No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

Allan Rencountre Petitioner

Vs.

Colby Braun, Warden North Dakota State Penitentiary, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals

For the Eighth Circuit

PEITIONER'S APPENDIX

Allan Rencountre

North Dakota State Penitentiary

P.O. Box 5521

Bismarck, ND 58506

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1362

Allan Wayne Rencountre

Petitioner - Appellant

v.

Colby Braun

Respondent - Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:17-cv-00162-DLH)

JUDGMENT

Before WOLLMAN, COLLOTON and GRUENDER, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motion to proceed *in forma pauperis* is denied as moot.

June 08, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Allen Rencountre,	)	
	)	
Petitioner,	)	**ORDER ADOPTING REPORT AND RECOMMENDATION**
	)	
vs.	)	
	)	Case No. 1:17-cv-162
Colby Braun, Warden,	)	
	)	
Respondent.	)	

The Petitioner, Allen Rencountre, is an inmate at the North Dakota State Penitentiary ("NDSP"). He initiated the above-entitled action on August 8, 2017, with the submission of a "Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody." On September 27, 2017, the respondent filed a motion to dismiss. See Docket No. 6. On October 10, 2017, the Petitioner filed a response to the motion to dismiss. See Docket No. 8.

The Court referred the matter to Magistrate Judge Charles S. Miller, Jr., for initial review and on January 11, 2018, Judge Miller issued a Report and Recommendation wherein he recommended granting the motion to dismiss Rencountre's petition as untimely. See Docket No. 9. The parties were given fourteen (14) days to file any objections to the Report and Recommendation. Rencountre filed an objection on January 25, 2018. See Docket No. 10.

The Court has carefully reviewed the Report and Recommendation, the relevant case law, the entire record, and the objection filed by the Petitioner and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 9) in its entirety; and **GRANTS** the Respondent's motion to dismiss (Docket No. 6). The Court (1) finds that any appeal would be frivolous, could not be taken in good faith, and may not be taken *in*

forma pauperis and (2) declines to issues a certificate of appealability, certifying that an appeal may not be taken in forma pauperis because such an appeal would be frivolous. Let judgment be entered accordingly.

IT IS SO ORDERED.

Dated this 29th day of January, 2018.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

Local AO 450 (rev. 5/10)

United States District Court

District of North Dakota

Allen Rencountre,

Petitioner,

vs.

Colby Braun, Warden,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. 1:17-cv-162

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☑ **Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

☐ **Stipulation.** This action came before the court on motion of the parties. The issues have been resolved.

☐ **Dismissal.** This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

Pursuant to the Order entered on January 29, 2018, the Court adopts the Report and Recommendations in its entirety and grants the Respondent's Motion to Dismiss.

The Court (1) finds that any appeal would be frivolous, could not be taken in good faith, and may not be taken in forma pauperis and (2) declines to issue a certificate of appealability, certifying that an appeal may not be taken in forma pauperis because such an appeal would be frivolous.

Date: January 29, 2018

ROBERT J. ANSLEY, CLERK OF COURT

by: */s/ Renee Hellwig, Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Allen Rencountre,	)	
	)	
Petitioner,	)	**REPORT AND RECOMMENDATION**
	)	**RE MOTION TO DISMISS**
vs.	)	
	)	
Colby Braun, Warden,	)	
	)	Case No. 1:17-cv-162
Respondent.	)	

Petitioner Allen Rencountre ("Rencountre") is an inmate at the North Dakota State Penitentiary in Bismarck, North Dakota. He initiated the above-entitled action on August 8, 2017, with the submission of a "Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody." On September 27, 2017, the respondent filed a motion to dismiss, which the court has now referred to the undersigned for initial review. Having now reviewed the motion, the undersigned recommends that it be granted and Rencountre's petition be dismissed.

