No.

In The

Supreme Court of the United States

ANTWAIN D. ASHLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Ashley Was Denied His Sixth Amendment Right to Effective Assistance of Counsel Where Counsel Advised Ashley that if He Made an Open Plea to the Court, He Would Get No More than Twenty (20) Years in Prison.

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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v.

STATE OF FLORIDA, *Respondent.*

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Antwain D. Ashley, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit, entered in *Ashley v. Sec'y, Dep't of Corr.*, 2018 U.S. App. LEXIS 28057, (11th Cir. 2018), filed April 18, 2018 denying Ashley's request for a certificate of appealability of the denial of his petition filed under Title 28, United States Code § 2254. Reconsideration was denied by an order entered September 28, 2018. *Ashley v. Sec'y, Dep't of Corr.*, 2018 U.S. App. LEXIS 27748 (11th Cir. 2018).

OPINION BELOW

The decision and orders of the Eleventh Circuit as well as the underlying district court and state court orders are included in the Appendix, *infra*.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit denying Ashley's request for certificate of appealability pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> 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.

The Sixth Amendment to the United States Constitution provides:

> Amendment VI. Jury trials for crimes, and procedural rights 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 defence.

STATEMENT OF THE CASE

Pursuant to Title 28, United States Code § 2253(c)(1)(A), and Rule 22(b), Federal Rules of Appellate Procedure, Antwain Ashley ("Ashley"), is requesting a Certificate of Appealability ("COA") from the Order dated and entered November 14, 2017 denying his Petition filed under 28 U.S.C. § 2254. Rule 22(b) of the Federal Rules of Appellate Procedure and Title 28 U.S.C. § 2253 require issuance of a COA before an appeal may be heard of a denial of a petition for relief under 28 U.S.C. § 2254. Ashley filed a timely notice of appeal. Thereafter the Eleventh Circuit Court of Appeals denied the COA request by an opinion which became final following the denial of Ashley's Motion for Reconsideration on September 28, 2018. This certiorari petition follows in a timely manner after the Eleventh Circuit denied reconsideration.

PROCEDURAL HISTORY AND FACTS PERTINENT TO THIS PETITION

Antwain Ashley was charged by an information filed in the circuit court in and for Duval County, Florida with two counts of armed robbery and one count of armed burglary. Ashley's trial counsel insisted that if he did an open plea to the court "he could get him a sweet deal" and that Ashley would get no more than twenty (20)

years in prison. [Appx. A][1] Ashley entered an open guilty plea to the court on all three charges and was sentenced to one hundred and seventy-five (175) years in prison. *Id.* At no time did Ashley's counsel advise him that he could possibly receive the one hundred and seventy-five (175) year sentence that he received. *Id.*

Ashley first raised this claim of ineffective assistance of counsel as ground one in a state post-conviction motion filed pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. *Id.* An evidentiary hearing was held on other grounds raised in Ashley's state post-conviction motion, but no hearing was ever conducted on ground one. [Appx. B] The trial court summarily denied this ground. [Appx. C] Ashley appealed the trial court's denial and the Florida First District Court of Appeal per curiam affirmed the denial. [Appx. D]

After exhausting his state remedies, Ashley raised the same ineffective assistance of counsel claim in the District Court for the Middle District of Florida pursuant to 28 U.S.C. § 2254. [Appx. E] Thereafter, the District Court granted Ashley leave to amend his § 2254 Petition and Ashley did so, adding other grounds which were omitted from his original petition. [Appx. F] The Government conceded that ground one of his amended petition related back to the ineffective assistance of

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1 Bracketed references in the form [Appx.] followed by a letter are to the Appendix accompanying this petition.

counsel claim in Ashley's timely filed § 2254 and proceeded to argue the merits of Ashley's misadvice claim. The district court denied Ashley's § 2254 petition and determined that a certificate of appealability was not warranted. [Appx. G]

Ashley filed a timely notice of appeal and his request for COA at the Eleventh Circuit. [Appx. H] The Eleventh Circuit denied Ashley's request for COA on April 18, 2018. *Ashley v. Sec'y, Dep't of Corr.*, 2018 U.S. App. LEXIS 28057, (11th Cir. 2018) [Appx. I] His motion for reconsideration was likewise denied on September 28, 2018 and this petition has followed in a timely manner. *Ashley v. Sec'y, Dep't of Corr.*, 2018 U.S. App. LEXIS 27748 (11th Cir. 2018). [Appx. J]

ARGUMENT AND REASONS FOR GRANTING THE WRIT

ASHLEY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL ADVISED ASHLEY THAT IF HE MADE AN OPEN PLEA TO THE COURT, HE WOULD GET NO MORE THAN TWENTY (20) YEARS IN PRISON

Ashley originally raised his claim that he had been advised by his trial counsel that he would receive no more than twenty (20) years in prison in his state motion for habeas corpus relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. [Appx. A] An evidentiary hearing was held on other grounds raised in Ashley's motion, but no evidence was presented at the hearing pertaining to his counsel's misadvice regarding the effects of entering an open plea of guilty to the

court. [Appx. B] In denying relief and denying a COA, both the District Court and the Eleventh Circuit adjudicated Ashley's claim based on a fundamentally factually mistaken understanding of the state court post-conviction record, and that factual mistake was the premise of the Eleventh Circuit's Order denying a COA as to ground one.

The Eleventh Circuit and the District Court both mistakenly understood the record to be:

> (1) that there had been a post-conviction evidentiary hearing in state court on this ground,
>
> (2) that the defense counsel had testified at that evidentiary hearing with respect to the advice he had given Ashley about the plea consequences,
>
> (3) that the defense counsel had refuted Ashley's claim, and
>
> (4) that the state court judge had found the defense counsel's testimony to be credible and accepted it over the assertions of Ashley to the contrary.
>
> None of these predicate assumptions is correct.

There has never been an evidentiary hearing on ground one before any court. The state court judge did *not* credit Ashley's defense counsel's testimony on this

claim, *because the defense counsel was never questioned about this claim and never gave any testimony about this claim.*

The state court order denying relief was written in a way that led to the confusion of everyone who has since read it - there was prefatory language in the order in which the state court did make a generic finding that the court found the defense counsel's testimony to be credible and that the court accepted it over the contrary assertions of the defendant - *but that finding was expressly limited to the issues addressed at the evidentiary hearing* and failed to clarify that *ground one was not addressed at the evidentiary hearing*[2] [Appx. C]

The Eleventh Circuit's Order denying the COA on ground one was expressly premised on this mistake:

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2 It is apparent, by implication from the record [Appx. B], that there must have been an unrecorded pre-hearing conference at which the state court limited the scope of the evidentiary hearing and excluded from the hearing ground one. At the beginning of the evidentiary hearing it is apparent that the parties, both state and defense, are operating under an understanding that the trial judge had already limited the scope of the hearing to exclude ground one. Nothing in the record explains this. There had been an order directing the state to respond to some but not all grounds of the 3.850 motion, but that order did not in any way address the omitted grounds. There does not appear to be a separate written order in the record setting the matter for an evidentiary hearing and setting forth the grounds to be covered, merely an order to transport the defendant back from prison for a hearing. Likewise the state post-conviction court order does not clarify that the court had summarily denied relief as to ground one.

> The state post-conviction court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts by denying this claim. *After the evidentiary hearing, the state post-conviction court determined that trial counsel's testimony that he had properly advised Ashley of the potential sentences was more credible than Ashley's allegation to the contrary. That determination is entitled to deference, and Ashley presented no additional evidence or arguments to show that the state court's determination was unreasonable.* See *Renico v. Lett*, 559 U.S. 766, 773 (2010) (noting that state-court decisions must be given the benefit of the doubt). Furthermore, the record reflected that Ashley's guilty plea was knowing, voluntary, and intelligent. See *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991) (explaining that if a guilty plea is knowing, voluntary, and intelligent, it will be upheld on federal review). Because the state post-conviction court did not unreasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), no COA is warranted for this claim.

[Appx. I (emphasis supplied)]

Instead of crediting that this misadvice had never been given, and then from that factual premise finding support in the plea agreement and plea colloquy to uphold the plea, *the state post-conviction court assumed the defense lawyer may in fact have misadvised the client that he would only be sentenced to twenty years*. The state court order stated "assuming *arguendo* counsel actually advised defendant that he 'would get no more than twenty (20) years in prison' such claim fails for lack of prejudice."[3] [Appx. C]

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3 Under Florida post-conviction procedure, when, as here, a trial court summarily denies relief without conducting an evidentiary hearing then the post-conviction court must accept as true the defendant's sworn assertions. Ashley swore to the

The Eleventh Circuit's Order denying the COA was simply premised on a mistake of fact, that there had been a fact finding by the state court judge after an

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following facts:

The Petitioner asserts that on September 21, 2007 prior to his sentencing, he retained counsel, Mr. Davis who was retained by his family. Counsel encouraged him to make an open plea to the court, and convinced him that "he could get him a sweet deal." Counsel said that the Petitioner would get no more than twenty (20) years in prison.

The Petitioner therefore agreed to make an open plea to the court and to agree with whatever the judge's questions would be. Counsel then encouraged the Petitioner to agree with all of the judge's questions. The Petitioner asserts that at no time did counsel properly inform him that he could receive one hundred and seventy-five years (175) by the court. The Petitioner further states that had he known or was properly informed as to the amount of time he could have been sentence to, he would not have made the open plea to the trial court and he would have chosen to go to trial. Trial counsel told the Petitioner that the charges could give him life in prison, but they could only sentence him to twenty years. The Petitioner asserts that had he not been misadvised by counsel relating to the sentence, he would have decided to go to trial because he had defenses he could have raised in this case. The Petitioner contends that the weapon/evidence in this case was not retrieved from him, but from another location, and the weapon was not registered in his name. Petitioner claimed that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that Petitioner would get a sentence of no more than twenty years, in spite of the charges statutory requirements, sufficiently pled prejudice prong of ineffective assistance of counsel claim, even though Petitioner did not make a showing as to his likelihood of success at trial or on appeal. Here Petitioner specifically swears that he would not have entered a guilty plea if he had been accurately advised that the court would sentence him to one hundred and seventy-five years. The Petitioner contends that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that the Petitioner would be sentenced to 175 years in prison.

evidentiary hearing upon which the state court had made a credibility determination that the defendant had not been misadvised as to the plea consequences. Clearly, had there been such a fact finding then it would for all practical purposes have been unreviewable by the district court or the Eleventh Circuit because of the great deference accorded state fact findings under AEDPA. But that is not what we have. We have the opposite. We have a state court assuming without deciding that the defense attorney affirmatively misadvised the defendant about the sentencing consequences of his plea.

Who was this defendant? He was 19 years old at the time of the offense and had been found to be borderline retarded [D 15-1, p. 67],[4] and whose mental functioning was such that his state public defender had filed March 19, 2007 a Suggestion of Mental Incompetence to Proceed. [D 15-1, p. 59] Shortly thereafter, April 26, 2007, retained counsel, Robert Carl Davis, the attorney whose performance and advice was the subject of the post-conviction motion, appeared as counsel replacing the public defender. [D 15-1, p. 63] Then on June 26, 2007, the state trial judge entered an Order for Competency Examination, which included the following finding:

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4 Bracketed References in the form [D] followed by a number are to the District Court docket in this case followed by the pertinent docket entry number and page.

> [T]here are reasonable grounds to believe that Defendant may be incompetent to stand trial and may be in need of involuntary hospitalization . . .

[D 15-1, p. 72]

The state trial court appointed a disinterested expert, Dr. Umesh Mhatre, to conduct the forensic examination and evaluation and report back to the court. There is nothing in the record to show that was done. There is no report from Dr. Mhatre in the record. Whether Dr. Mhatre examined Ashley or not, the state trial court failed to conduct a competency hearing and failed to enter any further written order finding Ashley to be competent. Under Florida law, that alone rendered the subsequent plea and conviction invalid. Under Florida law the defendant is presumed incompetent from that point forward unless and until the trial court enters *a written order finding the defendant competent.*

> To summarize, Rule 3.210 is triggered when a court makes an initial determination that it has reasonable grounds to question the competency of a defendant. When that initial determination is made, the court must take the following three steps.
>
> First, the court must enter an order that schedules a competency hearing, appoints experts to evaluate the defendant's competency, and satisfies the requirements of Rule 3.210(b)(4).
>
> Second, as required by Rule 3.212(b), the court must hold the scheduled hearing during which any party or the court may call the appointed experts to testify, and

> the parties may introduce any other evidence that has bearing on the defendant's competence.
>
> Third, the court must issue a written order making findings as to the competency of the defendant as is specifically required by Rule 3.212(b).
>
> In this case, while the court appointed an expert to evaluate the Defendant's competency, it did not hold the required hearing or issue an order making findings as to the Defendant's competency. This was error. Therefore, we vacate the court's judgment and sentence.
>
> Now we turn to the proceedings on remand. "Generally, failing to find a defendant competent after previously finding reasonable grounds to question his competency would entitle the 'defendant to receive a new trial, if deemed competent to proceed on remand.'" *D.B. v. State*, 222 So. 3d 627, 42 Fla. L. Weekly D1401 (Fla. 4th DCA June 21, 2017) (quoting *Dougherty*, 149 So. 3d at 678-79).

Hawks v. State, 226 So.3d 892 (Fla. 4th DCA 2018). *See Godinez v. Moran*, 509 U.S. 389, 398 (1993) (holding that the standard of competence for pleading guilty is the same as the standard of competence to stand trial, because pleading guilty involves waiving the rights enumerated in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

During the change of plea the defense attorney brought to the court's attention that Ashley suffered "a diminished capacity" and "does not comprehend the way a normal 20-year-old would." [D 15-3, pp. 66-67] But despite this warning, the trial court took no extra precautions whatsoever in his plea colloquy with this borderline

retarded young man to insure that he truly understood the consequences of his plea. Particularly noteworthy is that the trial court did not ask the defendant any questions whatsoever whether his trial attorney had made any promises to him what the court's sentence would be. [D 15-3, pp. 64-67] The dialogue with this diminished capacity defendant was only three pages of transcript with not a single question to the defendant about what his attorney had told him about the sentencing consequences of the plea agreement and not a single question whether his attorney had made any promises to him about the sentencing he would receive from the court.

This is not a case of a defendant attempting to go behind his sworn testimony in a plea proceeding, because the plea colloquy failed to address the question whether his attorney had made any promises to him about what the sentence would be.[5] Therefore the cases relied upon by the state post-conviction court and the

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5 Therefore, the statements the judge made during the plea colloquy about the maximum and minimum penalties the charges carried do not resolve the question whether despite maximum penalties the lawyer has promised the defendant the judge will impose a lesser sentence. It is this concern which prompts the Rule 11 colloquy this counsel has heard hundreds of times in federal court where even with sophisticated and educated defendants the federal judge will inquire repeatedly whether the defendant's lawyer or any other person has promised the defendant what his sentence will be and will assure the defendant that until the sentencing hearing and the judge has been advised of all of the pertinent sentencing factors, he the judge, will make the sentencing determination and until then no one can know or represent to the defendant what that sentence is going to be. That same inquiry and same warning was absent from this plea dialogue.

District Court have been unreasonably applied to the facts of this case. The fact that a defendant enters a plea of guilty and even states at the time of the plea that the plea is being given freely and voluntarily does not necessarily preclude that defendant from subsequently challenging the voluntariness of the plea. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Nor is there any support for the state post-conviction court's finding from the written plea agreement that Ashley signed. That plea agreement *does not contain one word about what the sentencing consequences of his plea would be.* Indeed, the plea agreement does not advise Ashley what charges he would be pleading guilty to, what the elements of the charges were, what the factual basis for the charges was, what the maximum or minimum penalties for the charges were, nothing. It is a *tabula rasa*. [D 15-3, p. 44]

On this record, with this defendant, who was presumptively mentally incompetent under Florida law and the trial judge's order, who was borderline retarded, whose plea agreement contained no information about the charges or penalties or sentencing consequences of his plea, and whose plea colloquy contained no dialogue with him or his attorney to inquire whether his attorney had or had not made any promises to him about what the sentence would be, it would be an unreasonable determination that he understood the sentence to be imposed and

that this was a knowing and intelligent, free and voluntary plea in light of the available facts and the state court's determination that Ashley was not prejudiced was unreasonable in light of the available facts. *See* 28 U.S.C. § 2254(d). *See Anderson v. Duncan*, 75 Fed. Appx. 577 (9th Cir. 2003) (finding unreasonable application of controlling Supreme Court precedent in state court order denying a motion to vacate a plea based on a defendant with diminished mental capacity's claim that he misunderstood the sentencing consequences of his plea when the state court based its order on a plea colloquy which took no extra precaution to insure defendant understood sentencing consequence of his plea).

Nor did the trial court address the core concern whether the plea had been coerced. The lawyer explained that he had had to spend hours with the defendant because of his diminished capacity to get him to do the plea. [D 15-3, pp. 66-67] Did these hours of conversation overbear the will or confuse the mind of this mentally diminished defendant? Under Rule 11, F.R.Crim.P., this plea would be automatically vacated:

> Rule 11 imposes upon a district court the obligation and responsibility to conduct an inquiry into whether the defendant makes a knowing and voluntary guilty plea. See *Wiggins*, 131 F.3d at 1442. When accepting a guilty plea, a court must address three core concerns underlying Rule 11: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea." *United*

> *States v. Jones*, 143 F.3d 1417, 1418-19 (11th Cir.1998) (quoting *United States v. Siegel*, 102 F.3d 477, 481 (11th Cir.1996)). "A court's failure to address any one of these three core concerns requires automatic reversal." *Siegel*, 102 F.3d at 481 (quoting *United States v. Bell*, 776 F.2d 965, 968 (11th Cir.1985)).

United States v. Hernandez-Fraire, 208 F.3d 945, 949-50 (11th Cir. 2000).

For a plea to be constitutionally free and voluntary certain things must be done. For example, *see Santobello v. New York*, 404 U.S. 257, 261–262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971): "The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." That was not done in this case.

> It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. That error, under Alabama procedure, was properly before the court below and considered explicitly by a majority of the justices and is properly before us on review.
>
> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See *Kercheval v. United States*, 274 U.S. 220, 223.Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." *Jackson v. Denno*, 378 U.S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley v. Cochran*, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and

> understandingly rejected the offer. Anything less is not waiver." We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. *Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.* The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. *Douglas v. Alabama*, 380 U.S. 415, 422.
>
> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. *First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400. We cannot presume a waiver of these three important federal rights from a silent record. . . .
>
> Reversed.

Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 1711-13 (1969) (emphasis supplied).

The trial judge in Ashley's case never advised him that he was giving up his most important constitutional right, his privilege against self-incrimination. [D 15-3, pp. 64-67] No case from this Court has ever retreated from the *Boykin* holding that a plea is constitutionally invalid if the record is silent as to whether the defendant was aware of all three constitutional rights before waiving them.

Rather, if anything, this Court has reaffirmed that basic understanding of *Boykin*. In *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), this Court discussed the requirement of showing prejudice to obtain relief for a Fed. R. Crim. P. 11 ("Rule 11") error, and noted:

> This is another point of contrast [between a Rule 11 question and] the constitutional question whether a defendant's guilty plea was knowing and voluntary. We have held, for example, that when the record of the criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights that he was putatively waiving, the conviction must be reversed. *Boykin v. Alabama*. We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.

542 U.S. at 84 n.10.

Both the state post-conviction court and the district court recognized that Ashley, in his *pro se* pleading, was raising a voluntariness claim and not simply a Sixth Amendment ineffective assistance of counsel claim, yet both courts denied Ashley relief based in part on a finding that Ashley had not established "*prejudice,*" and both courts articulated that prejudice as the failure to satisfactorily prove that he would have gone to trial but for the misadvice about the sentencing consequence of the plea. This is clearly a misapplication of controlling Supreme Court precedent. Once a defendant has established an involuntary plea the plea must be set aside no matter how overwhelming the evidence that he would have pled guilty anyway. This

is the rule quoted above from *Dominguez Benitez* and is the well settled Supreme Court rule with respect to involuntary pleas and is one more example of an unreasonable application of clearly established federal law and an unreasonable determination of the facts in light of the evidence. 28 U.S.C. § 2254(d)(1) and (2).

