Mr. McLemore . . . I don't think he still does—appreciate the fact that this report, at least to my reading of it, clearly lays out the fact that Mr. Camacho at the time of the crime was suffering from significant psychiatric disease or defect.”

In closing, defense counsel argued that trial counsel's belief that Mr. Camacho did not have mental health issues clouded their ability to read Dr. Stewart's report. Counsel presupposed that Mr. Camacho was competent and without a mental disease or defect defense prior to receiving the report, which contravenes the purpose of obtaining a mental health expert.

The district court adopted the magistrate judge's report and recommendation denying Mr. Camacho's habeas petition and found that “even a cursory analysis of

[Mr.] Camacho's plea hearing transcript reveals several indicia of competence." App. B, p. 7. The district court opined that because Mr. Camacho was able to state his full name and age, positively indicated his intent to plead guilty to the charges against him and affirmed he understood his trial rights, and was able to interact with the trial court judge, he was competent. *Id.* at 8-9. Specifically, because Mr. Camacho was weeping during the change of plea hearing, the district court surmised that "[t]his display of emotion additionally suggests that [he] was sufficiently competent to understand the consequences of his guilty plea." *Id.* at 8. Further, the district court found that Mr. Camacho's ability to articulate that he was going to prison for life when he apologized to his family revealed that he understood the result of the guilty plea. *Id.* at 8-9.

In addition, the district court opined that Mr. Buckley's testimony that he met with Mr. Camacho 25 or 26 times and observed that Mr. Camacho seemed to understand everything discussed, did not reveal that Mr. Camacho had a mental disease or defect. *Id.* at 9. Mr. McLemore echoed his partner's assessment because Mr. Camacho asked appropriate questions and expressed frustration about not having a plea offer. *Id.*

The district court was not persuaded that the order from Judge Keith, entered on June 6, 2008, directing Mr. Camacho to undergo a mental health examination at a state hospital, revealed concerns over competency. Although one of the objectives of the examination was to "determine [his] capacity to understand the proceedings against him and to assist effectively in his own defense," the district court reasoned

this was a standing order unrelated to his fitness to stand trial. *Id.* Instead, the district court surmised that Judge Keith's order was entered to ensure that the State could also put a mental health expert on the stand during the sentencing phase of trial only. *Id.*

As to Dr. Stewart's mental examination report, the district court found that it did not raise a substantial doubt about his competence although it stated that Mr. Camacho's "mental health conditions contributed to [him] not being able to act 'Knowingly' and 'Purposely' with respect to his conduct at or around the time of his alleged offenses." *Id.* at 10. Specifically, the district court found that Dr. Stewart's report did not opine on his competence to stand trial. *Id.* The district court was persuaded by tests that revealed Mr. Camacho had an IQ of 91³ and 86, respectively, and that Judge Keith and trial counsel observed Mr. Camacho on many occasions. *Id.* Mr. Camacho was granted a certificate of appealability to pursue only the claim regarding counsel's failure to ascertain his competency to enter a guilty plea after receiving Dr. Stewart's report in this matter.

In a published decision, the Court of Appeals for the Eighth Circuit affirmed the district court's denial. App. A. The Eighth Circuit determined that "[n]either Dr. Stewart nor Dr. Puente ever expressed to counsel a concern about Camacho's fitness to stand trial, in spite of Dr. Stewart's experience in the field of neuropsychiatric forensics." *Id.* at 4. The lower court found that Mr. Camacho had not shown that counsel's performance was deficient because his attorneys were reasonable in

³ This IQ is gathered from Dr. Faitak's report.

opposing a state hospital evaluation because of the potential that he would make incriminating statements. *Id.* at 5. In addition, the court reasoned that nothing in the reports would have caused counsel to conclude that Mr. Camacho was incompetent to stand trial or enter a plea. *Id.* The court surmised that counsel was “correct in their assessment that frontal lobe impairment . . . was insufficient . . . to establish a lack of fitness to proceed to trial or enter a plea.” *Id.* It further concluded that Mr. Camacho failed to meet the prejudice prong of *Strickland* because he could not establish that he would have been found incompetent to proceed. *Id.* at 6.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This case presents the important issue of whether defense counsel has an obligation to determine whether a defendant is competent to enter a guilty plea when a psychiatric report ordered by counsel revealed significant cognitive impairment. In this case, counsel was ineffective for failing to determine whether Mr. Camacho was competent to enter a guilty plea in light of the psychiatric report. Further, Mr. Camacho's guilty plea was neither voluntary nor knowing because he was not informed of the defense of mental disease or defect supported by the psychiatric report.