I. BACKGROUND

A. Conviction and Sentence

The following is the North Dakota Supreme Court's synopsis of the state court proceedings culminating in Rencountre's conviction:

> Rencountre was charged with attempted murder, a Class A felony, and fleeing or attempting to elude a peace officer, a class C felony. The State also filed a special danger offender notice against Rencountre to enhance the maximum penalty. Rencountre's retained attorney requested a mental health evaluation of Rencountre be performed at the State Hospital, and the State joined in the request. The evaluation revealed that Rencountre was competent to stand trial and was not suffering from a mental disease or defect at the time of the offense. On April 27, 2011, Rencountre pled guilty under a plea agreement to attempted murder. The charge of fleeing or attempting to elude a police officer was dismissed as part of the plea agreement, and the district court found Rencountre was a special danger

> offender. Rencountre waived his right to a presentence report and requested that he be sentenced immediately. The State orally advised the court that Rencountre had no prior criminal history. The court sentenced Rencountre to 30 years in prison with 10 years suspended, following by 5 years of supervised probation.

Rencountre v. State, 2015 ND 62 ¶ 4.

B. Direct Appeal

Rencountre filed a direct appeal with the North Dakota Supreme Court on May 26, 2011. (Doc. No. 7-3). The North Dakota Supreme Court dismissed his appeal on September 1, 2011, pursuant to a stipulation filed on August 24, 2011. (Id.).

C. State Post-Conviction Proceedings

Rencountre filed an application for post-conviction relief on April 23, 2012. (Doc. 7-4). The state district court convened a hearing on the application on January 27, 2014. (Id.). It subsequently denied the application on May 29, 2014. Its decision was affirmed on appeal by the North Dakota Supreme Court. The mandate was issued on April 15, 2015. (Id.)

D. § 2254 Petition

Rencountre filed a petition for a writ of habeas corpus with this court on August 8, 2017, asserting the following grounds for relief:

> GROUND ONE: Ineffective Assistance of Counsel - Attorney failed to file a motion to suppress Defendant's statements.
>
> GROUND TWO: Ineffective Assistance of Counsel - Attorney failed to request a second opinion of competency evaluation.
>
> GROUND THREE: Court failed to order and receive a pre-sentence investigation prior to sentencing.

(Id.).

E. Motion to Dismiss

On September 27, 2017, respondent filed a motion to dismiss Rencountre's petition on the grounds that it is time-barred. Rencountre has filed a response. Consequently, the motion is now ripe for the court's consideration.

II. APPLICABLE LAW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing federal habeas petitions. 28 U.S.C. § 2244(d)(1). As applicable here, the limitation period runs from the date on which the state court judgment became final by the conclusion of direct review or the expiration of time for seeking such review. 28 U.S.C. § 2241(d)(1)(A). "Review of a state criminal conviction by the United States Supreme Court is considered direct review of the conviction." King v. Hobbs, 666 F.3d 1132, 1135 (8th Cir. 2012) (quoting Smith v. Bowersox, 159 F.3d 345, 347 (8th Cir. 1998)). When the United States Supreme Court has jurisdiction to review the state court judgment and the petitioner does not seek such review, the state court judgment becomes final when the petitioner's time for requesting a writ of certiorari expires. Gonzalez v. Thaler, 132 S. Ct. 641, 653-54 (2012).

The limitations period is tolled while "a properly filed application for State post-conviction ... review ... is pending." 28 U.S.C. § 2244(d)(2). "A state postconviction action 'remains pending' for the purpose of federal tolling 'until the application has achieved final resolution through the State's postconviction procedures.'" Steen v. Schuetzle, 326 Fed. App'x 972, 973 (8th Cir. 2009) (quoting Carey v. Saffold, 536 U.S. 214, 220 (2002)). A postconviction proceeding appealed to the North Dakota Supreme Court remains pending until the Court issues its mandate. Id. at 974 (citing Finch v. Backes, 491 N.W.2d 705, 707 (N.D. 1992); N.D.C.C. § 28-05-10)).

III. DISCUSSION

A. Application of AEDPA

AEDPA's one-year limitations period clearly expired prior to Rencountre's initiation of the above-entitled action. As noted above, the North Dakota Supreme Court dismissed Rencountre's direct appeal on August 24, 2011. Giving Rencountre the benefit of all doubt, his conviction arguably became final for purposes of the AEDPA's one-year statute of limitations on November 22, 2011, the date on which his deadline for filing a petition for certiorari with the United States Supreme Court would have expired. He filed his application for post-conviction relief with the state district court one-hundred fifty-three days later, effectively tolling the limitations period until March April 15, 2015, the date on which the North Dakota Supreme Court's issued its mandate affirming the district court's denial of his application. Upon issuance of the mandate, the clock on the limitations period again started to tick. By the court's calculation, the clock struck midnight and the limitations period lapsed on or about November 13, 2015. Thereafter, more than 21 months lapsed until Rencountre filed his habeas petition with this court. Thus, his habeas petition is untimely.