CONCLUSION

Antwain Ashley requests this Court either grant plenary review or exercise its discretionary certiorari jurisdiction, grant certiorari, vacate the judgment below, and remand the case ("GVR") so that the Eleventh Circuit Court of Appeals can correct the obvious error affecting Ashley's substantial rights under the Fifth and Sixth Amendments to the United States Constitution. If this Court elects to not grant plenary review, then Ashley requests that his case be GVR'd to the Eleventh Circuit Court of Appeals with instructions that it reconsider this patent violation of Ashley's constitutional rights.

Respectfully submitted,

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No.

IN THE
Supreme Court of the United States

ANTWAIN ASHLEY,
Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et. al.
Respondent.

MOTION TO PROCEED *IN FORMA PAUPERIS*

The petitioner, ANTWAIN ASHLEY, asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without the prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39. Attached hereto is the **Affidavit or Declaration in Support of Motion for Leave to Proceed** *In Forma Pauperis* completed and signed by Petitioner Ashley.

Petitioner Ashley has previously been found to be indigent. Petitioner Ashley has been incarcerated since September 2007.

WHEREFORE, Petitioner, ANTWAIN ASHLEY, asks for leave to proceed *in forma pauperis*.

DATED this December 27, 2018.

Respectfully submitted,

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ATTORNEYS AT LAW

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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Antwain Ashley, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ 0 $ 0 $ 0

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ 0 $ 0 $ 0

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	$ 0 $ 0 $ 0	$ 0 $ 0 $ 0

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value N/A

☐ Motor Vehicle #2
Year, make & model N/A
Value N/A

☐ Other assets
Description N/A
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ 0	$ 0
	$ 0	$ 0
	$ 0	$ 0

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☑ No Is property insurance included? ☐ Yes ☑ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ ¢	$ ¢
Recreation, entertainment, newspapers, magazines, etc.	$ ¢	$ ¢
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ ¢	$ ¢
Life	$ ¢	$ ¢
Health	$ ¢	$ ¢
Motor Vehicle	$ ¢	$ ¢
Other: N/A	$ ¢	$ ¢
Taxes (not deducted from wages or included in mortgage payments)		
(specify): N/A	$ ¢	$ ¢
Installment payments		
Motor Vehicle	$ ¢	$ ¢
Credit card(s)	$ ¢	$ ¢
Department store(s)	$ ¢	$ ¢
Other: N/A	$ ¢	$ ¢
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ ¢	$ 0
Other (specify): N/A	$ ¢	$ 0
Total monthly expenses:	$ 0	$ ¢

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated in the Department of D.O.C

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 11-26, 2018

(Signature)

ANTWAIN ASHLEY V. SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.

APPENDIX

INDEX TO APPENDIX

APPENDIX

APPENDIX
A

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

Antwain Ashley,
Defendant.

v.

Case No: 16-2006-16512
CRE

STATE OF FLORIDA,
Plaintiff.
_____/

MOTION FOR POST CONVICTION RELIEF

The Defendant, Antwain Ashley, pro se, pursuant to Rule 3.850, Fla. R. Crim. P., moves the court to vacate and set aside his judgment, conviction, and sentence in the above styled criminal case.

1. The name and location of the court that entered the judgment, conviction, and sentence in this case is the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida.
2. The Honorable J. MERRIT, Circuit Court Judge presided over this case.
3. The Defendant entered the plea agreement on August 6, 2007 and the judgment, conviction, and sentence in this case was imposed on September 21, 2007.
4. The number and nature of the offenses involved in this case are: Armed Robbery Count I, Armed Robbery count II, Armed Burglary count III,
5. The defendant entered a plea of no contest.

EXHIBIT "D"

6. The Defendant did file for appeal of the judgment, conviction, and sentence in this case. The direct appeal was taken, the Court was the 1st District Court of Appeal, and the decision entered was *per curiam affirmed*, dated 2/4/04. On March 4, 2008 Appellate counsel filed a motion to correct illegal sentence. On April 28, 2008 the trial court denied the motion to correct illegal sentence.
7. The Defendant did not file any other post conviction relief motion in this case.
8. The Defendant was represented by attorney Robert Carl Davis of Duval county Florida at the sentencing hearing.
9. The Defendant was represented by Mr. Carl McGinnes on appeal.

ISSUE ONE

TRIAL COUNSEL WAS INEFFECTIVE FOR IMPROPERLY ADVISING THE DEFENDANT TO PLEA OUT TO TWENTY YEARS AND THE DEFENDANT WAS GIVEN ONE HUNDRED AND SEVENTY FIVE YEARS, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE 6th, 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

FACTS

The Defendant asserts that on September 21, 2007 prior to is sentencing, he retained counsel, Mr. Davis who was retained by his family. Counsel encouraged him to make an open plea to the court, and convinced him that "he could get him a

sweet deal." Counsel said that the Defendant would get no more than twenty (20) years in prison.

The Defendant therefore agreed to make an open plea to the court and to agree with whatever the judge's questions would be. Counsel then encouraged the Defendant to agree with all of the judge's questions.

The Defendant asserts that at no time did counsel properly inform him that he could have received one hundred and seventy-five years (175) by the court.

The Defendant further states that had he known or was properly informed as to the amount of time he could have been sentenced to. He would not have made the open plea to the trial court and he would have chosen to go to trial. Trial counsel told the Defendant that the charges could give him life in prison, but they could only sentence him to twenty hears.

The Defendant asserts that had he not been misadvised by counsel relating to the sentence, he would have decided to go to trial because he had defenses he could have raised in this case. The Defendant contends that the weapon/evidence in this case was not retrieved from him, but from another location, and the weapon was not registered in his name.

ARGUMENT

The Defendant would argue that trial counsel's action in advising the Defendant to enter an open plea to the court and that the court would given him twenty (20) years, and the court gave the Defendant fifteen years represents a deficient performance of counsel.

Separate and apart from any Sixth Amendment considerations, the Defendant's claim is colorable under decisional law of this state relating to the requirement that pleas be voluntarily and knowingly entered. The law of Florida has long recognized that a plea of guilty or nolo contendere may be vacated when the defendant has entered his plea as a result of mistaken advice by defense counsel as to the consequences of a plea. See, e.g., 92 Fla. 592, 109 So. 627 (1926); ***Crosby v. State***, 97 So.2d 181 (Fla.1957); ***Brown v. State***, 245 So.2d 41 (Fla.1971); ***Costello v. State***, 260 So.2d 198 (Fla.1972); ***Thompson v. State***, 351 So.2d 701 (Fla.1977); ***State v. Leroux***, 689 So.2d 235 (Fla.1996); ***Banks v. State***, 136 So.2d 25 (Fla. 1st DCA 1962); ***Eccleston v. State***, 706 So.2d 368 (Fla. 1st DCA 1998). In determining whether to vacate defendant's guilty plea based on defendant's misinformation, the issue is not whether the defense counsel has blundered in some manner; the issue is instead whether the plea was entered because of mistaken information given to the defendant regarding the consequences of his plea, regardless of the source of the misinformation.

The issue is instead whether the plea was entered because of mistaken information given to the defendant regarding the consequences of his plea, regardless of the source of the misinformation.

Defendant, claims in this motion for postconviction relief that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that defendant would get a sentence of no more than twenty years, in spite of the charges statutory requirement, sufficiently pled prejudice prong of ineffective assistance of counsel claim, even though defendant did not make a showing as to his likelihood of success at trial or on appeal. Here defendant specifically swears that he would not have entered guilty plea if he had been accurately advised that the court would sentence him to one-hundred and seventy five (175) years. The Defendant contends that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that defendant would be sentenced to 175 years in prison, stated colorable claim for relief, independent of ineffective assistance of counsel claim, based on mistaken information. ***Brazeail*** v. ***State***, 821 So.2d 364, (Fla.App. 1 Dist. 2002).

The Defendant contends that he suffered prejudice based on trial counsel's improper advice in telling the Defendant that he would only receive twenty (20) years. The Defendant would further state that the plea is involuntary because had he known that the Judge could have given him 175 years he would have gone to

trial because the statutory maximum for his offense carried a life sentence had he gone to trial. A life sentence in a term of years would only have given him forty (40) years.

Defendant was entitled to postconviction review of claim that trial counsel was ineffective for encouraging him to make an open plea to the court, despite substantial evidence against him, where claim was not conclusively refuted by record. U.S.C.A. Const. Amend. 6; West's F.S.A. RCrP Rule 3.850. 2008 WL 1733275, 33 Fla. L. Weekly D1038, *Garcia v. State*, (Fla.App. 3 Dist. 2008). Defendant is entitled to evidentiary hearing on claim raised in his motion for post-conviction relief that defense counsel had been ineffective for failing to properly advise him that the most he would receive was 20 years in prison for charged offenses. As he alleged that defense counsel misled him as to the amount of time he would receive and that he would have chosen to go to trial and demonstrate his innocence and there was a probability that he could have been acquitted of the charges, were facially sufficient to state a claim for ineffective assistance of counsel.

ISSUE TWO

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A PRE-TRIAL MOTION TO SUPPRESS EVIDENCE OF A GUN, WHICH WAS NOT FOUND IN THE DEFENDANT'S POSSESSION, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENTS.

FACTS

The Defendant asserts that he informed counsel that he had no knowledge of the gun/evidence which was being submitted to prove his guilt. Trial counsel Mr. Davis was properly informed that a weapon was at the home of Abdul Bissent and there was no evidence to prove that he ever handled or owned this weapon other than the testimony of the Bissent's.

The police were acting on misinformed information that the Defendant stayed at the home. The firearm was retrieved and tested for fingerprints by FDLE. The results of the test by FDLE demonstrated that the Defendant did not handle this weapon. There was nexus established between the Defendant and the weapon retrieved in this case. Previous counsel Ms. Hicks from the Public Defender's Office informed the Defendant that his prints did not match the prints found on the gun.

ARGUMENT

The Defendant contends that trial counsel's omission in failing to move to suppress the weapon of a gun in this case was a error that violated his Sixth Amendment rights under the United States Constitution. The failure of counsel to move to suppress the weapon falls below a reasonable representation and denied the Defendant the right to prove that the gun was not his own. Counsel's omission prejudiced the Defendant's ability to raise a viable defonse and to subject the state's case to a meaningful adversarial testing. Had the Defendant moved to establish ownership of the weapon the facts would have come to light as to the reap perpetrator in this crime. See ***Kimmelman v. Morrison***, 106 S.Ct. 2754 (1986).

The Defendant contends that the outcome of this trial and sentencing would have had a different result had it not been for counsel's omissions. The Defendant asserts that he could have probably been acquitted of these charges had trial counsel raised a viable defense by moving to suppress the evidence. The Defendant contends that trial counsel would have been able to identify the handler and owner of the gun by the prints lifted by the Florida Department of Law Enforcement (FDLE). Defendant argues that pursuant to ***Strickland v. Washington***, 104 S.Ct. 2050 (1984) that he has shown that counsel's deficient performance substantially prejudiced him and that had trial counsel acted as counsel guaranteed by the Sixth Amendment, the results of his proceedings would

have had a different result. He would not have followed counsel's misadvice because it was not in his best interest to enter an open plea to the court and receive one hundred and seventy five (175) years when he was promised by counsel that all he would receive was twenty (20) years, a "sweet deal," he said.

Trial counsel's action violated Defendant's constitutional right to due process of law and a right to subject the state's case to a meaningful adversarial testing. See *U.S. v. Cronic*, 104 S.Ct. 2039 (1984).

The Defendant asserts that by proving the owner of the gun in this case would have established the possible perpetrator of the crimes charged. The outcome of the outcome of the proceeding would have resulted in him being acquitted of these charges.

ISSUE THREE

CONSTITUTIONALLY DEFECTIVE AFFIDAVIT (TESTIMONY) OF MATERIAL WITNESS(ES) IS INVALID.

It is Defendant's contention that no oath-bearing affidavit (testimony) from material witness(es), in the instant case, exists. This fatal defect is a structural error, which not only violates Defendant's constitutionally protected due process right[1], but also deprives the trial court of subject matter jurisdiction.

[1] Art. I, Sec. 9, Florida Constitution

It is Defendant's contention that, pursuant to the constitutional mandate[2] buttressed by Florida Rules of Court[3] and case law doctrine[4], an oath-bearing affidavit (testimony) of must exist '*prior*' to serve as the basis for the magistrate to make a determination of probable cause to issue a warrant.

Defendant asserts that no such affidavit (testimony), bearing an oath, existed in the instant case prior to the issuance of said warrant.

It is Defendant's contention that an oath-bearing affidavit testimony from material witness(es) is an essential element of subject matter jurisdiction and in the instant case, this element is lacking.

This fatal defect parallels the '*fruit of poisonous tree*' doctrine, because it reaches not only the determination of probable cause to issue an arrest warrant, but also the judgment found to be a derivative of the defective affidavit (testimony).

Defendant asserts that, in Florida the primary (foundational) stage of a criminal proceeding is initiated when a citizen submits an affidavit (testimony) under lawful oath. Said citizen is defined as material because he/she gives testimony going to some facts affecting the merits of the case about which no other witness might testify. Such affidavit (testimony), duly prepared serves as probable cause, and this standard, like those for searches and seizures, represents a

[2] Art. I, Sec. 12, Florida Constitution
[3] 3.140(g), Fla. R. Crim. P.
[4] *State v. Hartung*, 543 So 2d. 236 (Fla. 5th DCA 1989)

necessary accommodation between the individuals' right to liberty, and the State's duty control crime. These long prevailing standards seek to safeguard citizens from rash and unreasonable interference with privacy and from unfound charges of crime.

The failure of the state to secure affidavit (testimony) from material witness(es)), and as this constitutionally defective charging instrument is the tool invoking the trial court's jurisdiction over subject matter, the trial court's judgment cannot legally stand.

It is the Defendant's contention that, the trial court's judgment, in the instant case, Sa predicated upon fraudulent representation, thus invalidating jurisdiction over subject matter and, as such, a manifest injustice has occurred.

Defendant assets that (1) '*there was error*' in that no oath-bearing affidavit (testimony) from material witness(es) exited prior to the trial court's judgment; (2) '*that was plain*' as evidenced by the absence of an oath-bearing affidavit (testimony) from material witness(es) in the record; (3) '*that affected his substantial rights*' by filing the charging instrument without the constitutionally mandated oath-bearing affidavit (testimony) from material witness(es) deprived Defendant of due process; and (4) '*that affected the fundamental fairness of the proceeding*' by the prosecutor presenting the fraudulent charging instrument to the trial court to obtain the instant conviction.

It is Defendant's contention that, from its inception, the trial court lacked lawful subject-matter jurisdiction in the instant case, and subsequently, the trial court without legal authority to hear the case at bar.

The Defendant therefore moves this Honorable Court to set aside his conviction based on the fact that his constitutional right to due process of law was violated due to a defective information.

GROUND FOUR

CHARGING INSTRUMENT FILED IN VIOLATION OF CONSTITUTIONAL MANDATE FAILS INVOKE JURISDICTION OF TRIAL COURT.

It is Defendant's contention that, in the instant case, the Prosecutor swore, under lawful oath, that the allegations set forth in the charging instrument was '*based upon facts that had been sworn to as true by material witness(es)*'. Further, the prosecutor having foreknowledge of the applicable law[5], swore under lawful oath[6] to have '*received*' oath-bearing affidavit (testimony) from material witness(es) when in fact, '*he had not.*'

It is Defendant's contention that the prosecutor is duty-bound to know and follow the law applicable to the case at bar. In the instant case, the prosecutor,

[5] 3.140(g), Fla. R. Crim. P.
[6] 92.50(1)(2), Fla. Stat. (1998)

under lawful oath, knew that no constitutionally mandated oath bearing affidavit (testimony) from material witness(es) existed, yet knowingly presented a fraudulent charging instrument to invoke the jurisdiction of the trial court and constitutionally impermissibly applied statue to obtain the instant conviction thereby violating Defendant's constitutionally protected due process right.

Defendant can imagine few situations with more potential for abuse of his constitutionally protected due process right than prosecutorial misconduct but, as in the instant case, to color testimony or even present fraud upon the court in pursuit of a conviction taints the prosecutor's '*good faith*' effort and plants a fatal defect in the trial court's judgment.

Defendant asserts that to protect the right to fair notice guaranteed by the constitution, prosecutor, prior to filing charging instrument invoking jurisdiction of the trial court '*must*' have before him an oath-bearing affidavit (testimony) from material witness(es). Rule 3.140(g), Fla. R. Crim. P. amplifies the oath required by providing:

> "An information charging the commission of a felony **shall** be signed by the State Attorney, or a designated Assistant State Attorney, **under oath** stating his good faith in instituting the prosecution **and** certifying that he has **received** testimony **under oath** from the material witnesses for the offense..." Emphasis added.

The oath requirement is not discretionary but mandatory, and is designed to protect the citizenry by insuring good faith in the institution of the criminal

proceedings, and also reduces the risk that frivolous criminal prosecutions will be instituted.

Under Constitutional and statutory provisions governing duties, the State Attorney speaks and acts on behalf of the State, and must conduct prosecutions by due course of law to the end that, in a fair trial, charges against accused must be proved in a manner required by law. The tenor of case law discussing the role of prosecutions make clear that prosecutors are held to the highest standard because of their unique powers and responsibilities. The United States Supreme Court has observed that a prosecutor has responsibilities beyond that of an advocate, and had a higher duty to assure that justice is served:

> "The U.S. Attorney is the representative not of an ordinary party to a controversy but of a Sovereignty whose obligations to govern impartially is as compelling as its obligations at all; and those whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done...he may prosecute with earnestness and vigor indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

Florida Courts have also recognized that by the nature of their position, prosecutors direct the power of the government against an accused person, and thus, prosecutors "must be ever mindful of their awesome power and concomitant

responsibility...to reflect scrupulous adherence to the highest standard of professional conduct." *Martin v. State*, 411 So.2d. 593, 600 (Fla. 4th DCA 1982); see also *Defreitas v. State*, 702 So.2d. 593, 600 (Fla. 4th DCA 1997)("prosecutors must seek justice with the circumspection and dignity the occasion calls for.") A Defendant's ignorance of the law applicable to the case at bar is of no consequence, because the prosecutor is not only '*expected*' to extend fair application of the law in all criminal prosecutions, he is '***required***' to. A criminal prosecution "is not a game where the prosecution can declare 'it is for me to know and for you to find out." *Craig v. State*, 685 So.2d. 1224, 1229 (Fla. 1996).

Defendant succinctly contends that, the prosecutor has jurisdiction to prosecute crimes *only* when she/he has received information based upon sworn testimony from a material witness. However, as in the instant case, when a charging instrument has been *filed* but there is '*no showing*' that the charging instrument is based upon sworn testimony of material witness, the charging instrument is invalid[7] and thus the jurisdiction of the trial court was improperly invoked, and Defendant's constitutionally protected due process right has been violated.

[7] *State v. Wainghera*, 780 So.2d. 214 (Fla. 5th DCA 2001)(dismissing information not based on sworn testimony of a material witness).

GROUND FIVE

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT ADEQUATE PRE-TRIAL INVESTIGATIONS AND TO RAISE A VIABLE DEFENSE.

FACTS

The Defendant asserts that trial counsel was in possession of the reports of FDLE on the lab analysis of the weapon in this case. In addition, all of the affidavits and reports of witnesses was turned over to counsel once he was retained by the Defendant's family. Trial counsel had this information in the months leading up to the sentencing date in which counsel persuaded Defendant to make an open plea to the court on the basis that he would receive no more than twenty years.

At no time did counsel make any pre-trial motion to suppress evidence or formulated a viable defense strategy in order to defend against these charges. The actions of counsel to convince the Defendant to take the open plea to the court as not in his best interest.