Certiorari is warranted to correct the Sixth Amendment violation where Mr. Camacho received ineffective assistance of counsel when his attorneys failed to ascertain his competency to enter a guilty plea after receiving Dr. Stewart's psychiatric report that revealed considerable deficits in Mr. Camacho's mental abilities.

- I. Whether trial counsel was ineffective for failing to determine if Mr. Camacho was competent to enter a guilty plea in light of a psychiatric report that revealed significant cognitive impairment.

This Court should grant review to provide relief on a Sixth Amendment violation. Mr. Camacho maintains he received ineffective assistance of counsel when his attorneys failed to determine whether he was competent to enter a guilty plea. An accused's Sixth Amendment right to the assistance of counsel is a right to the effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). In *Strickland v. Washington*, the Supreme Court established a two-part test for

determining whether or not an attorney provided effective assistance of counsel. 466 U.S. 668 (1984). The petitioner must establish both deficient performance, *i.e.*, that “counsel’s representation fell below an objective standard of reasonableness,” and prejudice, *i.e.*, that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 687–88, 694. This same two-part standard “applies to challenges to guilty pleas based on [the] ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 57–59 (1985).

For the performance prong of an ineffective assistance of counsel claim, a petitioner must demonstrate that “counsel’s performance was so deficient as to fall below an objective standard of the customary skill and diligence displayed by a reasonably competent attorney.” *Strickland*, 466 U.S. at 687–89. “Only reasonable competence, the sort expected of the ‘ordinary fallible lawyer,’ is demanded by the Sixth Amendment.” *White v. Helling*, 194 F.3d 937, 941 (8th Cir. 1999) (quoting *Nolan v. Armontrout*, 973 F.2d 615, 618 (8th Cir. 1992)). The assessment of prejudice resulting from an attorney’s allegedly deficient performance pertaining to a guilty plea, depends “in large part on a prediction” as to whether plea negotiations or a trial would have turned out differently. *Hill*, 474 U.S. at 59. Such a prediction must “be made objectively.” *Id.* at 59–60.

Mr. Camacho’s mental defect was raised in Dr. Stewart’s psychiatric report and counsel failed to apprise Mr. Camacho of the significant findings within the report. Therefore, after reading Dr. Stewart’s report, counsel should have questioned whether Mr. Camacho was criminally culpable at the time of the offense and whether

he was competent to enter a guilty plea. Thus, counsel was aware at the time they prompted Mr. Camacho to plead guilty that Dr. Stewart's report revealed that Mr. Camacho lacked the capacity to act "Knowingly" and "Purposely" at the time of the offense.

"A defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (quotation marks omitted)) (alteration in original). This competency standard also applies to one who is pleading guilty. *Godinez v. Moran*, 509 U.S. 389, 398 (1993).

Trial counsel was ineffective because Dr. Stewart's report put counsel on notice that Mr. Camacho was likely incompetent at the time he entered a guilty plea. Due process prohibits a defendant who is mentally incompetent from making a valid guilty plea, and from being convicted. *Cooper*, 517 U.S. at 357. A defendant is competent if he or she possesses a "sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings." *Id.* at 354 (citing *Dusky*, 362 U.S. at 402). "In determining the defendant's competency, the district court may consider numerous factors, including expert medical opinions and the court's observation of the defendant's demeanor." *United States v. Martinez*, 446 F.3d 878, 881 (8th Cir. 2006)

(internal citations omitted). This competency standard also applies to one who is pleading guilty. *Godinez*, 509 U.S. at 398.

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”

Wiggins v. Smith, 539 U.S. 510, 521–22 (2003) (citing *Strickland*, 466 U.S. at 690-91). “In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.” *Id.*

“In assessing the reasonableness of an attorney’s investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Id.* at 527. “Even assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy.” *Id.* “Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.” *Id.* In other words, Dr. Stewart’s report, at minimum, should have prompted Mr. Camacho’s trial counsel to ask more questions.