B. Equitable Tolling

Rencountre asserts that the limitations period should be tolled as a matter of equity due to the ineptitude of his retained counsel. In an affidavit attached to his petition, he states:

> [¶3] I asked the attorney who was representing me in my State- Post-Conviction appeal, Benjamin Pulkrabek, to file under 28 U.S.C. § 2254 for a Writ of Habeas Corpus when my appeal was denied in March 2015. I offered to pay Mr. Pulkrabek an additional sum for this service. He stated that he would write everything up first then let me know. My family remained in contact with Mr. Pulkrabek, and he stated that he was still working on my petition.
>
> [¶4] On 2/16/16, Mr. Pulkrabek mailed me a letter . . . informing me that the time limit had expired to file my Habeas petition, and detailing when my time started and stopped.

> [¶5] My family paid Mr. Pulkrabek $200 for writing the brief that was never filed.
>
> [¶6] I continued trying to find an attorney to file my Habeas Petition and later contacted another law firm; but was again told that my time to file had expired.
>
> [¶7] After discussing my case with others at the Penitentiary, I determined that the statute of limitations for filing had expired while Mr. Pulkrabek said he was working on my case; and that he had 110 days in which to file.
>
> [¶8] Even though I diligently attempted to exercise my right to a petition for a Writ of Habeas Corpus, I was prevented from doing so by my attorney's failure to file. I continued to attempt to get my petition filed, and only recently understood that the statute of limitations expired while my attorney was working on my petition.

(Doc. No. 1-2).

In his motion to dismiss, respondent disputes Rencountre's assertion that the delay in filing the instant petition was counsel's fault. In so doing, he stresses that counsel was not retained until after the limitations period had lapsed. For support, respondent cites a declaration in which counsel attested: (1) he represented Rencountre on the appeal of the state district court's order denying Rencountre's application for post-conviction relief; (2) his office received a letter from Rencountre on December 2, 2015, requesting his assistance in filing a brief in federal court; (2) he negotiated a fee, which Rencountre's family paid on February, 12, 2016; (3) he determined that the limitations period for filing a federal habeas petition had lapsed prior to being contacted by Rencountre; and (4) he thereafter refunded most of his fee to Rencountre's family and advised them of the statute of limitations issue. (Doc. No 7-7, p. 1). Respondent has also filed: a copy of the letter referenced by counsel in his declaration; a receipt dated February 12, 2016, evincing partial payment of the agreed upon retainer to counsel, and a copy of an email dated February 21, 2016, confirming that counsel had advised Rencountre's family of the statute of limitations issue and agreed to refund the bulk of his retainer. (Doc. No. 7-7, pp. 2-5).

In his response to respondent's motion, Rencountre insists that counsel agreed to prepare and file a habeas petition prior to the expiration of the limitations period. Specifically, he avers that he met with counsel in April 2015, that counsel represented to his family during a June 2015 conversation that he would take the case, that counsel repeatedly assured that him there was ample to time to prepare and file a federal habeas petition, and that he relied on counsel's assurances to his detriment. With respect to the letter referenced in counsel's declaration, Rencountre is dismissive, stating simply that it was not his initial request for representation and that he prepared the letter at counsel's direction.