ARGUMENT

The Defendant would argue that the omission of trial counsel to raise a viable defense represents a substantial deficient assistance under the ***Strickland*** standard, *supra*.

Trial counsel failed to file any pretrial motions to contest and challenge the evidence and materials the state was using in this case. Counsel relied on the state's version of the facts and not his own reasonable investigations. As in ***U.S. v. Matos***. 905 F.2d. 30 (2nd Cir. 1990); ***Clark v. Blackburn***, 619 F.2d. 431 (5th Cir. 1980).

GROUND SIX

DEFENDANT CONTENDS THAT HIS PLEA IS INVOLUNTARY BASED ON ILLEGAL SENTENCE AN THAT HE COULD NOT CONSENT OR PLEA OUR TO AN ILLEGAL SENTENCE.

The Defendant was charged with a three count information of: Count I Armed Robbery, F.S. 812.13(2)(a), 775.087(2)(a)2, Count II Armed Robbery, F.S. 812.13(4)(a), F.S. 775.087(2)(a)1; Count III Armed Burglary F.S. 810.02(2)(b), F.S. 775.087(2)1.

On August 6, 2007, the Defendant tendered and the court accepted a "straight up" plea of guilty to the three charges in the amended information.

The sentencing hearing was held on September 21, 2007. During the hearing, the Defendant was sentenced to 75 years on Count I with a 20 year minimum mandatory under F.S. 775.087(2)(a) to 50 years on Count II with a ten year minimum mandatory, and to 50 years on Count III with a minimum

mandatory. The trial court ordered the sentence to be served consecutively to each other.

ARGUMENT

The Defendant argues that the plea is involuntary based on the facts that the illegal sentence rendered the plea involuntary. See ***Lewis v. State***, 615 So.2d. 259 (Fla. 3rd DCA 1993); also ***Trott v. State***, 579 So.2d. 807 (Fla. 5th DCA 1991).

The Defendant contends that Armed Robbery, F.S. 812.13, 775.087(2)(a)2, that the weapon was an essential element of the crime of Armed Robbery and under the 10-20-Life statutory provision the court sentenced the Defendant to a term of years it was prohibited form sentencing him beyond 40 years. See: ***Farmer v. State***, 672 So.2d. 639 (Fla. 5th DCA 1996).

The Defendant asserts that the sentence is illegal insofar as it fails to comport with statutory and constitutional limitations and the Defendant cannot confer upon the court to plea out to an illegal sentence.

Therefore, the Defendant contends that he is entitled to have this plea withdrawn based on the facts that the sentence illegal.

The defendant is a Pro Se litigant and moves this Honorable court to treat the documents filed as if they were properly filed pursuant to ***Hull v. Bellman***, 935 F.2d. 1106, 1110 (10th Cir. 1991):

"A pro se litigant's pleadings are to be construed literally and held to a less stringent standard than formal pleadings drafted by lawyers...if a Court can reasonably read the pleading to state a valid claim on which the Plaintiff could prevail, it should do so despite the Plaintiff's failure to cite proper authority, his confusion of various legal theories, his poor syntax and sentence structures or his unfamiliarity with pleading requirements." See also: ***Haines v. Kerner****. 404 U.S. 519 (1972); 992 S.Ct. 594*

In the history of jurisprudence, pro se litigants have frequently been granted leniency in technical matters.

Wherefore in conclusion the Defendant would move this court to find as a matter of law that trial counsel was ineffective for improperly advising the Defendant to take a plea or to make an open plea to the court telling the Defendant that he would only received five years when the Defendant received fifteen. This was ineffective assistance of counsel pursuant to the Strickland standard.

s/ Antwain Ashley
Antwain Ashley DC# J34708
Columbia Correctional Institution
216 S.E. Corrections Way
Lake City, Florida 32025

UNNOTARIZED OATH.

Under penalties of perjury, I declare that I have read the foregoing Motion for Post Conviction Relief and that the facts stated in it are true.

s/ Antwain Ashley
Antwain Ashley DC# J34078
Columbia Correctional Institution
216 S.E. Corrections Way

Lake City, Florida 32025

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Of Motion For Post-Conviction Relief Pursuant To Rule 3.850 Memorandum Of Law In Support has been furnished to Office of the State Attorney Florida 32940 by U.S. Mail on this 11 day of ~~April~~ June 2009.

s/ Antwain Ashley

Antwain Ashley DC# J34078
Columbia Correctional Institution
216 S.E. Corrections Way
Lake City, Florida 32025

APPENDIX
B

March 3, 2011 1:37 p.m.

PROCEEDINGS

* * * * *

THE BAILIFF: All rise.

(Everyone complies.)

THE BAILIFF: Court is now in session. Thank you. You may be seated.

(Everyone complies.)

THE COURT: How are you, Mr. Davis?

MR. DAVIS: Good afternoon, Your Honor.

THE COURT: Now, are these copies that I can keep (indicating)?

THE CLERK: Yes, sir.

THE COURT: Okay.

MR. ZOMORODIAN: Your Honor, I have some documents for the Court that may be in the clerk file, and you may have, but I wanted to make sure you have them, and I think it would be helpful to present them before we start.

THE COURT: Okay.

MR. ZOMORODIAN: And I've provided them to Mr. Nolan well in advance of the hearing, and Mr. Davis as well, and a copy

of the blue form.

(Tenders instrument.)

THE COURT: Okay.

MR. ZOMORODIAN: And a copy of Mr. Ashley's plea dialogue with Judge Merrett from August 6, 2007. I will tender that to madam clerk.

(Tenders instrument.)

MR. ZOMORODIAN: And then I have a transcript of the sentencing hearing conducted by Mr. Davis. And that is approximately --

THE CLERK: I think is it right here, if you want to keep it?

MR. ZOMORODIAN: This is an extra copy for the Court.

THE CLERK: Oh, okay.

MR. ZOMORODIAN: It's 136 pages, the sentencing hearing transcript.

(Tenders instrument.)

THE COURT: Okay. Thank you.

THE CLERK: I got an extra copy.

THE COURT: I have a copy.

THE CLERK: Okay.

THE COURT: All right. Whenever you

are ready, we can begin. Why don't we just, for the record, you know, introduce yourself, and your capacity in today's hearing, and it's always helpful for the Court if you would outline the issue, you know, issues before the Court today.

MR. NOLAN: Yes, Your Honor. For the record, my name is James Nolan. I've been appointed by this Court to represent Mr. Antwain Ashley, the defendant and petitioner in this case. And we are here before the Court this afternoon on a 3.850 motion for post conviction relief.

MR. ZOMORODIAN: Cyrus Zomorodian, Assistant State Attorney, Fourth Judicial Circuit of Florida.

MR. DAVIS: Your Honor, I'm Robert Davis. I'm going to end up being the witness.

THE COURT: You're going to be a witness today. Okay. When that time comes, you can do that.

Okay. Very well. Mr. Nolan, would you like to proceed?

MR. NOLAN: Yes, Your Honor. Just to

give the Court some factual history, pursuant to a three-count Information that was filed by the State Attorney's Office, it appears on November 14th, 2006, Mr. Ashley was charged by way of Information of three counts, two counts of armed robbery, and a third count of armed burglary.

The Count 1, armed robbery, was a first degree, punishable by life felony, that carried with it a 20 year minimum mandatory as an adult sentence.

Second count was armed robbery, first degree, punishable by life felony, with a 10 year minimum mandatory.

And the third count was an armed burglary, punishable by life felony, also carrying with it a 10 year minimum mandatory.

THE COURT: What was the minimum mandatory on Count 1?

MR. NOLAN: 20 years.

THE COURT: 20 years. Okay.

MR. NOLAN: It was a discharge of a firearm.

THE COURT: Okay.

MR. NOLAN: At the time of the offense, or the offenses, Judge, Count 1, according to the Information, was committed on August 29th, 2006; Count 2 was committed August 15, 2006; Count 3 was committed October 18th, 2006.

At the time of the offenses, Mr. Ashley was 19-years-old. On August the 6th, of 2007, before Judge Merrett, Mr. Ashley was represented by Mr. Davis, and Mr. Ashley pled straight to the Court, to all three counts at that time.

On September 21st of 2008, a sentencing hearing was held, again, before Judge Merrett. There was testimony regarding from the State -- or argument from the State -- and some testimony from one of the victims.

There was also a considerable amount on the matter of mitigation testimony presented by Mr. Davis on behalf of Mr. Ashley, including, some diminished capacity evidence, some history regarding Mr. Ashley in mitigation.

The issue that we are here before the

Court on, and the significance of Mr. Ashley being 19-years-old at the time of the offense, 20-years-old at the time of entering the plea, is whether or not Mr. Davis should have argued that Mr. Ashley was entitled to a youthful offender sentence.

And, I believe, the State would agree or stipulate that as far as eligibility, not necessarily whether or not he was a candidate for youthful offender, but as far as legally, his eligibility, he was technically eligible for a youthful offender sentence.

Judge, in the packet that the State's given you this morning, specifically in the sentencing transcript, you will see that on Page 119, beginning at Line 20, Mr. Davis tells the Court, "Your Honor, I would be seeking in reviewing the PSI, and talking with the State, I don't believe my client's entitled to a YO offender status; however, based upon the mitigation presented by Mr. Miller, based upon the circumstances, we're seeking a downward departure."

Additionally, in argument by Mr. Davis on Page 121, specifically, Line 18, to the rest of the page, Mr. Davis argues that, "Mr. Ashley could realistically, if he is able to obtain his GED, and I believe that he could in a structured environment obtain his GED, he could have some vocational training, that they do have available. Were he eligible for a youthful offender, I would recommend that he would be a viable candidate, because in a youth camp, he can get the direction and guidance he needs, rather than just being incarcerated in an adult prison."

While Mr. Davis touches upon if he was a candidate, he would be eligible -- if he was eligible, he would be a candidate -- what Mr. Davis fails to do is argue the full force and affect involved in the criteria of the youthful offender sanction, or the youthful offender sentence instruction.

The State, I believe, will argue, we do concede that the Assistant State Attorney, Ms. Jessica Trudeau, and let me refer to Page 133, starting at Line 2, she

tells the Court, "So to err on the side of caution, the State would inform Your Honor, that it does appear that the defendant is eligible for YO. Based upon the prior arguments, the State would ask Your Honor to instead sentence him according to 10-20-Life."

So, we believe, that based upon Mr. Davis's erroneous characterization of the law, and should he have properly argued the youthful offender statute, and the criteria and the components of it to Judge Merrett, that in all likelihood, Judge Merrett would have sentenced Mr. Ashley to a youthful offender sanction.

And so we're asking the Court for the ability to at a resentencing date, present evidence that we believe would comport to the youthful offender statute.

We would like to make the argument to the Court, have the Court at least consider it. That's all we're asking the Court to do, is to determine whether or not he's a candidate at a sentencing hearing in the future. But we are asking the Court

specifically, excuse me, is to allow us a resentencing hearing for at least the Court to consider a youthful offender sanction. So that's the sum and substance and the lion's share of our argument, as to the eligibility and the criteria of youthful offender.

Mr. Ashley in his amended and consolidated motion, also indicates that he feels the gun that was -- the alleged gun that was obtained in this case, should have been suppressed, or at least Mr. Davis, as a reasonably prudent attorney, should have at least filed the Motion to Suppress that firearm. And he feels, in all likelihood, should he have done that, that the gun would have been suppressed, and that would have been evidence that would have not been included in it and, ultimately, may have impacted his decision whether or not to plead guilty in the first case.

And, for those reasons, Mr. Ashley is asking the Court to allow him to withdraw his plea, allow a proper Motion to Suppress the firearm to be argued, and then to make a

determination after that ruling what he would like to do in the case, so he is moving to withdraw his plea for that basis.

And, thirdly, there's kind of a catch-all allegation by Mr. Ashley and, that is, a proper investigation was not conducted by Mr. Davis. Specifically, Mr. Ashley feels that there are a couple of witnesses, specifically, the victims in Counts 2 and 3, that based upon his understanding of the case, they were uncooperative, or would not have testified, should the case have gone to trial; that if he was aware of that, at the time, he certainly would not have pled guilty to those two counts and would have, in fact, taken the case to trial.

So, Your Honor, I believe that is what Mr. Ashley is asking the Court to do, withdraw his plea and, at a minimum, to allow for a resentencing hearing to properly argue the youthful offender statute.

THE COURT: Okay. Very well. That's helpful. Thank you.

My question is -- okay. That certainly clarifies the issues or outlines

the issues for me. What else in way of argument, or do you have any evidence you want to present today?

MR. NOLAN: Your Honor, I know testimony from Mr. Davis would be solicited --

THE COURT: Okay.

MR. NOLAN: -- this afternoon. Either I can begin the testimony, or the State can? I can call him as a witness.

THE COURT: Or, Mr. Zomorodian, do you have preference as to how --

MR. ZOMORODIAN: No, I certainly don't mind.

THE COURT: I don't know if Mr. Davis was prepared for today, so I'll leave it up to you.

MR. ZOMORODIAN: I certainly don't mind counsel examining Mr. Davis. And the burden is not the State's in this hearing.

THE COURT: Right.

MR. ZOMORODIAN: So, if Mr. Nolan wants to begin the questioning, that's fine with the State.

MR. NOLAN: That's fine, Your Honor.

APPENDIX
C

A claim of ineffective assistance of counsel will warrant an evidentiary hearing only where a defendant alleges "specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990). Further, "[t]o establish prejudice [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Valle v. State, 778 So. 2d 960, 965-66 (Fla. 2001).

In the context of guilty pleas, the prejudice prong focuses on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see Grosvenor v. State, 874 So. 2d 1176, 1179 (Fla. 2004). "[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at trial." Grosvenor, 874 So. 2d at 1181-82. Further, the merits of any defense available is relevant to the credibility of a defendant's claim that he would have insisted on going to trial. Id. at 1181.

With regard to the claims of ineffective assistance of counsel that were argued during the March 3, 2011 evidentiary hearing, this Court finds that the testimony given by Defendant's trial counsel, Robert Carl Davis, Esquire, is both more credible and more persuasive than Defendant's

sworn allegations in the instant Motion. Laramore v. State, 699 So. 2d 846 (Fla. 4th DCA 1997). As such, this Court accepts his testimony, notes that he has been practicing as an attorney in good standing with the Florida Bar since 2003, and finds that he functioned as "reasonably effective counsel" in his investigation and preparation of the defense in the instant case. See Coleman, 718 So. 2d at 829. In addition, this Court finds the trial decisions made by Mr. Davis that are currently under attack in the instant Motion constituted sound trial strategy by a seasoned defense attorney. See Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v. State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.") Having established the preliminary findings with regard to the evidentiary hearing, this Court will now address the merits of Defendant's ineffective assistance of counsel claims.

Ground One

In Ground One, Defendant alleges counsel was ineffective for improperly advising him to openly plead to twenty (20) years, when he was actually sentenced to 175 years incarceration. Defendant further alleges counsel told him he "would get no more than twenty (20) years in prison," and never "properly inform[ed] him that he could have received one hundred and seventy-five years (175) by [sic] the court." (Def.'s Mot. 3.) Defendant asserts that if he had known the maximum amount of time to which he could have been sentenced, he would not have pled guilty and would have, instead, proceeded to trial. In this respect, Defendant also alleges his plea was not voluntarily, knowingly, and intelligently entered due to counsel's alleged misadvice.

Assuming *arguendo* counsel actually advised Defendant that he "would get no more than twenty (20) years in prison," such claim fails for lack of prejudice. This Court first looks to Defendant's sworn answers during the plea colloquy. See Stano v. State, 520 So. 2d 278, 280

(Fla. 1988) (holding that a defendant may not seek to go behind his sworn testimony at a plea hearing in a postconviction motion); Bir v. State, 493 So. 2d 55, 56 (Fla. 1st DCA 1986) (same); Dean v. State, 580 So. 2d 808, 810 (Fla. 3d DCA 1991) (same); see also Iacono v. State, 930 So. 2d 829, 831 (Fla. 4th DCA 2006) ("A defendant is not entitled to rely on an attorney's advice to commit perjury above the solemn oath that the defendant makes to the court to tell the truth."). At the plea hearing, the judge fully advised Defendant that he faced a maximum possible sentence of life on each count with which he was charged, and that he faced a twenty-year minimum mandatory term on Count One and two ten-year minimum mandatory terms on Counts Two and Three. (Ex. G at 5, 6-7.) The judge also informed Defendant that by entering his pleas, he was forfeiting certain constitutional rights. (Ex. G at 6.) Defendant testified that he had gone as far as the 11th grade in school, that he could read and write, that he was not under the influence of alcohol or any other drug or medication that could affect his ability to understand what was going on around him, and that he in fact understood everything the judge had asked him. (Ex. G at 5-7.) Defendant acknowledged having read, understood, and signed a written Plea of Guilty form. (Ex. G at 6.) Defendant further testified that he had reviewed the form with his attorney prior to signing it, and that his attorney had answered all of his questions. (Ex. G at 6.) Indeed, Defendant told the judge he had given his attorney permission to enter the guilty plea on his behalf, (Ex. G at 5), and defense counsel advised the judge that he had discussed the plea with Defendant at length on more than one occasion. (Ex. G at 8.) Thereafter, the judge properly accepted Defendant's plea as knowing, intelligent and voluntary. (Ex. G at 8-9.)

Second, Defendant signed a detailed Plea of Guilty Form. (Ex. A.) That form clearly indicates that Defendant "freely and voluntarily entered [his] plea of guilty," that he "ha[d] been advised of all direct consequences of the sentences which may be imposed," that he "ha[d] not been

offered any hope of reward, better treatment, or certain type of sentence as an inducement to enter [his] plea," that he "ha[d] not been promised by anyone, including [his] attorney, that [he] would actually serve any less time than that set forth [in the agreement]," and that he "ha[d] not been threatened, coerced, or intimidated by any person, including [his] attorney, in any way in order to get [him] to enter [his] plea." (Ex. A.)

Therefore, Defendant's claims that counsel was ineffective for improperly advising him to openly plead to twenty (20) years, and that his plea was not voluntarily, knowingly, and intelligently entered as a result of counsel's alleged misadvice, are refuted by the record. See Stano, 520 So. 2d at 280; Bir, 493 So. 2d at 56; Dean, 580 So. 2d at 810; see also Iacono, 930 So. 2d at 831. Further, given Defendant's signed Plea of Guilty form, his sworn testimony during the plea colloquy, and the totality of the circumstances of his case, there is no reasonable probability that he would have insisted on going to trial. See Grosvenor, 874 So. 2d at 1181-82. Thus, Defendant has failed to demonstrate prejudice and Ground One is denied.

Ground Two

In Ground Two, Defendant alleges counsel was ineffective for failing to file a motion to suppress evidence of a gun that he was charged with possessing and firing during the commission of his crimes. Defendant asserts counsel was properly informed a weapon was at the home of Abdul Bissent, but that, other than Mr. Bissent's testimony, there was no evidence to prove Defendant had ever handled or owned this gun. Specifically, Defendant argues tests conducted by the Florida Department of Law Enforcement ("FDLE") demonstrate that Defendant did not handle the gun because his fingerprints did not match those found on the gun. But for counsel's alleged failure to file a motion to suppress, Defendant avers he would not have pled guilty.

APPENDIX
D

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ANTWAIN ASHLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-1659

Opinion filed January 28, 2014.

An appeal from the Circuit Court for Duval County.
Thomas Beverly, Judge.

Antwain Ashley, pro se.

Pamela Jo Bondi, Attorney General; Trisha Meggs Pate and Brittany Rhodaback, Assistant Attorneys General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

THOMAS, MARSTILLER, and MAKAR, JJ., CONCUR.