The Eighth Circuit found that trial counsel’s decision not to pursue further mental health evaluations was strategic and that Mr. Camacho clearly had the ability to consult with his attorneys and assist in his defense. App. A, p. 5. In support of the conclusion that Mr. Camacho was competent to enter a guilty plea, the lower court

concluded that counsel correctly understood that frontal lobe impairment was “insufficient, standing alone, to establish a lack of fitness to proceed to trial or enter a plea.” *Id.*

Under Arkansas law, it is an affirmative defense that at the time the defendant engaged in the conduct charged he lacked capacity as a result of mental disease or defect to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. Ark. Code Ann. § 5-2-312. The defense of mental disease or defect permits the defendant to offer proof that he lacked the mental capacity to form the specific intent to commit the crime charged. *See Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008) (internal citation omitted). An attorney’s failure to request a competency hearing constitutes deficient performance under *Strickland* “if evidence raised substantial doubt about [the petitioner’s] mental competence” to participate in the state court proceedings. *Ford v. Bowersox*, 256 F.3d 783, 786 (8th Cir. 2001).

The declaration by Dr. Stewart attached to defense counsel’s motion to continue stated that Dr. Stewart was retained to present psychiatric evidence in the defense’s case-in-chief. The psychiatric report, submitted several days before the guilty plea was entered, revealed that Mr. Camacho suffered from PTSD and “displayed significant neurocognitive impairment of frontal lobe functioning.” This impairment involved “the ability to recognize future consequences resulting from current actions, to choose between good and bad actions . . . , override and suppress unacceptable social responses, and determine similarities and differences between things or events.” At minimum, such language should have prompted counsel to

question whether or not Mr. Camacho was competent to enter the guilty plea and discuss this with Dr. Stewart—the expert they hired to conduct a psychiatric evaluation of Mr. Camacho. In any event, trial counsel withheld an important fact from Mr. Camacho—that the report revealed cognitive deficiencies.

In an Eighth Circuit case, trial counsel was not required to pursue a competency evaluation where the defendant stated that he did not wish to be placed in a psychiatric institution, and the consequence of being adjudicated incompetent to stand trial is commitment to Missouri's department of mental health. *King v. Kemna*, 266 F.3d 816, 824 (8th Cir. 2001). Moreover, the expert report opined that the defendant was competent to stand trial. *Id.* Thus, unlike the instant case, trial counsel was not obligated to disregard the findings in the report and the defendant's wish not to be placed in a psychiatric institution and pursue a determination that his client was not competent to proceed. *Id.*; see *LaRette v. Delo*, 44 F.3d 681, 685–86 (8th Cir. 1995) (counsel's decision not to pursue competency defense was reasonable where the defendant insisted he was competent at the time of the offense and instructed counsel not to pursue such a defense); *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995) (counsel was not compelled to seek a second mental evaluation merely because the first was less than favorable). See also *United States v. Pacheco*, 641 F.3d 970, 972–73 (8th Cir. 2011) (denying permission to withdraw guilty plea although the defendant suffered impaired memory after attempting suicide where one expert found the defendant competent); *Martinez*, 446 F.3d at 881–82 (finding the defendant was competent after considering the expert medical opinions of two

psychologists, in which the medical opinion found to be more credible was based on observations during meetings with the defendant and test results, in addition to the court's independent observations in the courtroom); *Stanley v. Lockhart*, 941 F.2d 707, 710 (8th Cir. 1991) (finding defendant was competent to enter a guilty plea where two psychiatrists determined he was competent).

In the context of mitigation at sentencing, this Court has determined that trial counsel was ineffective for not fully investigating the defendant's background in making the decision not to present mitigation evidence at sentencing. *Wiggins*, 539 U.S. at 519. In fact, their knowledge, gained from a limited review of the defendant's background, triggered an obligation to look further because the defendant actually had powerful mitigation evidence due to physical and sexual abuse, homelessness, and diminished mental capacity. *Id.* at 535.

In the instant case, Dr. Stewart's report provided powerful revelations that Mr. Camacho suffered from PTSD and impairment of the frontal lobes, which contributed to his inability to act "Knowingly" and "Purposely" at the time of the offense. Counsel was ineffective by choosing to ignore this report because such revelations triggered an obligation for counsel to investigate whether he was competent to plead guilty to an offense that offered two abhorrent sentencing alternatives—life without parole or death.

II. Whether Mr. Camacho's guilty plea was voluntary and knowing when he was not informed of the defense of mental disease or defect supported by the psychiatric report.

The district court did not grant a certificate of appealability ("COA") as to whether the plea was voluntary and knowing when Mr. Camacho was not informed of the possible defense of mental disease or defect supported by Dr. Stewart's psychiatric report. Although the district court determined the issue was not raised in the habeas petition, Mr. Camacho claimed broadly that his guilty plea was not knowing and voluntary. This encapsulates a lack of culpability due to a diminished capacity defense in which one of the elements of the crime is not met. An affirmative defense of mental defect addresses whether the plea was knowing and voluntary, and therefore the district court erroneously dismissed this claim. Further, Mr. Camacho elaborates on this issue in his motion for reconsideration, in which he asks the magistrate to consider his coerced guilty plea because he had diminished capacity at the time of the offense.