AEDPA's limitations period may be may be equitably tolled. See Holland v. Florida, 560 U.S. 631, 645 (2010); see also Deroo v. United States, 709 F.3d 1242, 1246 (8th Cir. 2013). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (emphasis deleted)); see also Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir.2000) ("Equitable tolling is proper only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time."). "[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." Flanders v. Graves, 299 F.3d 974, 976 (8th Cir. 2002); see also Maghee v. Ault, 410 F.3d 473, 476 (8th Cir. 2005) (" Equitable tolling is an exceedingly narrow window of relief."). As a consequence, courts are loath equitably toll the limitations period on the basis of a petitioner's lack knowledge, unsuccessful searches of representation, the miscalculation of the filing deadline, or a claim of actual innocence. See e.g., Rues v. Denny, 643 F.3d 618, 621-22 (8th Cir. 2011)

(concluding that an attorney's miscalculation of the filing deadline, absent more, does not warrant equitable tolling); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004) (opining that a petitioner's misunderstanding of proper procedures did not warrant equitable tolling); Kreutzer, 231 F.3d at 463 (holding that "[e]ven in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted"); Jihad v. Hvass, 267 F.3d 803, 806-07 (2001) (opining that "an unsuccessful search for counsel was not an extraordinary circumstance warranting equitable tolling"); Flanders, 299 F.3d at 976-77 (finding that a claim of actual innocence could not justify equitable tolling).

Having reviewed the record, the undersigned finds that Rencountre has failed to carry his burden and that his assertions regarding counsel's ineptness and/or lack of diligence are specious. First, while Rencountre and counsel may have engaged in negotiations regarding representation prior to the expiration of the limitations period, the record evinces that counsel was not formally retained until after the limitations period had expired. Any expectation on Rencountre's part that counsel would leap into action prior to the receipt of a retainer (full or partial) or execution of an agreement formalizing their relationship was arguably unreasonable. Second, there is nothing in the record to suggest that Rencountre was intentionally misled by counsel. Rencountre insists that, in his and his families discussions with counsel in April and June 2015, they were told by counsel that the limitations period had yet to lapse. Assuming that these discussions did in fact take place, one cannot immediately leap to the conclusion that they were misleading or otherwise inaccurate as, by the court's calculation, the limitations period did not expire until November 13, 2015. Fourth, it is evident from the petition that Rencountre was at all times acutely aware that the proverbial clock was ticking and that he had a finite amount of time in which to file his petition. Finally, and perhaps

most importantly, Rencountre was seemingly in no hurry to petition this court for relief upon learning of the statute of limitations issue from counsel. Rather, he waited almost another eighteen months to file the instant petition.

If the court were to give Rencountre the benefit of all possible doubt, accept the premise that he was abandoned or otherwise lulled into inaction by counsel, and exclude the time during which he was negotiating with counsel through the date on which counsel informed him of the statute of limitations issue, the instant petition would still be untimely. In fact, even if the court were simply calculate the limitations period from February 21, 2016, the date on the email filed by respondent in which Rencountre's family acknowledged the statute of limitations issue and counsel's decision to return the bulk of his retainer, and conclude that the limitations period lapsed on or about February 21, 2017, the instant petition would still be more than five months late.

In sum, it is clear that Rencountre has neither demonstrated that he has pursued his rights with the requisite diligence and that some extraordinary circumstance stood in his way to warrant equitable tolling. Moreover, even if the court were to give him the benefit of all possible doubt and apply the doctrine of equitable tolling, his petition is still time-barred.

IV. CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if the petitioner has made a substantial showing of the denial of a constitutional right. When the court has rejected a petitioner's claim on the merits, the substantial showing required is that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)); see also, United States v. Lambros, 404 F.3d 1034, 1036-37

(8th Cir. 2005); Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000). When the court denies a petitioner's claim on procedural grounds without reaching the merits, the petitioner must demonstrate that reasonable jurists would find it debatable that a valid claim for the denial of constitutional rights has been stated and that reasonable jurists would find it debatable that the district court was correct in its procedural ruling. Slack, 529 U.S. at 484.

In this case, reasonable jurists would not find debatable the recommended disposition of the claims, whether on the merits or on procedural grounds. Consequently, it is recommended that the court not issue a certificate of appealability.

V. RECOMMENDATION

Based on the foregoing, the undersigned **RECOMMENDS** that respondent's Motion to Dismiss (Docket No. 6) be **GRANTED** and Rencountre's § 2254 petition (Docket No. 1) be **DISMISSED WITH PREJUDICE**. The undersigned further **RECOMMENDS** that no certificate of appealability be issued.

NOTICE OF RIGHT TO FILE OBJECTIONS

Pursuant to D.N.D. Civil L.R. 72.1(D)(3), any party may object to this recommendation within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to file appropriate objections may result in the recommended action being taken without further notice or opportunity to respond.