APPENDIX
E

FILED

2015 JAN -5 PM 2:

JACKSONVILLE, FLORIDA

DC 12/31/14

FOR MAILING 12/31/14

Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody

United States District Court	**Middle District of Florida**
Name (under which you were convicted) Antwain D. Ashley	Docket or Case No.: 3:15-CV-7-J-34JRK
Place of Confinement: Columbia Correctional Institution 216 S.E. Corrections Way Lake City, Florida 32025	Prisoner No.: J34708
Petitioner (include the name under which you were convicted) Antwain Ashley	Respondent (authorized person having custody of Petitioner) v. Julie Jones, Sec. DOC
The Attorney General of the State of Florida: Pamela Jo Bondi	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Fourth Judicial Circuit in and for Duval County, Florida

   (b) Criminal docket or case number: 16-2006-CF-016512-AX

2. (a) Date of the judgment of conviction: September 21, 2007

   (b) Date of Sentencing: September 21, 2007

3. Length of sentence: Count I – 75 years, Count II – 50 years, Count III – 50 years

4. In this case you were convicted on more than one count of more than one crime.

   [X] Yes [ ] No

5. Identify all crimes of which you were convicted and sentenced in this case:

   Count I Armed Robbery
   Count II Armed Robbery
   Count III Armed Burglary

6. (a) What was your plea?

   [ ] (1) Not Guilty [ ] (3) Nolo Contendere (No Contest)
   [X] (2) Guilty [ ] 4) Insanity Plea

   (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have?

[ ] Jury [X] Judge only

7. Did you testify at the trial?

[ ] Yes [X] No

8. Did you appeal from the judgment of conviction?

[X] Yes [ ] No

9. If you did appeal, answer the following:

(a) Name of Court: First District Court of Appeal

(b) Docket or case number: 1D7-5137

(c) Result: Per curiam affirmed

(d) Date of result: March 20, 2009, Mandate April 7, 2009

(e) Citation to the case: Ashley v. State, 4 So.3d. 1222 (Fla. 1st DCA 2009)

(f) Grounds raised: Anders Brief filed

(g) Did you seek further review by a higher state court? [ ] Yes [X] No

If yes, answer the following:

(1) Name of Court: N/A

(2) Docket or case number: N/A

(3) Result: N/A

(4) Date of result: N/A

(5) Citation to the case: N/A

(6) Grounds raised: N/A

(h) Did you file a petition for certiorari in the United States Supreme Court?

[ ] Yes [X] No

If yes, answer the following:

(1) Docket or case number: N/A

(2) Result: N/A

(3) Date of result: N/A

(4) Citation to the case: N/A

10. Other than the direct appeal, have you previously filed any petitions, applications, or motions with respect to this judgment in state court?

[X] Yes [ ] No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Fourth Judicial Circuit

(2) Docket or case number: 16-2006-CF-016512-AX

(3)Date of filing: October 31, 2013

(4) Nature of the proceeding: Motion to Correct Illegal Sentence 3.800

(5) Grounds raised:

The trial court violated the defendant's Eighth Amendment right against cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions" binding on the states through the Fourteenth Amendment of the United States Constitutions secured through Article One Section Nine of the Florida Constitutions.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

[ ] Yes [X] No

(7) Result: Denied

(8) Date of Result: December 20, 2013

(b) If you filed any second petition, application, or motion, give the same information?

(1) Name of court: Fourth Judicial Circuit Court

(2) Docket or case number: 16-2006-CF-016512-AX

(3) Date of filing: June 11, 2009, amended March 24, 2010

(4) Nature of the proceeding: Motion for Postconviction Relief 3.850

(5) Grounds raised:

Trial counsel was ineffective for improperly advising the Defendant to plea out to twenty years and the Defendant was given one hundred and seventy five years, in violation of his constitutional rights under the 6th, 14th Amendments of the United States.

Trial counsel was ineffective for failing to file a pre-trial motion to suppress evidence of a gun, which was not found in the Defendant's possession, in violation of his Sixth and Fourteenth Amendments.

Constitutionally defective affidavit (testimony) of material witnesses is invalid.

Charging instrument filed in violation of constitutional mandate fails to invoke jurisdiction of trial court.

Trial counsel was ineffective for failing to conduct adequate pre-trial investigations and to raise a viable defense.

Defendant contends that his plea is involuntary based on illegal sentence and that he could not consent or plea out to an illegal sentence.

Trial counsel was ineffective for failing to research the law on the trial court's discretion to sentence the Defendant as a youthful offender.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

[X] Yes [ ] No

(7) Result: Denied

(8) Date of Result: March 5, 2013

(b) If you filed any third petition, application, or motion, give the same information?

(1) Name of court: N/A

(2) Docket or case number: N/A

(3) Date of filing: N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

to support that argument. N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

[ ] Yes [X] No

(7) Result: N/A

(8) Date of Result: N/A

(d) Did you appeal to the highest state court having jurisdiction over the action on your petition, application, or motion?

(1) First Petition [X] Yes [ ] No

(2) Second Petition [X] Yes [ ] No

(3) Third Petition [ ] Yes [ ] No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

TRIAL COUNSEL WAS INEFFECTIVE FOR IMPROPERLY ADVISING THE PETITIONER TO PLEA OUT TO TWENTY YEARS AND THE PETITIONER WAS GIVEN ONE HUNDRED AND SEVENTY FIVE YEARS, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE 6TH, 14TH AMENDMENTS OF THE UNITED STATES.

(a) Supporting facts:

The Petitioner asserts that on September 21, 2007 prior to his sentencing, he retained counsel, Mr. Davis who was retained by his family. Counsel encouraged him to make an open plea to the court, and convinced him that "he could get him a sweet deal." Counsel said that the Petitioner would get no more than twenty (20) years in prison.

The Petitioner therefore agreed to make an open plea to the court and to agree with whatever the judge's questions would be. Counsel then encouraged the Petitioner to agree with all of the judge's questions.

The Petitioner asserts that at no time did counsel properly inform him that he could receive one hundred and seventy-five years (175) by the court.

The Petitioner further states that had he known or was properly informed as to the amount of time he could have been sentence to, he would not have made the open plea to the trial court and he would have chosen to go to trial. Trial counsel told the Petitioner that the charges could give him life in prison, but they could only sentence him to twenty years.

The Petitioner asserts that had he not been misadvised by counsel relating to the sentence, he would have decided to go to trial because he had defenses he could have raised in this case. The Petitioner contends that the weapon/evidence in this case was not retrieved from him, but from another location, and the weapon was not registered in his name.

Petitioner claimed that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that Petitioner would get a sentence of no more than twenty years, in spite of the charges statutory requirements, sufficiently pled prejudice prong of ineffective assistance of counsel claim, even though Petitioner did not make a showing as to his likelihood of success at trial or on appeal. Here Petitioner specifically swears that he would not have entered a guilty plea if he had been accurately advised that the court would

sentence him to one hundred and seventy-five years. The Petitioner contends that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that the Petitioner would be sentenced to 175 years in prison.

(b) If you did not exhaust your state remedies on Ground One, explain why: .

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground One:

GROUND TWO:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A PRE-TRIAL MOTION TO SUPPRESS EVIDENCE OF A GUN, WHICH WAS NOT FOUND IN THE PETITIONER'S POSSESSION, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT.

(a) Supporting facts:

The Petitioner asserts that he informed counsel that he had no knowledge of the gun/evidence which is being submitted to prove his guilt. Trial counsel, Mr. Davis was properly informed that a weapon was at the home of Abdul Bissent and there was no evidence to prove that he ever handled or owned this weapon other than the testimony of the Bissent's.

The police were acting on misinformed information that the Petitioner stayed at the home. The firearm was retrieved and tested for fingerprints by FDLE. The results of the test by FDLE demonstrated that the Petitioner did not handle this weapon. There was a nexus established between the Petitioner and the weapon retrieved in this case. Previously counsel Ms. Hicks from the Public Defender's Office informed the Defendant that his prints did not match the prints found on the gun.

Petitioner contends that trial counsel's omission in failing to move to suppress the weapon of a gun in this case was an error that violated his Sixth Amendment rights under the United States Constitution. The failure of counsel to move to suppress the weapon falls below a reasonable representation and denied the Petitioner the right to prove that the gun was not his

own. Counsel's omission prejudiced the Petitioner's ability to raise a viable defense and to subject the state's case to a meaningful adversarial testing. Had the defense moved to establish ownership of the weapon the facts would have come to light as to the real perpetrator in this crime.

The Petitioner contends that the outcome of this trial and sentencing would have had a different result had it not been for counsel's omissions. The Petitioner asserts that he could have been properly acquitted of these charges had trial counsel raised a viable defense by moving to suppress the evidence. The Petitioner contends that trial counsel would have been able to identify the handler and owner of the gun by the prints lifted by the FDLE.

(b) If you did not exhaust your state remedies on Ground Two, explain why:.

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Two:

GROUND THREE:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT ADEQUATE PRE-TRIAL INVESTIGATIONS AND TO RAISE A VIABLE DEFENSE.

(a) Supporting facts:

The Petitioner asserts that trial counsel was in possession of the reports of FDLE on the lab analysis of the weapon in this case. In addition, all of the affidavits and reports of witnesses were turned over to counsel once he was retained by the Petitioner's family. Trial counsel had this information in the months leading up to the sentencing date in which counsel persuaded Petitioner to make an open plea to the court on the basis that he would receive no more than twenty years.

At no time did counsel make any pre-trial motion to suppress evidence or formulated a viable defense strategy in order to defend against these charges. The actions of counsel to convince the Petitioner to take the open plea to the court was no in his best interest.

The Petitioner would argue that the omission of trial counsel to raise a viable defense represents a substantial deficient assistance under the Strickland standard. By trial counsel failing to file any pre-trial motions to contest and challenge the evidence and materials the state was using in this case caused the Petitioner to be prejudiced, causing him to enter an to a plea where he was sentenced to one hundred seventy-five years in prison.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?

[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d))(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Three:.

GROUND FOUR:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RESEARCH THE LAW OF THE TRIAL COURT'S DISCRETION TO SENTENCE THE PETITIONER AS A YOUTHFUL OFFENDER

(a) Supporting facts:

The Petitioner contends that counsel failed to research and attempt to negotiate a plea under a youthful offender sentence. Even though the Petitioner has no substantive right to a particular sentence within range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. The Petitioner has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have not right to a particular result of the sentencing process.

In the instant case, counsel clearly demonstrated on record that he did not believe his nineteen (19) year old client was eligible for sentencing under the Youthful Offender Statute. This clearly showed that counsel did not research the law in this areas.

(Counsel for the Petitioner)

> **Mr. Davis:** Your Honor, we'd be seeking - - in reviewing the PSI and talking with the State, I don't believe my client's entitled to a YO offender status.

See: Sentencing Hearing Transcripts at Page 119, Ln. 19-23.

The law that was available for counsel to research and build his argument upon as to why his nineteen (19) year old client was eligible and should be sentenced as a Youthful Offender was present law at the time of the crimes herein and the sentencing hearing.

Due to counsel's failure to adequately research the laws pertaining to the youthful offender sentencing he was instead exposed to harsher sentencing pursuant to Florida's 10/20/Life statute. The State argued during sentencing that the Petitioner was just the type of person that the legislature was envisioning when they decided to put that intent into the statute.

Had counsel researched the law properly and argued that Petitioner be sentenced to a Youthful Offender Sentence he would have found that the law applicable to his client under a youthful offender sentence would preclude him from being sentenced under the 10/20/Life statute there minimum mandatory sentencing provision of 10/20/Life statute applicable to enumerated felonies involving firearm do not supersede youthful offender sentence.

If counsel would have researched and argued for youthful offender sentencing, he would have received a sentence less onerous than the one he eventually ended up receiving.

(b) If you did not exhaust your state remedies on Ground Four, explain why:.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d))(5) is "No," explain why See (b):

(e) **Other Remedies:: Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? [X] Yes [ ] No

If your answer is "No," states which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court?

14. Have you previously filed any type of petition, application, or motion in federal court regarding the conviction that you challenge in this petition? [ ] Yes [X]No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? [ ] Yes [X] No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the grounds raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Unknown

(b) At arraignment and plea: Robert C. Davis, Jacksonville, Florida

(c) At trial: Robert C. Davis, Jacksonville, Florida

(d) At sentencing: Robert C. Davis, Jacksonville, Florida

(e) On Appeal: Carl S. McGinnes, 301 S. Monroe Street, Tallahassee, Florida 32301

(f) In any post-conviction proceeding: Public Defender's Office

(g) On appeal from any ruling against you in a post-conviction proceeding: Pro se

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? [ ] Yes [X]No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date of the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition, that challenges the judgment or sentence to be served in the future? [ ] Yes [X] No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Petitioner's Petition for Writ of Habeas Corpus § 2254 is timely filed.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244 provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest off –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, Petitioner asks that the Court grant the following relief: remand to the District Court to conduct an evidentiary hearing, order the District Court to Vacate Judgment and Sentence, grant a conditional writ.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 12-31-14 **(month, date, year).**

Executed (signed) on 12-31-14 **(date).**

Antonio Ashley
Signature of Petitioner

APPENDIX
F

FILED

Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody 2016 JAN 14 AM 9:00

United States District Court	Middle District of Florida
Name (under which you were convicted) Antwain D. Ashley	Docket or Case No.: 3:15-cv-7-J-34JRK
Place of Confinement: Columbia Correctional Institution 216 S.E. Corrections Way Lake City, Florida 32025	Prisoner No.: J34708
Petitioner (include the name under which you were convicted) Antwain D. Ashley	Respondent (authorized person having custody of Petitioner) v. Julie Jones, Sec. DOC
The Attorney General of the State of Florida: Pamela Jo Bondi	

AMENDED PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Fourth Judicial Circuit Court in and for Duval County, Florida

   (b) Criminal docket or case number: 16-2006-CF-016512-AX

2. (a) Date of the judgment of conviction: September 21, 2007

   (b) Date of Sentencing: September 21, 2007

3. Length of sentence: Count 1- 75 years, Count II – 50 years, Count III – 50 years

4. In this case you were convicted on more than one count of more than one crime.

   [ ] Yes [X] No

5. Identify all crimes of which you were convicted and sentenced in this case:

   Count I Armed Robbery
   Count II Armed Robbery
   Count III Armed Robbery

6. (a) What was your plea?

   [ ] (1) Not Guilty [ ] (3) Nolo Contendere (No Contest)
   [X] (2) Guilty [ ] 4) Insanity Plea

   (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have?

[ ] Jury [X] Judge only

7. Did you testify at the trial?

[ ] Yes [X] No

8. Did you appeal from the judgment of conviction?

[X] Yes [ ] No

9. If you did appeal, answer the following:

(a) Name of Court: First District Court of Appeal

(b) Docket or case number: 1D7-5137

(c) Result: Per curiam affirmed

(d) Date of result: March 20, 2009, Mandate April 7, 2009

(e) Citation to the case: Ashley v. State, 4 So.3d. 1222 (Fla. 1st DCA 2009)

(f) Grounds raised: Anders Brief filed

(g) Did you seek further review by a higher state court? [ ] Yes [X] No

If yes, answer the following:

(1) Name of Court: N/A

(2) Docket or case number: N/A

(3) Result: N/A

(4) Date of result: N/A

(5) Citation to the case: N/A

(6) Grounds raised: N/A

(h) Did you file a petition for certiorari in the United States Supreme Court?

[ ] Yes [X] No

If yes, answer the following:

(1) Docket or case number: N/A

(2) Result: N/A

(3) Date of result: N/A

(4) Citation to the case: N/A

10. Other than the direct appeal, have you previously filed any petitions, applications, or motions with respect to this judgment in state court?

[X] Yes [ ] No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Fourth Judicial Circuit

(2) Docket or case number: 16-2006-CF-016512-AX

(3)Date of filing: October 31, 2013

(4) Nature of the proceeding: Motion to Correct Illegal Sentence 3.800

(5) Grounds raised:

The trial court violated the defendant's Eighth Amendment right against cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions" binding on the states through the Fourteenth Amendment of the United States Constitutions secured through Article One Section Nine of the Florida Constitutions.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

[ ] Yes [X] No

(7) Result: Denied

(8) Date of Result: December 20, 2013

(b) If you filed any second petition, application, or motion, give the same information?

(1) Name of court: Fourth Judicial Circuit Court

(2) Docket or case number: 16-2006-CF-016512-AX

(3) Date of filing: June 11, 2009, amended March 24, 2010

(4) Nature of the proceeding: Motion for Postconviction Relief 3.850

(5) Grounds raised:

Trial counsel was ineffective for improperly advising the Defendant to plea out to twenty years and the Defendant was given one hundred and seventy five years, in violation of his constitutional rights under the 6th, 14th Amendments of the United States.

Trial counsel was ineffective for failing to file a pre-trial motion to suppress evidence of a gun, which was not found in the Defendant's possession, in violation of his Sixth and Fourteenth Amendments.

Constitutionally defective affidavit (testimony) of material witnesses is invalid.

Charging instrument filed in violation of constitutional mandate fails to invoke jurisdiction of trial court.

Trial counsel was ineffective for failing to conduct adequate pre-trial investigations and to raise a viable defense.

Defendant contends that his plea is involuntary based on illegal sentence and that he could not consent or plea out to an illegal sentence.

Trial counsel was ineffective for failing to research the law on the trial court's discretion to sentence the Defendant as a youthful offender.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

[X] Yes [ ] No

(7) Result: Denied

(8) Date of Result: March 5, 2013

(b) If you filed any third petition, application, or motion, give the same information?

(1) Name of court: N/A

(2) Docket or case number: N/A

(3) Date of filing: N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

to support that argument. N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

[ ] Yes [X] No

(7) Result: N/A

(8) Date of Result: N/A

(d) Did you appeal to the highest state court having jurisdiction over the action on your petition, application, or motion?

(1) First Petition [X] Yes [ ] No

(2) Second Petition [X] Yes [ ] No

(3) Third Petition [ ] Yes [ ] No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

TRIAL COUNSEL WAS INEFFECTIVE FOR IMPROPERLY ADVISING THE PETITIONER TO PLEA OUT TO TWENTY YEARS AND THE PETITIONER WAS GIVEN ONE HUNDRED AND SEVENTY FIVE YEARS, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE 6TH, 14TH AMENDMENTS OF THE UNITED STATES.

(a) Supporting facts:

The Petitioner asserts that on September 21, 2007 prior to his sentencing, he retained counsel, Mr. Davis who was retained by his family. Counsel encouraged him to make an open plea to the court, and convinced him that "he could get him a sweet deal." Counsel said that the Petitioner would get no more than twenty (20) years in prison.

The Petitioner therefore agreed to make an open plea to the court and to agree with whatever the judge's questions would be. Counsel then encouraged the Petitioner to agree with all of the judge's questions.

The Petitioner asserts that at no time did counsel properly inform him that he could receive one hundred and seventy-five years (175) by the court.

The Petitioner further states that had he known or was properly informed as to the amount of time he could have been sentence to, he would not have made the open plea to the trial court and he would have chosen to go to trial. Trial counsel told the Petitioner that the charges could give him life in prison, but they could only sentence him to twenty years.

The Petitioner asserts that had he not been misadvised by counsel relating to the sentence, he would have decided to go to trial because he had defenses he could have raised in this case. The Petitioner contends that the weapon/evidence in this case was not retrieved from him, but from another location, and the weapon was not registered in his name.

Petitioner claimed that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that Petitioner would get a sentence of no more than twenty years, in spite of the charges statutory requirements, sufficiently pled prejudice prong of ineffective assistance of counsel claim, even though Petitioner did not make a showing as to his likelihood of success at trial or on appeal. Here Petitioner specifically swears that he would not have entered a guilty plea if he had been accurately advised that the court would

sentence him to one hundred and seventy-five years. The Petitioner contends that his guilty plea was not voluntarily, knowingly, and intelligently entered due to his counsel's inaccurate advice that the Petitioner would be sentenced to 175 years in prison.

(b) If you did not exhaust your state remedies on Ground One, explain why: .

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground One:

GROUND TWO:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A PRE-TRIAL MOTION TO SUPPRESS EVIDENCE OF A GUN, WHICH WAS NOT FOUND IN THE PETITIONER'S POSSESSION, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT.