Mr. Camacho submits this claim makes a substantial showing of the denial of a constitutional right. Accordingly, this Court should issue a COA indicating that his claim satisfies the statutory prerequisites to appeal final orders in proceedings under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(2).

Before a petitioner may appeal from the final order in a proceeding under 28 U.S.C. § 2254, he or she must first obtain a COA. *See* 28 U.S.C. § 2253. A COA should issue where the applicant has made a substantial showing of the denial of a constitutional right. *Id.* Where the district court has denied relief on the merits, the

substantial showing standard requires that reasonable jurists could debate as to whether the petition: (1) states a valid claim of the denial of a constitutional right; or (2) presents issues adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). The determination of whether a COA should issue is a threshold inquiry only. *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003). “[A] claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that the petitioner will not prevail.” *Id.* at 338. Thus, the COA can be granted so long as the petitioner’s claim does not appear utterly without merit after a quick look. *Mateo v. United States*, 310 F.3d 39, 41 (1st Cir. 2002) (citing *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000)); *see also Sechrest v. Ignacio*, 549 F.3d 789, 803 (9th Cir. 2008) (“[W]e simply take a ‘quick look’ at the face of the petition.”); *Gibson v. Klinger*, 232 F.3d 799, 803 (10th Cir. 2000) (“We will only take a ‘quick’ look at the . . . petition to determine whether [the petitioner] has ‘facially alleged’ the denial of a constitutional right.”).

Importantly, a COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337-38. Mr. Camacho asserts the district court failed to fully address the evident violations of his constitutional rights because his guilty plea was not knowing and voluntary.

For a defendant’s guilty plea to be constitutionally valid, “not only must he have been competent to stand trial, but his waiver of . . . the right to stand trial must have been ‘knowing and voluntary.’” *Hunter v. Bowersox*, 172 F.3d 1016, 1022 (8th

Cir. 1999) (quoting *Godinez*, 509 U.S. at 400). To be valid, a guilty plea must represent “a voluntary and intelligent choice among the alternative courses of action open to the defendant,” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970), and the defendant must “possess[] an understanding of the law in relation to the facts.” *McCarthy v. United States*, 394 U.S. 459, 466 (1969). A defendant is competent to stand trial when he has “the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Thus, a plea is not knowing and voluntary if a defendant is not informed of the alternative courses of action available to him. In this case, counsel never provided the report to Mr. Camacho, and therefore, he was unaware of the viable option of a mental defect defense at trial.

Dr. Stewart’s report addressed Mr. Camacho’s culpability at the time of the offense conduct, revealing that Mr. Camacho very likely failed to satisfy the mental state element for capital murder. Even Mr. McLemore acknowledged that Dr. Stewart’s report addressed the requisite mental state for commission of the offense, which is a necessary element to be found guilty of the crime. If Mr. Camacho’s conduct did not meet all of the elements of the offense, then it is ineffective for counsel to allow him to plead guilty of the crime. Mr. Camacho was not aware until after filing the instant habeas petition, that trial counsel had received the completed psychiatric evaluation revealing that he failed to meet the requisite *mens rea* required for capital murder. Because trial counsel was intent on avoiding the death

penalty through plea bargaining, somehow this report was not shared with Mr. Camacho and he was unaware that he had a viable defense to the crime.

Under Arkansas law, the relevant portion of the capital murder statute as charged in the criminal information reads as follows:

(b) A person commits capital murder if:

(10) The person:

(A) Purposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable structure that he or she **knows** or has good reason to believe to be occupied by a person; and

(B) Thereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

Ark. Code Ann. § 5-10-101 (emphasis added). A defendant is an accomplice, if he:

(a) (1) Solicits, advises, encourages, or coerces the other person to commit the offense;

(2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or

(3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.

..

Ark. Code Ann. § 5-2-403(a).