Dated this 11th day of January, 2018.

/s/ Charles S. Miller, Jr.
Charles S. Miller, Jr., Magistrate Judge
United States District Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2015 ND 68

Allen Wayne Rencountre, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20140197

Appeal from the District Court of Ward County, North Central Judicial District, the Honorable Gary H. Lee, Judge.

AFFIRMED.

Opinion of the Court by McEvers, Justice.

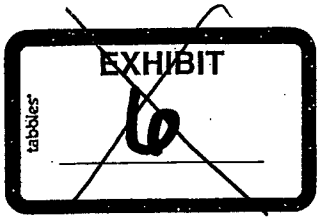
Benjamin C. Pulkrabek, 402 1st Street Northwest, Mandan, N.D. 58554-3118, for petitioner and appellant.

Christene A. Reierson, Assistant State's Attorney, P.O. Box 5005, Minot, N.D. 58702-5005, for respondent and appellee.

STATE OF NORTH DAKOTA } SS.
IN THE SUPREME COURT }

I, Penny Miller, Clerk of the Supreme Court within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true and correct copy of the original, as the same remains on file in my said office.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at Bismarck, this 15th day of April, 2015

Penny Miller
Clerk, Supreme Court
By: Beth Hanson



Rencountre v. State

No. 20140197

McEvers, Justice.

[¶1] Allen Wayne Rencountre appeals from an order denying his application for postconviction relief. Because the district court did not err in concluding Rencountre failed to establish that he received ineffective assistance of counsel and because the court's error in failing to receive a written criminal record report before sentencing Rencountre was harmless, we affirm the order.

I

[¶2] In the early morning hours of October 10, 2010, a desk clerk at a Minot hotel was shot by an individual. Rencountre was staying at the hotel and the shooting was recorded by the hotel's front desk security camera. Although the desk clerk had not seen the face of the person who shot him, the clerk did see him go out the door and described the shooter as "a bigger person, wearing a dark hoodie and ballcap." Two people who were in the hotel parking lot and had been drinking with Rencountre earlier heard the gunshots. They watched the person they knew as "Al," who they described as "a big boy," walk to his white truck with a "large CAT logo in the rear window" and take "off out of the parking lot 'like a bat out of hell.'"

[¶3] Later that morning, a law enforcement officer was driving west of Minot when he noticed a white truck with the letters "CAT" in the rear window coming from behind and passing him at a high speed. The officer pursued the vehicle at speeds up to 115 miles per hour and informed other officers to place spikes in the road ahead. The truck's tires were eventually punctured and the driver, Rencountre, pulled into a gas station in Stanley and stopped. Rencountre remained in the truck holding a pistol in one hand and a bottle of liquor in the other, occasionally taking a drink. One of the officers present negotiated with Rencountre and got him to hand the pistol out

the window, but Rencountre remained in the truck drinking out of the bottle, listening to music on the radio, and stating "I shot him . . . I shot him . . . I shot him!" After his attention was diverted, Rencountre was tased and taken into custody. Rencountre was interviewed by law enforcement officers after he signed a waiver of rights form and was advised of his Miranda rights and orally waived them. Rencountre admitted shooting the desk clerk. Although officers asked him whether his "head was clouded," Rencountre responded "I'm good, just pissed off." Rencountre was not tested for blood alcohol concentration.

[¶4] Rencountre was charged with attempted murder, a class A felony, and fleeing or attempting to elude a peace officer, a class C felony. The State also filed a special dangerous offender notice against Rencountre to enhance the maximum penalty. Rencountre's retained attorney requested a mental health evaluation of Rencountre be performed at the State Hospital, and the State joined in the request. The evaluation revealed that Rencountre was competent to stand trial and was not suffering from a mental disease or defect at the time of the offense. On April 27, 2011, Rencountre pled guilty under a plea agreement to attempted murder. The charge of fleeing or attempting to elude a peace officer was dismissed as part of the plea agreement, and the district court found Rencountre was a special dangerous offender. Rencountre waived his right to a presentence report and requested that he be sentenced immediately. The State orally advised the court that Rencountre had no prior criminal history. The court sentenced Rencountre to 30 years in prison with 10 years suspended, followed by 5 years of supervised probation.