(a) Supporting facts:

The Petitioner asserts that he informed counsel that he had no knowledge of the gun/evidence which is being submitted to prove his guilt. Trial counsel, Mr. Davis was properly informed that a weapon was at the home of Abdul Bissent and there was no evidence to prove that he ever handled or owned this weapon other than the testimony of the Bissent's.

The police were acting on misinformed information that the Petitioner stayed at the home. The firearm was retrieved and tested for fingerprints by FDLE. The results of the test by FDLE demonstrated that the Petitioner did not handle this weapon. There was a nexus established between the Petitioner and the weapon retrieved in this case. Previously counsel Ms. Hicks from the Public Defender's Office informed the Defendant that his prints did not match the prints found on the gun.

Petitioner contends that trial counsel's omission in failing to move to suppress the weapon of a gun in this case was an error that violated his Sixth Amendment rights under the United States Constitution. The failure of counsel to move to suppress the weapon falls below a reasonable representation and denied the Petitioner the right to prove that the gun was not his

own. Counsel's omission prejudiced the Petitioner's ability to raise a viable defense and to subject the state's case to a meaningful adversarial testing. Had the defense moved to establish ownership of the weapon the facts would have come to light as to the real perpetrator in this crime.

The Petitioner contends that the outcome of this trial and sentencing would have had a different result had it not been for counsel's omissions. The Petitioner asserts that he could have been properly acquitted of these charges had trial counsel raised a viable defense by moving to suppress the evidence. The Petitioner contends that trial counsel would have been able to identify the handler and owner of the gun by the prints lifted by the FDLE.

(b) If you did not exhaust your state remedies on Ground Two, explain why:.

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Two:

GROUND THREE:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT ADEQUATE PRE-TRIAL INVESTIGATIONS AND TO RAISE A VIABLE DEFENSE.

(a) Supporting facts:

The Petitioner asserts that trial counsel was in possession of the reports of FDLE on the lab analysis of the weapon in this case. In addition, all of the affidavits and reports of witnesses were turned over to counsel once he was retained by the Petitioner's family. Trial counsel had this information in the months leading up to the sentencing date in which counsel persuaded Petitioner to make an open plea to the court on the basis that he would receive no more than twenty years.

At no time did counsel make any pre-trial motion to suppress evidence or formulated a viable defense strategy in order to defend against these charges. The actions of counsel to convince the Petitioner to take the open plea to the court was no in his best interest.

The Petitioner would argue that the omission of trial counsel to raise a viable defense represents a substantial deficient assistance under the Strickland standard. By trial counsel failing to file any pre-trial motions to contest and challenge the evidence and materials the state was using in this case caused the Petitioner to be prejudiced, causing him to enter an to a plea where he was sentenced to one hundred seventy-five years in prison.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?

[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d))(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Three:.

GROUND FOUR:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RESEARCH THE LAW OF THE TRIAL COURT'S DISCRETION TO SENTENCE THE PETITIONER AS A YOUTHFUL OFFENDER

(a) Supporting facts:

The Petitioner contends that counsel failed to research and attempt to negotiate a plea under a youthful offender sentence. Even though the Petitioner has no substantive right to a particular sentence within range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. The Petitioner has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have not right to a particular result of the sentencing process.

In the instant case, counsel clearly demonstrated on record that he did not believe his nineteen (19) year old client was eligible for sentencing under the Youthful Offender Statute. This clearly showed that counsel did not research the law in this areas.

(Counsel for the Petitioner)

> **Mr. Davis:** Your Honor, we'd be seeking - - in reviewing the PSI and talking with the State, I don't believe my client's entitled to a YO offender status.

See: Sentencing Hearing Transcripts at Page 119, Ln. 19-23.

The law that was available for counsel to research and build his argument upon as to why his nineteen (19) year old client was eligible and should be sentenced as a Youthful Offender was present law at the time of the crimes herein and the sentencing hearing.

Due to counsel's failure to adequately research the laws pertaining to the youthful offender sentencing he was instead exposed to harsher sentencing pursuant to Florida's 10/20/Life statute. The State argued during sentencing that the Petitioner was just the type of person that the legislature was envisioning when they decided to put that intent into the statute.

Had counsel researched the law properly and argued that Petitioner be sentenced to a Youthful Offender Sentence he would have found that the law applicable to his client under a youthful offender sentence would preclude him from being sentenced under the 10/20/Life statute there minimum mandatory sentencing provision of 10/20/Life statute applicable to enumerated felonies involving firearm do not supersede youthful offender sentence.

If counsel would have researched and argued for youthful offender sentencing, he would have received a sentence less onerous than the one he eventually ended up receiving.

(b) If you did not exhaust your state remedies on Ground Four, explain why:.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: Per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d))(5) is "No," explain why See (b):

(e) **Other Remedies:: Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Four:

GROUND FIVE:

CONSTITUTIONALLY DEFECTIVE AFFIDAVIT (TESTIMONY) OF MATERIAL WITNESS(ES) IS INVALID.

(a) Supporting facts:

It is Petitioner's contention that no oath-bearing affidavit (testimony) from material witness(es), in the instant case, exists. This fatal defect is a structural error, which not only violates Petitioner's constitutionally protected due process right, but also deprives the trial court of subject matter jurisdiction.

It is Petitioner's contention that, pursuant to the constitutional mandate buttressed by Florida Rules of Court and case law doctrine, an oath bearing affidavit (testimony) of must exist '*prior*' to serve as the basis for the magistrate to make a determination of probable cause to issue a warrant.

Petitioner asserts that no such affidavit (testimony), bearing an oath, existed in the instant case prior to the issuance of said warrant.

It is Petitioner's contention that an oath-bearing affidavit testimony from material witness(es) is an essential element of subject matter jurisdiction and in the instant case, this element is lacking.

This fatal defect parallels the '*fruit of poisonous tree*' doctrine, because it reaches not only the determination of probable cause to issue an arrest warrant, but also the judgment found to be a derivative of the defective affidavit (testimony).

Petitioner asserts that, in Florida the primary (foundational) stage of a criminal proceeding is initiated when a citizen submits an affidavit (testimony) under lawful oath. Said citizen is defined as material because he/she gives testimony going to some facts affecting the merits of the case about which no other witness might testify. Such affidavit (testimony), duly prepared serves as probable cause, and this standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty, and the State's duty to control crime. These long prevailing standards seek to safeguard citizens from rash and unreasonable interference with privacy and from unfound charges of crime.

The failure of the state to secure affidavit (testimony) from material witness(es)), and as this constitutionally defective charging instrument is the tool invoking the trial court's jurisdiction over subject matter, the trial court's judgment cannot legally stand.

It is the Defendant's contention that, the trial court's judgment, in the instant case, is predicated upon fraudulent representation, thus invalidating jurisdiction over subject matter and, as such, a manifest injustice has occurred.

Petitioner asserts that (1) there was error in that no oath-bearing affidavit (testimony) from material witness(es) existed prior to the trial court's judgment; (2) that was plain as evidenced by the absence of an oath-bearing affidavit (testimony) from material witness(es) in the record; (3) that affected his substantial rights by filing the charging instrument without the constitutionally mandated oath-bearing affidavit (testimony) from material witness(es) deprived Petitioner of due process; and (4) that affected the fundamental fairness of the proceeding by the prosecutor presenting the fraudulent charging instrument to the trial court to obtain the instant conviction.

It is Petitioner's contention that, from its inception, the trial court lacked lawful subject matter jurisdiction in the instant case, and subsequently, the trial court without legally authority to hear the case at bar.

The Petitioner avers that his constitutional right to due process of law has been violated due to a defective information.

(b) If you did not exhaust your state remedies on Ground Five, explain why: .

(c) **Direct Appeal of Ground Five:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Five:

GROUND SIX:

CHARGING INSTRUMENT FILED IN VIOLATION OF CONSTITUTIONAL MANDATE FAILS TO INVOKE JURISDICTION OF TRIAL COURT.

(a) Supporting facts:

It is Petitioner's contention that, in the instant case, the prosecutor swore, under lawful oath, that all the allegations set forth in the charging instrument was based upon facts that had been sworn to as true by material witness(es). Further, the prosecutor having foreknowledge of the applicable law, swore under lawful oath to have received oath bearing affidavit (testimony) from material witness(es) when in fact, he had not.

It is Petitioner's contention that the prosecutor is duty bound to know and follow the law applicable to the case at bar. In the instant case, the prosecutor, under lawful oath, knew that no constitutionally mandated oath bearing affidavit (testimony) from material witness(es) existed, yet knowingly presented a fraudulent charging instrument to invoke the jurisdiction of the trial court and constitutionally impermissibly applied statute to obtain the instant conviction thereby violating Petitioner's constitutionally protected due process right.

Petitioner can imagine few situations with more potential for abuse of his constitutionally protected due process rights than prosecutorial misconduct but, as in the instant case, to color testimony or even present fraud upon the court in pursuit of a conviction taints the prosecutor's good faith effort and plants a fatal defect in the trial court's judgment.

Petitioner asserts that to protect the right to fair notice guaranteed by the constitution, prosecutor, prior to filing charging instrument invoking jurisdiction of the trial court must have before him an oath bearing affidavit (testimony) from material witness(es). Rule 3.140(g), Fla. R. Crim. P. amplifies the oath required by providing:

> "An information charging the commission of a felony shall be signed by the State Attorney, or designated Assistant State Attorney, under oath stating his good faith in instituting the prosecution and certifying that he has received testimony under oath from the material witnesses for the offense..."

The oath requirement is not discretionary but mandatory, and is designed to protect the citizenry by insuring good faith in the institution of the criminal proceedings, and also reduces the risk that frivolous criminal prosecutions will be instituted.

Under constitutional and statutory provisions governing duties, the state attorney speaks and acts on behalf of the state, and must conduct prosecutions by due course of law to the end that, in a fair trial, charges against accused must be proved in a manner required by law. The tenor of case law discussing the role of prosecutions make clear that prosecutors are held to the highest standard because of their unique powers and responsibilities. The United States Supreme Court has observed that a prosecutor has responsibilities beyond that of an advocate, and had a higher duty to assure that justice is served:

> "The U.S. Attorney is the representative not of an ordinary party to a controversy but of a sovereignty whose obligations to govern impartially is as compelling as its obligations at all; and those whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done...he may prosecute with earnestness and vigor indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

Florida courts have also recognized that by the nature of their position, prosecutors direct the power of the government against an accused person, and thus, prosecutors "must be ever mindful of their awesome power and concomitant responsibility...to reflect scrupulous adherence to the highest standard of professional conduct."

Petitioner succinctly contends that, the prosecutor has jurisdiction to prosecute crimes only when she/he has received information based upon sworn testimony from a material witness. However, as in the instant case, when a charging instrument has been filed but there is no showing that the charging instrument is invalid and thus the adjudication of the trial court was improperly invoked, and Petitioner's constitutionally protected due process right has been violated.

(b) If you did not exhaust your state remedies on Ground Six, explain why: .

(c) **Direct Appeal of Ground Six:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Six:

GROUND SEVEN:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RESEARCH THE LAW ON THE TRIAL COURT'S DISCRETION TO SENTENCE THE DEFENDANT AS A YOUTHFUL OFFENDER.

(a) Supporting facts:

It is now clear that the sentencing process, as well as the trial itself, must satisfy, the requirements of the due process clause. Even though the Petitioner has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. The Petitioner has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.

> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands...Its flexibility is in its scope once it has been determined that some process is due, it is recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d. 494.

In the instant case, counsel clearly demonstrated on record that he did not believe his nineteen (19) year old client was eligible for sentencing under the youthful offender statute. This clearly showed that counsel did not research the law in this area.

(Counsel for the Defendant)

> Mr. Davis: Your Honor, we'd be seeking - - in reviewing the PSI and talking with the State, I don't believe my client's entitled to a YO offender status. (See sentencing hearing transcript at page 119, Ln. 19-23).

The law that was available for counsel to research the build his argument upon as to why his nineteen (19) year old client was eligible and should be sentenced as a Youthful Offender was present law at the time of the crimes herein and the sentencing hearing.

> A "Youthful Offender (YO) is any person who is sentenced as such by the court or is classified as such by the Department of Corrections pursuant to section 958.04. There are two ways by which a defendant can become entitled to the benefits of the YO statute. Either the trial court can sentence the defendant as a YO, or the Department of Corrections can designate a defendant who was sentenced as an adult to be a YO.
>
> Pursuant to section 958.04, F.S., the court may sentence as a YO any person:
>
> (a) Who is at lest 18 years of age or who has been transferred for prosecution to the criminal division of the circuit court pursuant to chapter 958;
>
> (b) Who is found guilty of or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime that is, under the laws of this state, a felony if the offender is younger than 21 years of age at the time sentence is imposed; and
>
> (c) Who has not previously been classified as a youthful offender under the provisions of chapter 985; however, a person who has been found guilty of a capital or life felony may not be sentenced as a YO under the Youthful Offender Act.

Further, the Petitioner has made a prima facie claim of ineffective assistance because the Defendant now alleges and demonstrates prejudice.

At the Petitioner's sentencing hearing the state was able to argue successfully that the Petitioner was exactly the type of person that the legislature was envisioning when they decided to put the intent of using firearms in the 10/20/Life statute:

(Counsel for the state)

> Ms. Trudeau: Yes sit.
> The statutory language that I want to bring up to your honor will be 775.087(2)(d), and if I may just quote it: "It is the intent of the legislature that offenders who actually possess, carry, display, use,

> threaten to use, or attempt to use firearms or destruction devices be punished to the full extent of t he law, and the minimum terms of imprisonment imposed for each qualifying felony county for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense." That is the intent of the legislature. That is the spirit of the rule of 775.

See Sentencing Hearing Transcript at pages 128-129, Ln. 16-25; 15.

> Your Honor, the state's position is that this defendant is exactly the type of person that the legislature was envisioning when they decided to put that intent into the statute. What that means for us is that yes, he's pled to three. He's facing 20 and 10, which is 40.

correct

See Sentencing Hearing Transcript at page 129, Ln. 6-12

Had counsel researched the law applicable to his young client he would have been able to rebut the state categorizing the Petitioner as the type of person to be sentenced under the 10/20/Life statute by simply bringing to the trial court's attention that the 10/20/Life statute does not superceded the youthful offender statute pursuant to the authority of *State v. Wooten*, 782 So.2d. 408 (Fla. 2nd DCA 2001) which holds in pertinent part:

> Minimum mandatory sentencing provisions of 10/20/Life statute applicable to enumerated felonies involving firearm do not supersede youthful offender sentence.

The above authorities clearly shows that it is not the intent of the legislature for an eligible youth offender to be sentenced under the 10/20/Life statues. However, it is the intent of the legislature for the trial court to exercise its discretion on whether to sentence [or] not to sentence an eligible youthful offender under the statute. Sec. 958.04, Fla. Stat. (2007).

Therefore, due to the ineffective assistance, the trial court did not have the knowledge and therefrom opportunity to consider the Petitioner under the youthful offender sentencing and a new sentencing hearing should be awarded due to the ineffective assistance of counsel.

(b) If you did not exhaust your state remedies on Ground Seven, explain why: .

(c) **Direct Appeal of Ground Seven:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

[X] Yes [ ] No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

[X] Yes [ ] No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of Motion: Motion for Postconviction 3.850

Name and location of the court where the motion or petition was filed: Fourth Judicial Circuit in and for Duval County

Docket or case number: 16-2006-CF-016512-AX

Date of the court's decision: March 5, 2013

Result: Denied

(3) Did you receive a hearing on your motion or petition?
[X] Yes [ ] No

(4) did you appeal from the denial of your motion or petition?
[X] Yes [ ] No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
[X] Yes [ ] No

(6) If your answer to question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: First District Court of Appeal

Docket or case number: 1D13-1659

Date of Court's Decision: January 28, 2014

Result: per curiam affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why See (b):

(e) **Other Remedies:** Describe any other that you have used to exhaust your state remedies on Ground Seven:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? [X] Yes [ ] No

If your answer is "No," states which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court?

14. Have you previously filed any type of petition, application, or motion in federal court regarding the conviction that you challenge in this petition? [ ] Yes [X]No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? [ ] Yes [X] No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the grounds raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Unknown

(b) At arraignment and plea: Robert C. Davis, Jacksonville, Florida

(c) At trial: Robert C. Davis, Jacksonville, Florida

(d) At sentencing: Robert C. Davis, Jacksonville, Florida

(e) On Appeal: Carl S. Mcginnes, 301 S. Monroe Street, Tallahassee, Florida 32301

(f) In any post-conviction proceeding: Public Defender's Office

(g) On appeal from any ruling against you in a post-conviction proceeding: Pro se

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? [ ] Yes [X]No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date of the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition, that challenges the judgment or sentence to be served in the future? [X] Yes [ ] No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Petitioner's Petition for Writ of Habeas Corpus § 2254 is timely filed.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244 provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest off –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, Petitioner asks that the Court grant the following relief: Grant the relief as requested.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 1-8-16 (month, date, year).

Executed (signed) on January 4, 2016 (date).

Signature of Petitioner

DEBBIE E. PITTMAN
MY COMMISSION # FF 007557
EXPIRES: April 14, 2017
Bonded Thru Budget Notary Services

APPENDIX
G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ANTWAIN D. ASHLEY,

Petitioner,

v. Case No. 3:15-cv-7-J-34JRK

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

I. Status

Petitioner Antwain D. Ashley, an inmate of the Florida penal system, initiated this action on January 5, 2015, by filing a pro se Petition for Writ of Habeas Corpus (Petition; Doc. 1) under 28 U.S.C. § 2254. He filed an Amended Petition (Doc. 8) on January 14, 2016. In the Amended Petition, Ashley challenges a 2007 state court (Duval County, Florida) judgment of conviction for armed robbery and armed burglary. Respondents have submitted a memorandum in opposition to the Amended Petition. See Respondents' Answer to Petition for Writ of Habeas Corpus (Response; Doc. 15) with exhibits (Resp. Ex.). On June 9, 2016, the Court entered an Order to Show Cause and Notice to Petitioner (Doc. 10), admonishing Ashley regarding his obligations and giving Ashley a time frame in which to submit a reply. Ashley submitted a brief in reply. See Petitioner's Response to Answer to Petition for Writ of Habeas Corpus (Reply; Doc. 16). This case is ripe for review.

II. Procedural History

On March 8, 2007, the State of Florida charged Ashley with armed robbery (counts one and two) and armed burglary (count three). See Resp. Ex. 1 at 39-40, Amended Information. On August 6, 2007, Ashley entered a guilty plea to all three charges. See Resp. Exs. 1 at 63-64; 2 at 97-105, Transcript of the Plea Proceeding (Plea Tr.). On September 21, 2007, the court sentenced Ashley to a term of imprisonment of seventy-five years for count one with a twenty-year minimum mandatory term for actual possession and discharge of a firearm; a term of imprisonment of fifty years for count two with a ten-year minimum mandatory term for actual possession of a firearm, to run consecutively to count one; and a term of imprisonment of fifty years for count three with a ten-year minimum mandatory term for actual possession of a firearm, to run consecutively to count two. See Resp. Exs. 1 at 65-72; 10 at 205-26, Transcript of the Sentencing Hearing (Sentencing Tr.).

On March 4, 2008, with the benefit of counsel, Ashley filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) (Rule 3.800(b)(2) motion). In the Rule 3.800(b)(2) motion, he requested a new sentencing hearing, at which the court could exercise its discretion as to whether to impose concurrent sentences instead of consecutive sentences. See Resp. Ex. 3 at 1-9. On April 28, 2008, the trial court denied the Rule 3.800(b)(2) motion. See id. at 10-160.

On direct appeal, Ashley, with the benefit of counsel, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). See Resp. Ex. 4. Ashley filed a pro se brief, arguing that the trial court erred when it: denied his motion to correct illegal sentence (ground one), and imposed a sentence that violated the Eighth Amendment (ground two). See Resp. Ex. 6. On February 4, 2009, the appellate court affirmed Ashley's conviction and sentence per curiam, see Ashley v. State, 4 So.3d 1222 (Fla. 1st DCA 2009); Resp. Ex. 7, and later denied his motion for rehearing on March 20, 2009, see Resp. Ex. 8. The mandate issued on April 7, 2009. See Resp. Ex. 7.