According to the Arkansas criminal jury instructions, an essential element of the offense for capital murder is that the defendant purposely discharged a firearm from a vehicle at a person or vehicle that he knew or had good reason to believe to be occupied by a person; and caused the death of that person under circumstances

manifesting extreme indifference to the value of human life. Ark. Model Crim. Jury Inst. 2d 1001.⁴

Trial counsel was erroneously dismissive of Dr. Stewart's finding of a mental disease or defect at the time of the offense conduct. Mr. McLemore stated that the lack of mental state required to commit the offense was not an affirmative defense of mental disease, but an opinion of Dr. Stewart that would only be suitable for mitigation. However, diminished capacity is an affirmative defense and specifically addresses a person's mental state—a requirement to be guilty of a crime. To follow such logic requires a finding of capital murder absent the element requiring a mental state. According to this line of reasoning, a defendant's *mens rea* is only appropriate for mitigation purposes. In order to bring the defense of mental disease or defect, Arkansas requires that at the time the defendant engaged in the conduct charged he or she lacked capacity as a result of mental disease or defect to conform his or her conduct to the requirements of law or appreciate the criminality of his or her conduct. Ark. Code Ann. § 5-2-312. Mental disease or defect includes “[s]ignificant impairment in cognitive functioning acquired as a direct consequence of a brain injury.” Ark. Code Ann. § 5-2-301(6)(a)(iii). A brain injury concern was raised by Dr. Stewart in his report where he points to Mr. Camacho's inability to act “knowingly and purposely

⁴ “A person acts knowingly (or with knowledge) with respect to his conduct or the circumstances that exist at the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.” Ark. Model Crim. Jury Inst. 2d 1001. “A person acts purposely with respect to the results of his conduct when it is his conscious object to cause the results.” *Id.*

with respect to his conduct at or around the time of his alleged offenses.” He specifically points out that Mr. Camacho “displayed significant neurocognitive impairment of frontal lobe functioning” and scored in the bottom first percentile of the population range. This test measures the executive function of the brain, which controls the ability to recognize future consequences and to choose between good and bad actions. While the Eighth Circuit was dismissive of this finding in the report, this should have caused a reasonable attorney to, at minimum, ask questions. Counsel was ineffective for dismissing such findings without any discussion or investigation.

The testimony during the evidentiary hearing is replete with how focused trial counsel was on avoiding trial and the possibility of death penalty. While it is imperative to avoid the death penalty in a capital case, here, counsel overlooked an actual defense that could be raised and failed to share this defense with Mr. Camacho. Failure to have the requisite mental state is certainly a viable defense to the crime charged and is relevant to the guilt-innocence phase of a trial. Mr. Camacho was never presented with Dr. Stewart’s report prior to entering his guilty plea. He was told that his only options were to plead to life without parole or receive the death penalty. He was not informed of a possible third option—that there was a defense because counsel’s own expert questioned whether Mr. Camacho had the requisite *mens rea* to be found guilty of the crime. This is clearly ineffective assistance of counsel.

The district judge relied on Dr. Faitak's report, among other things, to determine that Mr. Camacho was competent. However, even trial counsel admitted that Dr. Faitak was concerned over the accuracy of his own report because of the language barrier, which is why they hired Dr. Puente to evaluate Mr. Camacho. It was erroneous for the district court to give any weight to a report that was not reliable as to this particular defendant.

Mr. Camacho's guilty plea was not a knowing plea, as it was premised on counsel's withholding the likelihood that he did not have the required mental state to meet an element of the offense. With this failure to advise, Mr. Camacho believed that his case was indefensible and he had no recourse but to plead guilty, otherwise he would be sentenced to death. At this stage in the proceedings, all he must demonstrate is that he would not have pleaded guilty and would have insisted on going to trial but for this failure to keep him advised. Here, counsel's performance fell below the customary skill and diligence of a reasonable attorney. Further, Mr. Camacho has a plausible defense as to the charges against him—one of mental defect. The prejudice prong of *Strickland* is satisfied.

CONCLUSION

Therefore, Mr. Camacho's guilty plea was neither knowing or voluntary, and the judgment must be vacated and the matter remanded to the Arkansas state court for further proceedings. A grant of Mr. Camacho's petition for writ of certiorari is necessary because, at this point in the case, only this Court can reverse a guilty plea that was neither voluntary nor knowing.

For all of the foregoing reasons, Petitioner Manuel Enrique Camacho respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 20th day of September, 2018.

Respectfully submitted,

BRUCE D. EDDY
Federal Public Defender
Western District of Arkansas

Anna M. Williams

Anna M. Williams
Assistant Federal Public Defender
Office of the Federal Public Defender
3739 Steele Blvd., Ste. 280
Fayetteville, Arkansas 72703
(479) 442-2306
anna_williams@fd.org

Counsel for Petitioner