[¶5] Rencountre subsequently filed this application for postconviction relief under N.D.C.C. ch. 29-32.1, alleging he received ineffective assistance from his retained counsel and he is entitled to be resentenced because the district court failed to follow the procedure required by N.D.C.C. § 12.1-32-02(11). Following a hearing, the court denied the application. The court ruled Rencountre had not received ineffective assistance of counsel and, even though the court did not follow the mandates of

N.D.C.C. § 12.1-32-02(11), Rencountre was not entitled to be resentenced because he "suffered no prejudice."

II

[¶6] Rencountre argues the district court erred in determining his attorney was not ineffective.

[¶7] In Osier v. State, 2014 ND 41, ¶¶ 10-11, 843 N.W.2d 277, we explained:

> Applications for post-conviction relief are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750; Bahtiraj v. State, 2013 ND 240, ¶ 8, 840 N.W.2d 605. The applicant bears the burden of establishing grounds for post-conviction relief. Broadwell, at ¶ 5; Bahtiraj, at ¶ 8. When an applicant for post-conviction relief claims ineffective assistance of counsel, he must establish both prongs of the Strickland test and demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) he was prejudiced by counsel's deficient performance. Broadwell, 2014 ND 6, ¶ 7, 841 N.W.2d 750; Dahl v. State, 2013 ND 25, ¶ 8, 826 N.W.2d 922; see Strickland v. Washington, 466 U.S. 668 (1984). Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable on appeal. Kinsella v. State, 2013 ND 238, ¶ 4, 840 N.W.2d 625; Bahtiraj, at ¶ 8.
>
> To meet the prejudice prong of the Strickland test, the defendant bears the heavy burden of establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Dahl, 2013 ND 25, ¶¶ 8, 15, 826 N.W.2d 922; Coppage v. State, 2013 ND 10, ¶ 12, 826 N.W.2d 320. To meet this burden the defendant must prove not only that counsel's assistance was ineffective, but must demonstrate with specificity how and where trial counsel was incompetent and must specify the probable different result if trial counsel had not performed incompetently. Kinsella, 2013 ND 238, ¶ 6, 840 N.W.2d 625; Dahl, at ¶ 8; Coppage, at ¶ 12. We have explained that, "[u]nless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial." Broadwell, at ¶ 7 (quoting Coppage, at ¶ 21).

> Courts need not address both prongs of the Strickland test, and if a court can resolve the case by addressing only one prong it is encouraged to do so. Broadwell, at ¶ 7.

To establish prejudice in the context of a guilty plea, the defendant must show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383 (internal citation omitted).

A

[¶8] Rencountre argues his attorney should have filed a motion to suppress incriminating statements he made to law enforcement officers because he was intoxicated at the time and if the statements had been suppressed he would have gone to trial on the charges.

[¶9] To bring a successful ineffective assistance of counsel claim based on an attorney's failure to file a pretrial suppression motion, the defendant must prove that he would have prevailed on his motion to suppress and that there is a reasonable probability a successful motion would have affected the outcome of the trial. See Kinsella v. State, 2013 ND 238, ¶ 9, 840 N.W.2d 625; Roth v. State, 2007 ND 112, ¶ 10, 735 N.W.2d 882. Rencountre's attorney testified that they discussed filing a motion to suppress, but he did not do so for two reasons. First, the attorney was concerned about the voluntary statements made by Rencountre in Stanley before law enforcement officers attempted to question him and seek a waiver of rights. See, e.g., State v. Syvertson, 1999 ND 134, ¶ 19, 597 N.W.2d 652 ("[I]f a defendant at first makes a statement voluntarily, without actual coercion, a subsequent voluntary statement, made after receiving Miranda warnings and voluntarily waiving those rights, is untainted and admissible evidence."). The attorney testified he could not tell from the recording of the interview made by law enforcement officers whether Rencountre was intoxicated and a motion to suppress "could have gone either way."