On June 11, 2009, Ashley filed a pro se motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 (Rule 3.850 motion) and an amended motion (Amended Rule 3.850 motion) on April 1, 2010. See Resp. Ex. 9 at 1-20, 49-57. In his requests for post-conviction relief, he asserted that counsel (Robert Carl Davis) was ineffective because he failed to: file a motion to suppress evidence of a gun that he was charged with possessing and firing during the commission of his crimes (ground two); conduct an adequate pretrial investigation and raise a viable defense (ground five); and research the law on the court's discretion to sentence him as a youthful offender (ground seven). Additionally, Ashley stated that counsel misadvised him that the court would sentence him to no more than twenty years of

incarceration if he entered an open plea (ground one). He also asserted that the trial court was deprived of subject matter jurisdiction because the Information was defective (grounds three and four), and his sentence was illegal because the factual basis for his plea did not support a finding that he possessed and/or used a gun during the commission of the crimes (ground six). The State responded, see id. at 45-48, 116-27, and Ashley replied, see id. at 150-51. On March 3, 2011, the Court held an evidentiary hearing, at which Davis (his former trial counsel) testified. See Resp. Ex. 10 at 243-300, Transcript of the Evidentiary Hearing (EH Tr.). On March 6, 2013, the court denied his requests for post-conviction relief. See id. at 164-226. On January 28, 2014, the appellate court affirmed the court's denial of post-conviction relief per curiam, see Ashley v. State, 132 So.3d 224 (Fla. 1st DCA 2014); Resp. Ex. 13, and the mandate issued on March 5, 2014, See Resp. Ex. 13.

During the pendency of the post-conviction proceedings, Ashley filed a pro se motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a) (Rule 3.800(a) motion) on October 31, 2013. See Resp. Ex. 14 at 1-170. The court denied the Rule 3.800(a) motion on December 26, 2013. See id. at 171-85. On June 3, 2014, the appellate court affirmed the court's denial per curiam, see Ashley v. State, 139 So.3d 890 (Fla. 1st DCA 2014);

Resp. Ex. 15, and the mandate issued on July 1, 2014, see Resp. Ex. 15.

On October 7, 2015, Ashley filed a pro se petition for writ of habeas corpus or second successive motion for post-conviction relief. See Resp. Ex. 16. The court dismissed Ashley's motion on September 26, 2017. See https://core.duvalclerk.com, case number 16-2006-CF-016512-AXXX-MA, docket entry 312.

III. One-Year Limitations Period

The Petition appears to be timely filed within the one-year limitations period. See 28 U.S.C. § 2244(d).

IV. Evidentiary Hearing

In a habeas corpus proceeding, the burden is on the petitioner to establish the need for a federal evidentiary hearing. See Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474 (2007); Jones v. Sec'y, Fla. Dep't of Corr., 834 F.3d 1299, 1318-19 (11th Cir. 2016), cert. denied, 137 S.Ct. 2245 (2017). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro, 550 U.S. at 474. The pertinent facts

of this case are fully developed in the record before the Court. Because this Court can "adequately assess [Ashley's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing will not be conducted.

V. Governing Legal Principles

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs a state prisoner's federal petition for habeas corpus. See Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 642 (11th Cir. 2016), cert. denied, 137 S.Ct. 1432 (2017). "'The purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.'" Id. (quoting Greene v. Fisher, 565 U.S. 34, 38 (2011) (quotation marks omitted)). As such, federal habeas review of final state court decisions is "'greatly circumscribed' and 'highly deferential.'" Id. (quoting Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011) (quotation marks omitted)).

The first task of the federal habeas court is to identify the last state court decision, if any, that adjudicated the claim on the merits. See Wilson v. Warden, Ga. Diagnostic Prison, 834 F.3d 1227, 1235 (11th Cir. 2016) (en banc), cert. granted, 137 S.Ct. 1203 (2017); Marshall v. Sec'y, Fla. Dep't of Corr., 828 F.3d 1277,

1285 (11th Cir. 2016). Regardless of whether the last state court provided a reasoned opinion, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Harrington v. Richter, 562 U.S. 86, 99 (2011) (citation omitted); see also Johnson v. Williams, 568 U.S. 289, 301 (2013).[1] Thus, the state court need not issue an opinion explaining its rationale in order for the state court's decision to qualify as an adjudication on the merits. See Richter, 562 U.S. at 100.

If the claim was "adjudicated on the merits" in state court, § 2254(d) bars relitigation of the claim unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Richter, 562 U.S. at 97-98. As the Eleventh Circuit has explained:

> First, § 2254(d)(1) provides for federal review for claims of state courts' erroneous legal conclusions. As explained by the Supreme Court in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000), § 2254(d)(1) consists of two distinct clauses: a

[1] The presumption is rebuttable and "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." Richter, 562 U.S. at 99-100; see also Johnson, 133 S.Ct. at 1096-97. However, "the Richter presumption is a strong one that may be rebutted only in unusual circumstances . . . ." Johnson, 568 U.S. at 302.

"contrary to" clause and an "unreasonable application" clause. The "contrary to" clause allows for relief only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Id. at 413, 120 S. Ct. at 1523 (plurality opinion). The "unreasonable application" clause allows for relief only "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id.

Second, § 2254(d)(2) provides for federal review for claims of state courts' erroneous factual determinations. Section 2254(d)(2) allows federal courts to grant relief only if the state court's denial of the petitioner's claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The Supreme Court has not yet defined § 2254(d)(2)'s "precise relationship" to § 2254(e)(1), which imposes a burden on the petitioner to rebut the state court's factual findings "by clear and convincing evidence." See Burt v. Titlow, 571 U.S. ---, ---, 134 S. Ct. 10, 15, 187 L.Ed.2d 348 (2013); accord Brumfield v. Cain, 576 U.S. ---, ---, 135 S. Ct. 2269, 2282, 192 L.Ed.2d 356 (2015). Whatever that "precise relationship" may be, "'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'"[2] Titlow, 571 U.S. at ---, 134 S. Ct. at 15 (quoting Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

---

[2] The Eleventh Circuit has described the interaction between § 2254(d)(2) and § 2254(e)(1) as "somewhat murky." Clark v. Att'y Gen., Fla., 821 F.3d 1270, 1286 n.3 (11th Cir. 2016), cert. denied, 137 S.Ct. 1103 (2017).

Tharpe v. Warden, 834 F.3d 1323, 1337 (11th Cir. 2016), cert. denied, 137 S.Ct. 2298 (2017); see also Daniel v. Comm'r, Ala. Dep't of Corr., 822 F.3d 1248, 1259 (11th Cir. 2016). Also, deferential review under § 2254(d) generally is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. 170, 182 (2011) (stating the language in § 2254(d)(1)'s "requires an examination of the state-court decision at the time it was made"); Landers v. Warden, Att'y Gen. of Ala., 776 F.3d 1288, 1295 (11th Cir. 2015) (regarding § 2254(d)(2)).

Where the state court's adjudication on the merits is "'unaccompanied by an explanation,' a petitioner's burden under section 2254(d) is to 'show[] there was no reasonable basis for the state court to deny relief.'" Wilson, 834 F.3d at 1235 (quoting Richter, 562 U.S. at 98). Thus, "a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." Richter, 562 U.S. at 102; see also Wilson, 834 F.3d at 1235. To determine which theories could have supported the state appellate court's decision, the federal habeas court may look to a state trial court's previous opinion as one example of a reasonable application of law or determination of fact. Wilson, 834 F.3d at

1239; see Butts v. GDCP Warden, 850 F.3d 1201, 1204 (11th Cir. 2017), petition for cert. filed, No. 17-512 (Sept. 29, 2017).[3] However, in Wilson, the en banc Eleventh Circuit stated that the federal habeas court is not limited to assessing the reasoning of the lower court. 834 F.3d at 1239. As such,

> even when the opinion of a lower state court contains flawed reasoning, [AEDPA] requires that [the federal court] give the last state court to adjudicate the prisoner's claim on the merits "the benefit of the doubt," Renico,[4] 559 U.S. at 773, 130 S.Ct. 1855 (quoting Visciotti,[5] 537 U.S. at 24, 123 S.Ct. 357), and presume that it "follow[ed] the law," Donald,[6] 135 S.Ct. at 1376 (quoting Visciotti, 537 U.S. at 24, 123 S.Ct. 357).

Id. at 1238.

Thus, "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 134 S.Ct. 10, 16 (2013). "Federal courts may grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'" Tharpe, 834 F.3d at 1338

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[3] Although the United States Supreme Court has granted Wilson's petition for certiorari, the "en banc decision in Wilson remains the law of the [Eleventh Circuit] unless and until the Supreme Court overrules it." Butts, 850 F.3d at 1205 n.2.

[4] Renico v. Lett, 559 U.S. 766 (2010).

[5] Woodford v. Visciotti, 537 U.S. 19 (2002).

[6] Woods v. Donald, 135 U.S. 1372 (2015).

(quoting Richter, 562 U.S. at 102-03). "This standard is 'meant to be' a difficult one to meet." Rimmer v. Sec'y, Fla. Dep't of Corr., 864 F.3d 1261, 1274 (11th Cir. 2017) (quoting Richter, 562 U.S. at 102). Thus, to the extent that Ashley's claims were adjudicated on the merits in the state courts, they must be evaluated under 28 U.S.C. § 2254(d).

B. Ineffective Assistance of Counsel

"The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (per curiam) (citing Wiggins v. Smith, 539 U.S. 510, 521 (2003), and Strickland v. Washington, 466 U.S. 668, 687 (1984)).

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." [Strickland,] 466 U.S. at 688, 104 S.Ct. 2052. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. Id., at 689, 104 S.Ct. 2052. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., at 687, 104 S.Ct. 2052.
>
> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

> different.[7] A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.

Richter, 562 U.S. at 104. The Eleventh Circuit has recognized "the absence of any iron-clad rule requiring a court to tackle one prong of the Strickland test before the other." Ward v. Hall, 592 F.3d 1144, 1163 (11th Cir. 2010). Since both prongs of the two-part Strickland test must be satisfied to show a Sixth Amendment violation, "a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa." Id. (citing Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)). As stated in Strickland: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

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[7] In the context of an ineffective assistance challenge to the voluntariness of a guilty or no contest plea, a petitioner 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." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see Lynch v. Sec'y, Fla. Dep't of Corr., 776 F.3d 1209, 1218 (11th Cir. 2015) (citation omitted) (stating that, to succeed on a claim that counsel was ineffective because he advised petitioner to plead guilty, petitioner "must prove that: (1) counsel's advice was deficient; and (2) 'but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial'"), cert. denied, 136 S.Ct. 798 (2016).

A state court's adjudication of an ineffectiveness claim is accorded great deference.

> "[T]he standard for judging counsel's representation is a most deferential one." Richter, - U.S. at -, 131 S.Ct. at 788. But "[e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." Id. (citations and quotation marks omitted). "The question is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable - a substantially higher threshold." Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009) (quotation marks omitted). If there is "any reasonable argument that counsel satisfied Strickland's deferential standard," then a federal court may not disturb a state-court decision denying the claim. Richter, - U.S. at -, 131 S.Ct. at 788.

Hittson v. GDCP Warden, 759 F.3d 1210, 1248 (11th Cir. 2014), cert. denied, 135 S.Ct. 2126 (2015); Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). "In addition to the deference to counsel's performance mandated by Strickland, the AEDPA adds another layer of deference--this one to a state court's decision--when we are considering whether to grant federal habeas relief from a state court's decision." Rutherford v. Crosby, 385 F.3d 1300, 1309 (11th Cir. 2004). As such, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

VI. Findings of Fact and Conclusions of Law

A. Ground One

As ground one, Ashley asserts that counsel was ineffective because he misadvised him that the court would sentence him to no more than twenty years of incarceration if he entered an open plea. See Amended Petition at 6-7; Reply at 2-3. He raised the claim in his Rule 3.850 motion in state court. See Resp. Ex. 9 at 2-6. The court held an evidentiary hearing, at which Davis testified. Identifying the two-prong Strickland ineffectiveness test and Hill v. Lockhart as the controlling law, the post-conviction court ultimately denied the Rule 3.850 motion with respect to the claim, stating in pertinent part:

> With regard to the claims of ineffective assistance of counsel that were argued during the March 3, 2011 evidentiary hearing, this Court finds that the testimony given by Defendant's trial counsel, Robert Carl Davis, Esquire, is both more credible and more persuasive than Defendant's sworn allegations in the instant Motion. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). As such, this Court accepts his testimony, notes that he has been practicing as an attorney in good standing with the Florida Bar since 2003, and finds that he functioned as "reasonably effective counsel" in his investigation and preparation of the defense in the instant case. See Coleman, 718 So.2d at 829.[8] In addition, this Court finds the trial decisions made by Mr. Davis that are currently under attack in the instant Motion constituted sound trial strategy by a seasoned defense attorney.

[8] Coleman v. State, 718 So.2d 827 (Fla. 4th DCA 1998).

See Songer v. State, 419 So.2d 1044 (Fla. 1982); Gonzalez v. State, 579 So.2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.") Having established the preliminary findings with regard to the evidentiary hearing, this Court will now address the merits of Defendant's ineffective assistance of counsel claims.

Ground One

In Ground One, Defendant alleges counsel was ineffective for improperly advising him to openly plead to twenty (20) years, when he was actually sentenced to 175 years incarceration. Defendant further alleges counsel told him he "would get no more than twenty (20) years in prison," and never "properly inform[ed] him that he could have received one hundred and seventy-five years (175) by [sic] the court." (Def.'s Mot. 3.) Defendant asserts that if he had known the maximum amount of time to which he could have been sentenced, he would not have pled guilty and would have, instead, proceeded to trial. In this respect, Defendant also alleges his plea was not voluntarily, knowingly, and intelligently entered due to counsel's alleged misadvice.

Assuming arguendo counsel actually advised Defendant that he "would get no more than twenty (20) years in prison," such claim fails for lack of prejudice. This Court first looks to Defendant's sworn answers during the plea colloquy. See Stano v. State, 520 So.2d 278, 280 (Fla. 1988) (holding that a defendant may not seek to go behind his sworn testimony at a plea hearing in a postconviction motion); Bir v. State, 493 So.2d 55, 56 (Fla. 1st DCA 1986) (same); Dean v. State, 580 So.2d 808, 810 (Fla. 3d DCA 1991)(same); see also Iacono v. State, 930 So.2d 829, 831 (Fla. 4th DCA 2006) ("A defendant is not entitled to rely on an attorney's advice to commit perjury above the solemn oath that the defendant makes to the court to tell the truth."). At the plea hearing, the judge fully advised Defendant

that he faced a maximum possible sentence of life on each count with which he was charged, and that he faced a twenty-year minimum mandatory term on Count One and two ten-year minimum mandatory terms on Counts Two and Three. (Ex. G at 5, 6-7.)[9] The judge also informed Defendant that by entering his pleas, he was forfeiting certain constitutional rights. (Ex. G at 6.) Defendant testified that he had gone as far as the 11th grade in school, that he could read and write, that he was not under the influence of alcohol or any other drug or medication that could affect his ability to understand what was going on around him, and that he in fact understood everything the judge had asked him. (Ex. G at 5-7.) Defendant acknowledged having read, understood, and signed a written Plea of Guilty form. (Ex. G at 6.) Defendant further testified that he had reviewed the form with his attorney prior to signing it, and that his attorney had answered all of his questions. (Ex. G at 6.) Indeed, Defendant told the judge he had given his attorney permission to enter the guilty plea on his behalf, (Ex. G at 5), and defense counsel advised the judge that he had discussed the plea with Defendant at length on more than one occasion. (Ex. G at 8.) Thereafter, the judge properly accepted Defendant's plea as knowing, intelligent and voluntary. (Ex. G at 8-9.)

Second, Defendant signed a detailed Plea of Guilty Form. (Ex. A.) That form clearly indicates that Defendant "freely and voluntarily entered [his] plea of guilty," that he "ha[d] been advised of all direct consequences of the sentences which may be imposed," that he "ha[d] not been offered any hope of reward, better treatment, or certain type of sentence as an inducement to enter [his] plea," that he "ha[d] not been promised by anyone, including [his] attorney, that [he] would actually serve any less time than that set forth [in the agreement]," and that he

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[9] See Plea Tr.

> "ha[d] not been threatened, coerced, or intimidated by any person, including [his] attorney, in any way in order to get [him] to enter [his] plea." (Ex. A.)
>
> Therefore, Defendant's claims that counsel was ineffective for improperly advising him to openly plead to twenty (20) years, and that his plea was not voluntarily, knowingly, and intelligently entered as a result of counsel's alleged misadvice, are refuted by the record. See Stano, 520 So.2d at 280; Bir, 493 So.2d at 56; Dean, 580 So.2d at 810; see also Iacono, 930 So.2d at 831. Further, given Defendant's signed Plea of Guilty form, his sworn testimony during the plea colloquy, and the totality of the circumstances of his case, there is no reasonable probability that he would have insisted on going to trial. See Grosvenor, 874 So.2d at 1181-82.[10] Thus, Defendant has failed to demonstrate prejudice and Ground One is denied.

Resp. Ex. 10 at 170-73. On appeal, Ashley filed a pro se initial brief, see Resp. Ex. 11 at 3-6; the State filed an answer brief, see Resp. Ex. 12 at 18-25; and the appellate court affirmed the court's denial of post-conviction relief per curiam, see Resp. Ex. 13.

In its appellate brief, the State addressed the claim on the merits, see Resp. Ex. 12 at 19-25, and therefore, the appellate court may have affirmed Ashley's conviction based on the State's argument. If the appellate court addressed the merits, the state court's adjudication of this claim is entitled to deference under AEDPA. After a review of the record and the applicable law, the

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[10] Grosvenor v. State, 874 So.2d 1176 (Fla. 2004).

Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law and did not involve an unreasonable application of clearly established federal law. Nor was the state court's adjudication based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, Ashley is not entitled to relief on the basis of this claim.

Moreover, even assuming the state appellate court's adjudication of the claim is not entitled to deference, Ashley's claim, nevertheless, is without merit. The United States Supreme Court has determined that "the representations of the defendant ... [at a plea proceeding] as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). The Court stated:

> Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

Lee v. United States, 137 S.Ct 1958, 1967 (2017). Moreover, "[a] reviewing federal court may set aside a state court guilty plea only for failure to satisfy due process: If a defendant understands the charges against him, understands the consequences of a guilty

plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea ... will be upheld on federal review." Stano v. Dugger, 921 F.2d 1125, 1141 (11th Cir. 1991). On this record, Ashley has failed to carry his burden of showing that his counsel's representation fell outside that range of reasonably professional assistance.

At the plea hearing, counsel advised the court that Ashley "is going to be entering a plea straight up to the Court[]" as to all three counts. Plea Tr. at 100. The following colloquy ensued.

> THE COURT: Did you hear the plea your attorney just entered on your behalf?
>
> [ASHLEY]: Yes, sir.
>
> THE COURT: Did he have your permission to do that?
>
> [ASHLEY]: Yes, sir.
>
> THE COURT: Did you tell him he could do that because you are guilty?
>
> [ASHLEY]: Yes, sir.
>
> THE COURT: Do you understand that you face a maximum sentence of life on each of the counts with which you are charged?
>
> [ASHLEY]: Yes, sir.
>
> [PROSECUTOR]: And, Judge, if I may, on Counts 2 and 3 there is a ten-year minimum mandatory, and on Count 1 there is a 20-year minimum mandatory.
>
> THE COURT: You understand your minimum sentence is 20 years?
>
> [ASHLEY]: Yes, sir.

. . . .

THE COURT: Do you understand that there is no parole in Florida and that if you are sentenced to life in prison on any or all of these counts, you will spend the rest of your life locked up?