[¶10] Second, the attorney testified that even if a motion to suppress the statements would have been successful, there nevertheless would have been "overwhelming evidence" to convict Rencountre. Although Rencountre points out that the desk clerk did not actually see the person who shot him, the surveillance video captured the shooting. The attorney testified the "video clearly shows Mr. Rencountre or someone looking like Mr. Rencountre walking into the lobby of the hotel, leveling a pistol at the night clerk and pulling the trigger numerous times." There were also witnesses in the hotel parking lot who, after hearing shots, saw Rencountre leave at a high speed in his white truck with the "CAT logo," the same white truck in which he was captured by law enforcement officers after surrendering a pistol.

[¶11] We agree with the district court that Rencountre has not established his attorney's failure to file a motion to suppress was deficient performance or that there was a reasonable probability he would not have pled guilty had the motion been filed.

B

[¶12] Rencountre argues he received ineffective assistance of counsel because his attorney did not request a second mental health evaluation.

[¶13] Rencountre testified that he asked his attorney to arrange for a second evaluation and that the attorney advised him a second opinion was not possible. Rencountre's attorney testified that he could not recall whether Rencountre asked him to arrange for a second evaluation, but if he had the attorney would have done so "[i]f I felt it was warranted." First, a criminal defendant has no "right to shop for a psychiatrist at public expense until he finds one who will support his theory of the case." State v. Norman, 507 N.W.2d 522, 524 (N.D. 1993). Second, Rencountre must "show[] that a second evaluation would have benefited him or that the result of the proceedings would have been different if he had received another evaluation." Johnson v. State, 2005 ND App 8, ¶ 12, 700 N.W.2d 723. Here, the district court observed:

> Rencountre testified and now argues that [his] attorney . . . wrongly advised him that he could not obtain a second opinion regarding competency. He argues that a second opinion might have been different from the first opinion. A second examiner might have concluded that Rencountre was suffering from some PTSD blackout, or some other temporary trauma which might have excused his conduct. He states that if he would have had this second opinion, he would have insisted on going to trial.
>
> Rencountre's arguments and testimony are nothing more than self-serving statements, and wishful thinking. His position requires the Court to accept first that a second opinion would have been different from the first opinion. Other than Rencountre's wishful thinking, there is nothing to support this first premise. Rencountre has not offered any medical or psychological records from any time before, or after his guilty plea which would lend any credence to the possibility that a second opinion would have been different from the first opinion.

Because Rencountre has failed to establish a reasonable probability that a second evaluation would have led to a different result, we agree that his attorney's failure to seek a second evaluation did not constitute ineffective assistance of counsel.

[¶14] We conclude the district court did not err in determining Rencountre was not denied effective assistance of counsel.

III

[¶15] Rencountre argues he is entitled to be resentenced because the district court failed to follow the procedure required by N.D.C.C. § 12.1-32-02(11) when he pled guilty.

[¶16] Section 12.1-32-02(11), N.D.C.C., provides:

> Before sentencing a defendant on a felony charge under section 12.1-20-03, 12.1-20-03.1, 12.1-20-11, 12.1-27.2-02, 12.1-27.2-03, 12.1-27.2-04, or 12.1-27.2-05, a court shall order the department of corrections and rehabilitation to conduct a presentence investigation and to prepare a presentence report. A presentence investigation for a charge under section 12.1-20-03 must include a risk assessment. A court may order the inclusion of a risk assessment in any presentence investigation. In all felony or class A misdemeanor offenses, in which force, as defined in section 12.1-01-04, or threat of force is an element

> of the offense or in violation of section 12.1-22-02, or an attempt to commit the offenses, a court, unless a presentence investigation has been ordered, must receive a criminal record report before the sentencing of the defendant. Unless otherwise ordered by the court, the criminal record report must be conducted by the department of corrections and rehabilitation after consulting with the prosecuting attorney regarding the defendant's criminal record. The criminal record report must be in writing, filed with the court before sentencing, and made a part of the court's record of the sentencing proceeding.

(Emphasis added).