[ASHLEY]: Yes, sir.

THE COURT: Do you understand the minimum sentences on each count are day-for-day minimum sentences and that the very least amount of time that you would serve would be an actual term of 20 years?

[ASHLEY]: Yes, sir.

. . . .

THE COURT: Have you had enough time to talk to your lawyer and to think about this?

[ASHLEY]: Yes, sir.

[DEFENSE COUNSEL]: Your Honor, for purposes of the record, because of the early findings of Dr. Miller, my client does suffer from a diminished capacity and does not comprehend the way a normal 20-year-old would. So we have gone and spent, to an extensive degree, to make sure he completely understands what's going on before going forward.

THE COURT: How much time would you estimate you've spent discussing the plea with him?

[ASHLEY]: On two, possibly three occasions, at least two to three hours --

THE COURT: All right.

[ASHLEY]: -- maybe more.

Id. at 101-04.

At the evidentiary hearing, Davis testified that he discussed with Ashley whether he wanted to proceed to trial on four or five separate occasions, and Ashley ultimately decided that he did not want to go to trial. See EH Tr. at 268. Davis stated:

> I can't even count the number of times I went to the jail and discussed his case with him, because he had copies of all of his transcripts, all of the discovery, and we went over it time and time again, so that he knew inherently what the pitfalls were in his case.
>
> One of the victims he worked with. So identity wasn't an issue. When the police were looking for him, one of the witnesses that identified him was a family member.

Id. at 269. Davis testified that Ashley "made it inherently clear that he in no way, shape, or form, wanted to go to trial." Id. at 264.

After the state court evidentiary hearing, the circuit court resolved the credibility issue in favor of believing counsel's testimony over Ashley's sworn allegations in his Rule 3.850 motion. See Resp. Ex. 10 at 170-71 (stating "the testimony given by Defendant's trial counsel, Robert Carl Davis, Esquire, is both more credible and more persuasive than Defendant's sworn allegations in the instant Motion."). The Court notes that credibility determinations are questions of fact. See Martin v. Kemp, 760 F.2d 1244, 1247 (11th Cir. 1985) (per curiam) (finding that factual issues include basic, primary, or historical facts, such as external events and credibility determinations). Here, Ashley has

not rebutted the trial court's credibility finding by clear and convincing evidence. See Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Given the trial court's credibility determination, Ashley's claim is wholly unsupported, and therefore must fail.

Even assuming arguendo deficient performance by defense counsel, Ashley has not shown any resulting prejudice. He has not shown a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. At the plea hearing, Ashley acknowledged that he pled guilty because he was in fact guilty of the charges. See Plea Tr. at 101. Additionally, the State's evidence against him was substantial. The court found from the arrest affidavit that there was a factual basis for the plea. See id. at 105. If Ashley had proceeded to trial, and the jury had found him guilty of the offenses, he would have faced possible terms of life imprisonment. See id. at 101. Notably, the court informed him of the severe sentences he faced, and he acknowledged that he understood. See id. at 101-04. Accordingly, Ashley is not entitled to federal habeas relief on ground one.

B. Ground Two

As ground two, Ashley asserts that counsel was ineffective because he failed to file a motion to suppress evidence of a firearm that he was charged with possessing and firing during the commission of the crimes. See Amended Petition at 8-9; Reply at 3-

4. He raised the claim in his Rule 3.850 motion in state court. See Resp. Ex. 9 at 7-9. After an evidentiary hearing, the post-conviction court ultimately denied the Rule 3.850 motion with respect to the claim, stating in pertinent part:

> In Ground Two, Defendant alleges counsel was ineffective for failing to file a motion to suppress evidence of a gun that he was charged with possessing and firing during the commission of his crimes. Defendant asserts counsel was properly informed a weapon was at the home of Abdul Bissent, but that, other than Mr. Bissent's testimony, there was no evidence to prove Defendant had ever handled or owned this gun. Specifically, Defendant argues tests conducted by the Florida Department of Law Enforcement ("FDLE") demonstrate that Defendant did not handle the gun because his fingerprints did not match those found on the gun. But for counsel's alleged failure to file a motion to suppress, Defendant avers he would not have pled guilty.
>
> Initially, this Court notes that, to the extent Defendant is challenging the sufficiency of the evidence, he may not do so in a motion for postconviction relief. Betts v. State, 792 So.2d 589 (Fla. 1st DCA 2001); Jackson v. State, 640 So.2d 1173 (Fla. 2d DCA 1994). As for the merits of Defendant's claims, at the March 3, 2011 evidentiary hearing, Mr. Davis, Esq., testified that he made the strategic choice not to file a motion to suppress the gun.[11] Specifically, Mr. Davis said there were State witnesses, including some members of Defendant's own family, who, even absent the evidence of the gun, would have identified Defendant as the robber.[12] Mr. Davis stated that if he had filed a motion to suppress, these witnesses

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[11] See EH Tr. at 263-66, 270.

[12] See EH Tr. at 265.

> would have taken the stand and it would have been "troubling" for Defendant's case.[13] Further, Mr. Davis stated that Defendant's choice to openly plead guilty added to his decision not to file a motion to suppress.[14] Based on such testimony, this Court finds counsel's failure to file a motion to suppress the gun constituted proper trial strategy. See Chavez v. State, 12 So.3d 199, 207 (Fla. 2009) (finding a strategic decision by counsel does not "constitute ineffective assistance if alternate courses of action have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"). Thus, counsel was not deficient and Ground Two is denied.

Resp. Ex. 10 at 173-74. On appeal, Ashley filed a pro se brief, see Resp. Ex. 11 at 6-8; the State filed an answer brief, see Resp. Ex. 12 at 25-30; and the appellate court affirmed the court's denial of post-conviction relief per curiam, see Resp. Ex. 13.

In its appellate brief, the State addressed the claim on the merits, see Resp. Ex. 12 at 26-30, and therefore, the appellate court may have affirmed Ashley's conviction based on the State's argument. If the appellate court addressed the merits, the state court's adjudication of this claim is entitled to deference under AEDPA. After a review of the record and the applicable law, the Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law and did not involve an unreasonable application of clearly established federal

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[13] See EH Tr. at 275-76.

[14] See EH Tr. at 266, 275.

law. Nor was the state court's adjudication based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, Ashley is not entitled to relief on the basis of this claim.

Moreover, even assuming the state appellate court's adjudication of the claim is not entitled to deference, Ashley's claim still is without merit. The record supports the post-conviction court's conclusion that counsel's decision not to file a motion to suppress the gun constituted reasonable trial strategy. After an evidentiary hearing, the circuit court resolved the credibility issue in favor of believing counsel's testimony over Ashley's sworn allegations. See Resp. Ex. 10 at 170-71. Given the trial court's credibility determination, Ashley's claim is wholly unsupported, and therefore must fail.

In evaluating the performance prong of the Strickland ineffectiveness inquiry, there is a strong presumption in favor of competence. See Anderson v. Sec'y, Fla. Dep't of Corr., 752 F.3d 881, 904 (11th Cir. 2014). The inquiry is "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. "[H]indsight is discounted by pegging adequacy to 'counsel's perspective at the time' . . . and by giving a 'heavy measure of deference to counsel's judgments.'" Rompilla v. Beard, 545 U.S. 374, 381 (2005). Thus, Ashley must establish that no

competent attorney would have taken the action that counsel, here, chose.

Notably, the test for ineffectiveness is neither whether counsel could have done more nor whether the best criminal defense attorneys might have done more; in retrospect, one may always identify shortcomings. Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (stating that "perfection is not the standard of effective assistance") (quotations omitted). Instead, the test is whether what counsel did was within the wide range of reasonable professional assistance. Ward, 592 F.3d at 1164 (quotations and citation omitted); Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) ("The question is whether some reasonable lawyer at the trial could have acted as defense counsel acted in the trial at issue and not what 'most good lawyers' would have done.") (citation omitted).

On this record, Ashley has failed to carry his burden of showing that his counsel's representation fell outside that range of reasonably professional assistance. Even assuming arguendo deficient performance by defense counsel, Ashley has not shown prejudice. He has not shown a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. Ashley's ineffectiveness claim is without merit since he has shown neither

deficient performance nor resulting prejudice. Accordingly, Ashley is not entitled to federal habeas relief on ground two.

C. Ground Three

As ground three, Ashley asserts that counsel was ineffective because he failed to conduct an adequate pretrial investigation and raise a viable defense. See Amended Petition at 10-11; Reply at 4-6. He raised the claim in his Rule 3.850 motion in state court. See Resp. Ex. 9 at 16-17. After an evidentiary hearing, the post-conviction court ultimately denied the Rule 3.850 motion with respect to the claim, stating in pertinent part:

> In Ground Five, Defendant alleges counsel was ineffective for failing to conduct an adequate pre-trial investigation and to raise a viable defense. Specifically, Defendant asserts counsel was ineffective for failing to develop any defenses premised upon the suppression of the firearm evidence. Defendant argues that, as a result of counsel's alleged ineffective assistance, he entered an ill-advised guilty plea.
>
> Again, this Court notes that, to the extent Defendant is challenging the sufficiency of the evidence, he may not do so in a motion for postconviction relief. Betts, 792 So.2d 589;[15] Jackson, 640 So.2d 1173.[16] Moreover, as detailed in Grounds One and Two, above, Defendant's open plea of guilty was knowingly, intelligently, and voluntarily entered, and counsel's decision not to pursue a motion to suppress the gun was a strategic one. Thus, Defendant has failed to demonstrate both deficiency on the part of counsel for

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[15] Betts v. State, 792 So.2d 589 (Fla. 1st DCA 2001).

[16] Jackson v. State, 640 So.2d 1173 (Fla. 2nd DCA 1994).

> failing to pursue the suppression of the firearm evidence, and resulting prejudice. Accordingly, Ground Five is denied.

Resp. Ex. 10 at 174-75. On appeal, Ashley filed a pro se brief, see Resp. Ex. 11 at 12-13; the State filed an answer brief, see Resp. Ex. 12 at 32-36; and the appellate court affirmed the court's denial of post-conviction relief per curiam, see Resp. Ex. 13.

In its appellate brief, the State addressed the claim on the merits, see Resp. Ex. 12 at 32-36, and therefore, the appellate court may have affirmed Ashley's conviction based on the State's argument. If the appellate court addressed the merits, the state court's adjudication of this claim is entitled to deference under AEDPA. After a review of the record and the applicable law, the Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law and did not involve an unreasonable application of clearly established federal law. Nor was the state court's adjudication based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, Ashley is not entitled to relief on the basis of this claim.

Moreover, even assuming the state appellate court's adjudication of the claim is not entitled to deference, Ashley's claim, nevertheless, is without merit. The record supports the post-conviction court's conclusion that Ashley failed to demonstrate both deficiency on the part of counsel and resulting

prejudice. On this record, Ashley has failed to carry his burden of showing that his counsel's representation fell outside that range of reasonably professional assistance. According to Davis, he deposed numerous witnesses, see EH Tr. at 264, reviewed discovery with Ashley on multiple occasions, see id. at 269, and "was very worried" that if he "kept digging" and continued with pretrial investigations, "it might actually get worse" for Ashley, id. at 278. Davis testified that there was some DNA evidence that would inculpate Ashley and expose him to "additional problems." Id. Given the trial court's credibility determination in believing counsel's testimony over Ashley's sworn allegations, Ashley's claim is wholly unsupported, and therefore must fail.

Even assuming arguendo deficient performance by defense counsel, Ashley has not shown any resulting prejudice. Ashley's ineffectiveness claim is without merit since he has shown neither deficient performance nor resulting prejudice. Accordingly, Ashley is not entitled to federal habeas relief on ground three.

D. Grounds Four and Seven

As grounds four and seven, Ashley asserts that counsel was ineffective because he failed to research the law relating to the trial court's discretion to sentence Ashley as a youthful offender. See Amended Petition at 12-13, 21-23. He raised the claims in his Amended Rule 3.850 motion, as ground seven, in state court. See Resp. Ex. 9 at 50-56. After an evidentiary hearing, the post-

conviction court ultimately denied the Amended Rule 3.850 motion with respect to the claim, stating in pertinent part:

> Defendant alleges counsel was ineffective for failing to research the law on the court's discretion to sentence Defendant as a Youthful Offender. This Court construes Defendant's claim as also alleging that he would have qualified for Youthful Offender sentencing, and that he was prejudiced as a result of counsel's failure to investigate this sentencing possibility.
>
> Defendant's claim fails because he cannot demonstrate prejudice. At the sentencing hearing, defense counsel advised the judge that, after reviewing the Pre-Sentence Investigation Report and conferring with the State, he did not believe Defendant was entitled to be sentenced as a Youthful Offender because he had already received a Youthful Offender adjudication. (Ex. I at 119, 122.) See § 958.04(1)(c), Fla. Stat (2006).[17]

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[17] Florida Statutes section 958.04(1) provides that the court may sentence as a youthful offender any person:

> (a) Who is at least 18 years of age or who has been transferred for prosecution to the criminal division of the circuit court pursuant to chapter 985;
>
> (b) Who is found guilty of or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime that is, under the laws of this state, a felony if the offender is younger than 21 years of age at the time sentence is imposed; and
>
> (c) Who has not previously been classified as a youthful offender under the provisions of this act; however, a person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act.

> Yet, defense counsel argued that if Defendant were eligible for a Youthful Offender sentence, he would "be a viable candidate for it because in a youth camp he can get the direction and guidance that he needs rather than just being incarcerated in an adult prison." (Ex. I at 121-22.) In fact, prior to imposition of sentence, the Assistant State Attorney advised the judge that it did appear Defendant was eligible for Youthful Offender sentencing because the Assistant State Attorney was not aware of any prior instances where Defendant was adjudicated and sentenced as a Youthful Offender. (Ex. I at 132-33.) The Assistant State Attorney also advised that Youthful Offender sentencing was purely within the judge's discretion. (Ex. I at 132.) Therefore, the judge was well aware of the possibility of sentencing Defendant as a Youthful Offender, and that such [a] sentencing decision was purely within his discretion. As such, Defendant has failed to establish prejudice as required by Strickland. Accordingly, Ground Seven is denied.

Resp. Ex. 10 at 175-76. On appeal, Ashley filed a pro se brief, see Resp. Ex. 11 at 14-17; the State filed an answer brief, see Resp. Ex. 12 at 39-44; and the appellate court affirmed the court's denial of post-conviction relief per curiam, see Resp. Ex. 13.

In its appellate brief, the State addressed the claims on the merits, see Resp. Ex. 12 at 40-44, and therefore, the appellate court may have affirmed Ashley's conviction based on the State's argument. If the appellate court addressed the merits, the state court's adjudication of this claims is entitled to deference under AEDPA. After a review of the record and the applicable law, the

Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law and did not involve an unreasonable application of clearly established federal law. Nor was the state court's adjudication based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, Ashley is not entitled to relief on the basis of these claims.

Moreover, even assuming the state appellate court's adjudication of the claims is not entitled to deference, Ashley's claims, nevertheless, are without merit. On this record, Ashley has failed to carry his burden of showing that his counsel's representation fell outside that range of reasonably professional assistance. At sentencing, Davis stated, "I don't believe my client's entitled to a YO [(youthful offender)] status." Sentencing Tr. at 209. Nevertheless, he argued that the mitigation presented by Dr. Miller supported a downward departure sentence. See id. at 209-10. Davis explained:

> [W]ere [Ashley] eligible for a YO [sentence], I would recommend that he would be a viable candidate for it because in a youth camp he can get the direction and guidance that he needs rather than just being incarcerated in an adult prison. However, in reviewing his PSI, I don't believe he might be eligible for that because I believe he received a youthful offender adjudication.

Id. at 211-12. The State responded:

> Based on my review of his record, I do not see any prior instances where he was

> specifically adjudicated and sentenced as a YO. I do see that he has two prior sentences as a juvenile, but not specifically YO. So to err on the side of caution, the State would inform Your Honor that it does appear that the defendant is eligible for YO. However, based on our prior arguments, the State would ask Your Honor to instead sentence him according to the 10-20-Life.

Id. at 222-23.

At the state court evidentiary hearing, Davis described the sidebar discussion he had with Judge Merrett and Ms. Trudeau, the Assistant State Attorney.

> If you look at the transcript, you'll see where we approached the bench sidebar. And, at that point in time, we were in Courtroom 2, if I'm not mistaken. We approached sidebar. Judge Merrett came down off the bench, and sat literally on the step, and we had one of the Florida Rules of Criminal Procedure, at that time, I believe, it was 2007, and we sat there, and we literally thumbed through the statute sidebar, to determine whether or not Mr. Ashley was, in fact, eligible, because this was a 10-20-Life case, and it was one of the ones that was first to be filed using Mr. Ashley under 10-20-Life, which is where the confusion, of whether or not he would or would not be eligible.
>
> And we sat there, and we went through this four or five different points, to determine whether or not a youthful offender sanction [sic] would be appropriate in Mr. Ashley's case, specifically, was this a single and isolated case. And the Judge sat there and said, "Well, we got three separate incidents on three separate dates, so how do you view that he's going to be eligible as a youthful offender, being we have three separate dates? And if you're going to argue for a youthful offender, then you have to show remorse."

> And, he goes, "Every time I've seen him in court here, I haven't seen a whole lot of remorse, because he doesn't act like it. The way he's been acting, I don't know as though he would."
>
> And that's when I said, "Your Honor, that's the whole reason why I brought in Dr. Miller, and I presented testimony as to mitigation. I brought in his school counselor to show that he doesn't completely understand, comprehend, the same way that a lot of other people do, and he doesn't completely understand the ramifications of, how do I want to say it, to be held accountable for his actions. He doesn't comprehend it the way you and I may."
>
> And I went line by line, and that's the whole reason for having this guidance counselor in school, and his [sic] Dr. Miller, and having all the reports, and going to the extent and length that I did.
>
> . . . .
>
> And that is what I did actually sidebar with the Judge when Ms. Trudeau came back and said, "Judge, he may, in fact, be eligible." That was the whole purpose. We were up there for an extensive period of time, literally, going line by line through the Florida Rules of Criminal Procedures [sic], to determine was he eligible, and going through the components of the youthful offender, and that was not on the record.

Id. at 260-63. According to Davis, the trial judge was fully aware of the criteria necessary for a youthful offender sentence. See id. at 286-87. Given the trial court's credibility determination in believing counsel's testimony over Ashley's sworn allegations, Ashley's claims are wholly unsupported, and therefore must fail.

Assuming arguendo deficient performance by defense counsel, Ashley has not shown any resulting prejudice. He has not shown a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. His ineffectiveness claims are without merit since he has shown neither deficient performance nor resulting prejudice. Accordingly, Ashley is not entitled to federal habeas relief on grounds four and seven.

E. Grounds Five and Six

As grounds five and six, Ashley asserts that the trial court lacked subject matter jurisdiction because the Information was not based on sworn testimony of a material witness. See Amended Petition at 15-19. Respondents assert, see Response at 56, and this Court agrees, that grounds five and six do not relate back to any of the claims in the original Petition,[18] and therefore are due to be dismissed as untimely. Nevertheless, for purposes of the foregoing analysis, this Court will assume Ashley timely filed the claims.

Ashley raised the claims in his Rule 3.850 motion in state court. See Resp. Ex. 9 at 9-15. The post-conviction court denied the Rule 3.850 motion with respect to the claims, stating in pertinent part:

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[18] See Mayle v. Felix, 545 U.S. 644 (2005)

In Grounds Three and Four, Defendant alleges the Information was defective, thereby divesting this Court of subject matter jurisdiction. As to Ground Three, Defendant specifically alleges that "no oath-bearing affidavit (testimony) from material witness(es)" exists. According to Defendant, this fatal defect deprived the trial court of subject matter jurisdiction over his case. As to Ground Four, Defendant alleges the charging instrument was filed in violation of constitutional mandate and, therefore, failed to invoke the jurisdiction of the court. Specifically, Defendant alleges the prosecutor knew that "no oath bearing affidavit (testimony) from material witness(es) existed, [and] yet knowingly presented a fraudulent charging instrument to invoke the jurisdiction of the trial court." (Def.'s Mot. 13.)