[¶17] The underscored language of N.D.C.C. § 12.1-32-02(11) was enacted by the Legislature in 1995 as part of a "tough on crime" bill. See 1995 N.D. Sess. Laws ch. 136, § 3; Hearing on H.B. 1218 Before the House Judiciary Committee, 54th N.D. Legis. Sess. (Jan. 24, 1995) (testimony of Sen. Donna Nalewaja). At the time, some defendants were sentenced either without any prior criminal history checks whatsoever or by checks of only "a state rap sheet" that did not reveal out-of-state criminal histories, and the defendants' complete criminal histories were not discovered by Department of Corrections staff until they were incarcerated. Hearing on H.B. 1218 Before the House Judiciary Committee, 54th Legis. Sess. (Jan. 24, 1995) (written testimony of Elaine Little, Director of Department of Corrections and Rehabilitation) (written testimony of Jackie Jensen, Parole Officer). Proponents of the legislation argued that the change in the law was necessary because:

1. The system relies on a system that has been in place since 1965 and has not been effective. (See example of NDCC 12-60.)
2. The system relies on incomplete information found in the State Criminal History database. (See example of the errors.)
3. Plea agreements are accepted by the Court that would not be accepted with the report.
4. Unnecessary court time is spent on returning offenders to court as a result of poorly thought-out plea agreements.
5. Victim concerns are routinely overlooked.

6. The public will eventually demand mandatory sentences which will remove all discretion from within the system.

7. The public is placed at greater risk.

Hearing on H.B. 1218 Before the House Judiciary Committee, 54th Legis. Sess. (Jan. 24, 1995) (written testimony of Warren Emmer, Director of Parole and Probation Division). The requirement of a written, or "hard copy," of the criminal record report was intended to "assure[] that the information will be a permanent part of the record rather than an oral statement during the sentencing." Hearing on H.B. 1218 Before the House Judiciary Committee, 54th Legis. Sess. (Jan. 24, 1995) (testimony of Cynthia Feland, North Dakota State's Attorneys' Association). Section 12.1-32-02(11), N.D.C.C., is primarily intended for the benefit or protection of the State and the public, not for the benefit of a defendant.

[¶18] It is unclear from the record whether the State engaged in the thorough criminal records check envisioned by N.D.C.C. § 12.1-32-02(11) before orally informing the district court that Rencountre had no prior criminal history. If the State did not do so, and a more thorough check would have revealed a criminal record, the error would have inured to Rencountre's benefit, and a "party cannot complain about legal errors which redound to their benefit, rather than to their prejudice." Dozier v. Williams Cnty. Soc. Serv. Bd., 1999 ND 240, ¶ 20, 603 N.W.2d 493; see also State v. Dilger, 338 N.W.2d 87, 96 (N.D. 1983). Moreover, the district court judge in this postconviction proceeding is the same judge who presided over Rencountre's sentencing in 2011. The court acknowledged that it did not comply with N.D.C.C. § 12.1-32-02(11) in sentencing Rencountre, and further found that it "relied upon information which everyone agrees was the correct information, albeit not in the form of a written report." The court reasoned:

> The relief requested by Rencountre in his petition for post-conviction relief is that he be returned to the court for re-sentencing with the appropriate written record. To what end? To re-sentence with the same information, except this time one piece of information will be in a written format? The substance of the written

information will be unchanged from the information given to the Court verbally in the prior proceeding.

There is no purpose to a re-sentencing. No wrong information will be righted. Rencountre has suffered no prejudice. The law respects form less than substance. Section 31-11-05(19), NDCC. The law neither does nor requires idle acts. Section 31-11-05(23), NDCC. Bringing Rencountre back for re-sentencing merely because a piece of paper, containing the same information that was provided to the Court verbally, was not filed is an exaltation of form over substance. Bringing him back for re-sentencing so that a piece of paper can be filed is an idle act.

[¶19] Under N.D.R.Crim.P. 52(a), courts must disregard "[a]ny error, defect, irregularity or variance that does not affect substantial rights," and "[w]e have consistently held a defendant must show he is prejudiced by a court's error in a rule 52(a) harmless error analysis." Wilson v. State, 2013 ND 124, ¶ 15, 833 N.W.2d 492. Insofar as Rencountre is concerned, we conclude the district court's error in failing to require a written criminal record report before sentencing him was harmless.

IV

[¶20] The district court did not err in dismissing Rencountre's application for postconviction relief. The order is affirmed.

[¶21]