Because these two grounds for relief are related, this Court will consider them together. Additionally, this Court notes that Defendant's allegations as to Ground Three appear to allege the lack of a sworn affidavit from a material witness with regard to both the arrest warrant and the Information. Out of an abundance of caution, this Court will address both matters.

As to Defendant's allegations in Ground Three regarding the lack of a sworn affidavit for the arrest warrant, such claims are refuted by the record. Prior to issuance of the arrest warrant in the instant case, Detective T.W. Wildes tendered an affidavit for arrest warrant, in which he made sworn statements regarding the witness' statements. (Ex. D.)[19] Based on this affidavit, the arrest warrant was subsequently issued. (Ex. E.)[20] Thus, the allegations in Ground Three regarding the lack of a sworn affidavit for the arrest warrant are denied.

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[19] See Resp. Ex. 10 at 190.

[20] See Resp. Ex. 10 at 191.

As to the allegations in Grounds Three and Four regarding the lack of a sworn affidavit for the Information and the resulting jurisdictional implications, these claims are also refuted by the record. By pleading guilty, a defendant waives any technical defects in the information. See Fla. R. Crim. P. 3.140(o), 3.190; see also Colson v. State, 717 So.2d 554, 555 (Fla. 4th DCA 1998)("A defendant waives a defect in the information if he fails to object before pleading to the substantive charges."); Asmer v. State, 416 So.2d 485, 487 (Fla. 4th DCA 1982). Further, "[w]here a defendant waits until after the State rests its case to challenge the propriety of an indictment [or information], the defendant is required to show not that the indictment [or information] is technically defective, but that it is so fundamentally defective that it cannot support a judgment of conviction." Ford v. State, 802 So.2d 1121, 1130 (Fla. 2001) (emphasis added); State v. Burnette, 881 So.2d 693, 694 (Fla. 1st DCA 2004)[.]

In the instant case, the Amended Information properly charged Defendant with two counts of Armed Robbery, and one count of Armed Burglary.[21] That is, the Amended Information contained a sufficiently detailed allegation of the essential elements of the respective charges, including specific references to the appropriate sections of the criminal code, Defendant's name, and the time and place of the commission of the offenses. (Ex. F.) Therefore, the Amended Information was not fundamentally defective, and properly conferred subject matter jurisdiction upon the trial court. See Fla. R. Crim. P. 3.140(o) ("No ... information ... shall be dismissed ... unless ... [it is] so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new

[21] See Resp. Ex. 1 at 39-40, Amended Information.

> prosecution for the same offense.") Accordingly, Grounds Three and Four are denied.

Resp. Ex. 10 at 165-67 (emphasis deleted). On appeal, Ashley filed a pro se brief, see Resp. Ex. 11 at 8-12; the State filed an answer brief, see Resp. Ex. 12 at 30-32; and the appellate court affirmed the court's denial of post-conviction relief per curiam, see Resp. Ex. 13.

In its appellate brief, the State addressed the claims on the merits, see Resp. Ex. 12 at 30-32, and therefore, the appellate court may have affirmed Ashley's conviction based on the State's argument. If the appellate court addressed the merits, the state court's adjudication of this claims is entitled to deference under AEDPA. After a review of the record and the applicable law, the Court concludes that the state court's adjudication of this claim was not contrary to clearly established federal law and did not involve an unreasonable application of clearly established federal law. Nor was the state court's adjudication based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, Ashley is not entitled to relief on the basis of these claims.

Moreover, even assuming the state appellate court's adjudication of the claims is not entitled to deference, Ashley's claims are still without merit. The claims present issues purely of state law not cognizable on federal habeas review. The purpose of

a federal habeas proceeding is to review the lawfulness of Ashley's custody to determine whether that custody is in violation of the Constitution or laws or treaties of the United States. Coleman v. Thompson, 501 U.S. 722 (1991). Ashley's conviction and sentence do not violate the Constitution or laws or treaties of the United States.

For a defective Information to be a cognizable claim in a federal habeas corpus action, the charging document must be so defective that it deprives the court of jurisdiction. DeBenedictis v. Wainwright, 674 F.2d 841, 842 (11th Cir. 1982) (citations omitted) ("The sufficiency of a state indictment or information is not properly the subject of federal habeas corpus relief unless the indictment or information is so deficient that the convicting court is deprived of jurisdiction."). Under Florida law, the state circuit courts have jurisdiction over all felonies. See Fla. Stat. § 26.012(2)(d). Moreover, the Information in Ashley's case named Ashley; described the dates and locations of the offenses; stated the statutory basis for each offense; and properly set forth the elements of armed robbery and armed burglary. See Resp. Ex. 1 at 39-40. It therefore met the minimum requirements for invoking the jurisdiction of the state circuit court. Additionally, the Information contained the required sworn oath of the Assistant State Attorney, certifying that the allegations in the Information "are based upon facts that have been sworn to as true, and which,

if true, would constitute the offense therein charged," that the prosecution is instituted "in good faith," and that the facts are "based on testimony of material witnesses." Id. Such a sworn oath by the prosecutor that he received testimony under oath from the material witnesses for the offenses is sufficient pursuant to applicable Florida law. See Fla. R. Crim. P. 3.140(g).[22] Undoubtedly, the trial court had subject matter jurisdiction over Ashley's case since the Information charged him with armed robbery and armed burglary, both felonies, in violation of Florida Statutes sections 812.13(2)(a) and 810.02(2)(b). Thus, Ashley is not entitled to federal habeas relief on grounds five and six.

VII. Certificate of Appealability Pursuant to 28 U.S.C. § 2253(c)(1)

If Ashley seeks issuance of a certificate of appealability, the undersigned opines that a certificate of appealability is not warranted. This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this

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[22] Florida Rule of Criminal Procedure 3.140(g) provides:

> Signature, Oath, and Certification; Information. An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution and certifying that he or she has received testimony under oath from the material witness or witnesses for the offense.

substantial showing, Ashley "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack, 529 U.S. at 484. However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court will deny a certificate of appealability.

Therefore, it is now

ORDERED AND ADJUDGED:

1. The Amended Petition (Doc. 8) is **DENIED**, and this action is **DISMISSED WITH PREJUDICE**.

2. The Clerk of the Court shall enter judgment denying the Amended Petition and dismissing this case with prejudice.

3. If Ashley appeals the denial of the Amended Petition, the Court denies a certificate of appealability. Because this Court has determined that a certificate of appealability is not warranted, the Clerk shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

4. The Clerk of the Court is directed to close this case and terminate any pending motions.

DONE AND ORDERED at Jacksonville, Florida, this 14th day of November, 2017.

sc 11/14
c:
Antwain D. Ashley, FDOC #J34708
Counsel of Record

APPENDIX
H

IN THE CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANTWAIN D. ASHLEY,
Appellant,

v.

SECRETARY, FLORIDA DEPTARTMENT OF CORRECTIONS, ET. AL.,
Respondent.

Case No.: 17-15504-F
L.T. Case.: **3:15-cv-7-J-34JRK**

PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY TO THE ELEVENTH CIRCUIT

COMES NOW, the Petitioner, Antwain D. Ashley, *pro se,* and, pursuant to 28 U.S.C. §2254, and Fed. R. App. P. Proc. 22(b), hereby applies to this Honorable Court for a Certificate of Appealability (COA), and as a basis in support, states the following, to wit:

I. INTRODUCTION

On November 14, 2017, United States District Judge Marcia Morales-Howard issued her final order denying Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On the same date, Judge Morales-Howard denied a Certificate of Appealability pursuant to 28 U.S.C. §2253.

The questions raised in the Petitioner's habeas petition demonstrate a substantial showing of the denial of a constitutional right. The Petitioner seeks to appeal to the Eleventh Circuit Court of Appeals the district court's denial of his petition. The Petitioner is in state custody at Columbia Correctional Institution in Lake City, Florida.

II. PROCESS AND STANDARD OF REVIEW FOR CERTIFICATE OF APPEALABILITUY

Under rules governing 28 U.S. C. § 2254 cases and Rule 11, 28 U.S.C. foll. § 2254, the district court must either issue or deny a certificate of appealability, when it enters a final order adverse to the applicant. 28 U.S.C.A. § 2253(2) states that a COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right. If the district court denies a COA, a petitioner may seek one from the circuit court. *See* Fed. R. App. P. 22(b)(1).

Under the AEDPA[1], before a petitioner may appeal the denial of a habeas corpus petition filed under section 2254, the petitioner must obtain a COA. *See Miller-El v. Cockrell,* 537 U.S. 322, 335-36, 123 S.Ct. 1029, 1039, 54 L.Ed.2d 931 (2003).

The certificate of appealability requirement is to be administered by the district court at the threshold of the appeal, and deciding whether to issue one neither requires nor permits full consideration of the factual and legal merits of the

[1] The Anti-Terrorism and Effective Death Penalty Act of 1996

claims. *Miller-El, at* 336, 123 S.Ct. at 1039, because "[t]he question is the debateability of the underlying constitutional claim, not the resolution of that debate." *Id. at* 324, 123 S.Ct. *at* 1042. A petitioner is not required to demonstrate entitlement to appellate relief in order to be given an opportunity to pursue it. *See Tennard v. Dretke,* 542 274, 282, 124 S.Ct. 2562, 2569, 159 L.Ed.2d 384 (2004) ("To make such a showing, the petitioner need not show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further.").

A COA is granted or denied on an issue-by-issue basis and will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. The showing necessary to obtain a COA on a particular claim is dependant upon the manner in which the claim has been disposed of. If the district court rejects a petitioner's constitutional claim *on the merits,* the petitioner must demonstrate reasonable jurists could find the court's assessment of the constitutional claim to be debatable or wrong.

> [W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's constitutional claims debatable or wrong.

Miller-El, at 338, 123 S.Ct. *at* 1040 (quoting *Slack v. McDaniel,* 529 U.S. *at* 1604).

In a case in which the petitioner wishes to challenge on appeal the district court's *dismissal of a claim* for a reason not of constitutional dimension such as procedural default, limitations period, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. See *Slack v. McDaniel,* 529 U.S. at 484, 120 S.Ct. *at* 1604 (holding that when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a COA may issue only when the petitioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right; and, (2) the district court's procedural ruling was correct).

The petitioner must make a showing of both of the preceding components in order to be entitled to a certificate of appealability. If either of the components is lacking, a court may deny the application for a certificate because of the absence of that component without deciding whether the other one exists. *Id.* at 485, 120 S.Ct. at 1604 ("Each component of the § 2253 showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and

prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.").

III. STATEMENT OF THE CASE

This application for certificate of appealability arises from the denial by Judge Marcia Morales-Howard of the Appellant's Petition for Writ of Habeas Corpus on November 14, 2017.

The Appellant accepts the district court's procedural history as generally correct. (Order - 2). The Appellant was charged on March 8, 2007 with two counts of armed robbery and one count of armed burglary. Upon the advice of his counsel, Robert Carl David, Esq., the Appellant entered an open plea to all three counts and on September 21, 2007, he was sentenced to seventy-five years for Count I with a twenty year minimum mandatory of twenty years for actual possession and discharge of a firearm; to fifty years for Count II with a ten-year minimum mandatory for actual possession of a firearm; and to fifty years for Count III with a ten year minimum mandatory for actual possession of a firearm. The sentences for all three counts were ordered to be run consecutively for an overall prison term of 175 years.

After exhausting his state remedies, the Appellant petitioned the district court for a writ of habeas corpus on January 5, 2015. He submitted an Amended

Petition on January 14, 2016. The Respondents answered the Petition and the Appellant replied.

In his Amended Petition, the Appellant raised six claims for relief: (1) that he was misadvised to enter an open plea to the charged offenses based on his counsel's estimate he would receive no more than 20 years in prison; (2) his counsel failed to file a motion to suppress gun evidence; (3) his counsel failed to perform an adequate investigation and inform the Appellant of viable defenses before advising him to enter his open plea; (4) his counsel failed to properly argue for a youthful offender sentence; and, (5)-6) the trial court lacked subject matter jurisdiction because the charging Information was not accompanied by the sworn statement of a material witness.

The district court denied the Appellant's petition on November 14, 2017. The Appellant filed a timely notice of appeal. This Application follows...

IV. QUESTION AND ARGUMENT

QUESTION ONE

WHETHER THE DISTRICT COURT'S ANALYSIS THAT FOCUSED ON THE APPELLANT'S PLEA COLLOQUY AND NOT THE OBJECTIVE REASONABLENESS OF HIS COUNSEL'S ADVICE WAS AN UNREASONABLE APPLICATION OF THE *STRICKLAND* STANDARD

The Appellant first contends that a COA should be granted as to his first Amended Habeas claim that his counsel rendered ineffective assistance by

advising him to enter an open plea versus going to trial. In denying this claim, the district court unreasonably applied the standards set forth in *Strickland* and *Hill.*[2]

The district court mischaracterized the correct analytical framework applicable to this claim by scrutinizing the Appellant's conduct during the plea colloquy as opposed to examining the objective reasonableness of counsel's advice to enter an open plea versus electing a jury trial.

The question before the district court was not the legitimacy of the Appellant's plea decision, but the validity of his counsel's underlying advice and whether that advice was objectively reasonable. The district court made the Appellant's plea decision and colloquy the main focus of its analysis, but by doing so, the court unreasonably applied clearly established federal precedent. *See Strickland,* 466 U.S. *at* 690 ("a court deciding an...ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case."); *Hill,* 474 U.S. at 56 ("[w]here...a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on the whether counsel's advice was within the wide range of competence demanded of attorneys in criminal cases.").

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[2] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984); *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

Also, under well-established Florida decisional law, the district court's reliance in the Appellant's plea colloquy as a means to defeat his ineffectiveness claim must also fail. The Appellant asserted he entered his open plea based upon his counsel's estimation that the court would not impose a sentence greater than 20 years. While not a promise, this advice formed the foundation of the Appellant's decision to enter his plea – where he invariably relied on the expert advice and counsel of his attorney.

In *State v. Leroux,* 689 So.2d 235 (Fla. 1996) the Florida Supreme Court explained:

> These cases recognize the proposition that a defendant invariably relies upon the expert advice of counsel concerning sentencing in agreeing to plead guilty. In addition, there may be a difference between asking a defendant whether anything was promised to get the defendant to agree to a plea, and asking whether any additional promises were made to the defendant concerning the terms of the plea apart from those discussed during the taking of the plea.
>
> We agree, and acknowledge that there may also be a difference between a "promise" as commonly understood, and an attorney's expert advice to his client based upon the attorney's computation and ***estimate*** of the actual amount of time a defendant may serve on a sentence.
>
> Supplying such ***advice is not necessarily a promise of an outcome.*** Rather, providing such advice is a legitimate and essential part of the lawyer's professional responsibility to his client in most plea negotiations, where often the bottom line for the defendant is the amount of time he will serve

Leroux, 689 So.2d at 237 (emphasis added).

The state trial court and the district court made extensive references to the Appellant's plea colloquy and signed plea agreement in determining the Appellant's claim lacks merit. The district court's order cited the Appellant's specific responses during the colloquy and noted counsel's responses at the evidentiary hearing which also concentrated on the Appellant's purported knowledge of the potential consequences of his plea.

Importantly however, at the evidentiary hearing, counsel never denied having advised the Appellant to enter an open plea to the court where he faced a potential life sentence and where he ultimately received a sentence designed to ensure that he dies in prison. It is the reasonableness of this advice which the Appellant sought to challenge in his state post-conviction motion and in his Amended Petition for Writ of Habeas Corpus in the district court.

The district court's finding that the Appellant's counsel made a strategic decision in advising him to enter an open plea and did not therefore, perform deficiently was incorrect: the court did not evaluate the objective reasonableness of counsel's purportedly strategic choice. The Appellant was charged with offenses for which he could have received a life sentence *whether he entered an open plea, or whether he proceeded to trial.* In other words, the Appellant faced the exact same sentencing exposure by entering an open plea he would have faced had he proceeded to trial and not prevailed.

In order for a 'strategic' choice to be valid, i.e. to not be deficient performance, the choice purported to have been strategic must be objectively reasonable. That is, the choice undertaken must at least contemplate *some* prospective benefit for the defendant. It is true that strategic choices made by counsel will generally not be second guessed by a reviewing court. However, the mere incantation of the word "strategy" does not render an attorney's conduct bulletproof under the Sixth Amendment. Rather, "[t]he attorney's choice of tactic must be *reasonable* under the circumstances." *Cave v. Singletary,* 971 F.2d 1513 (11th Cir. 1992) (emphasis in original).

Here, counsel's advice accorded no prospective benefit to the Appellant. The Appellant's open plea benefitted the State by removing the necessity to prove every element of the charged offenses beyond a reasonable doubt. Counsel's advice to the Appellant that he didn't believe that the trial court would impose a sentence over 20 years if the Appellant entered an open plea – in tandem with his failure to perform a reasonable pre-trial investigation (see Questions 3 and 4, *infra),* induced the Appellant to expose himself to the same sentence that he might have received pursuant to a trial – including a life sentence. That the trial court ultimately imposed a sentence of 175 years in the Florida Department of Corrections as opposed to a formal life sentence makes little difference in terms of its effect on the Appellant. There were viable defenses to the charged offenses, and where the

sentencing exposure was exactly identical, it was not objectively reasonable to advise the Appellant to enter an open plea under *any* circumstances, barring an assurance of leniency from the trial court itself, including counsel's "estimation" of a term of years the trial court would not be likely to exceed. See *Horton v. Zant*, 941 F.2d 1449, 1462, (11th Cir. 1991), *cert denied*, U.S. 952, 117 L.Ed.2d 265, 112 S.Ct. 1516 (1992) ("the question of whether a decision was a tactical one is a question of fact...however, whether this tactic was reasonable is a question of law, and we owe neither the district court nor the state court any deference on this point.").

Accordingly, because the district court's analysis focused almost exclusively in the voluntary nature of the Appellant's plea, and not the objective reasonableness of counsel's underlying advice, a COA should be granted on this claim.

Reasonable jurists could debate as to whether the district court reached the correct conclusion on this issue and, while the Appellant is not required to demonstrate that he would likely prevail on the merits of this claim on appeal, he respectfully submits that he has made a sufficient demonstration to deserve encouragement to proceed further.

APPENDIX
I

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15504-F

ANTWAIN D. ASHLEY,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Antwain Ashley is a Florida prisoner serving a term of 175 years' imprisonment after pleading guilty to 2 counts of armed robbery and 1 count of armed burglary. He seeks a certificate of appealability ("COA"), as well as leave to proceed *in forma pauperis* ("IFP"), in order to appeal the denial of his habeas corpus petition, 28 U.S.C. § 2254, in which he raised seven claims for relief.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or by demonstrating that the issues "deserve

encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Claim One:

Ashley first argued that his counsel was ineffective by advising him that the court would sentence him to no more than 20 years' imprisonment if he pleaded guilty. At an evidentiary hearing held by the state post-conviction court, Ashley's trial counsel testified that he had advised Ashley that a guilty plea could result in a minimum sentence of 20 years' imprisonment and a maximum sentence of life imprisonment.

The state post-conviction court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts by denying this claim. After the evidentiary hearing, the state post-conviction court determined that trial counsel's testimony that he had properly advised Ashley of the potential sentences was more credible than Ashley's allegation to the contrary. That determination is entitled to deference, and Ashley presented no additional evidence or arguments to show that the state court's determination was unreasonable. *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (noting that state-court decisions must be given the benefit of the doubt). Furthermore, the record reflected that Ashley's guilty plea was knowing, voluntary, and intelligent. *See Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991) (explaining that if a guilty plea is knowing, voluntary, and intelligent, it will be upheld on federal review). Because the state post-conviction court did not unreasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), no COA is warranted for this claim.

Claim Two:

Ashley next asserted that his counsel was ineffective for failing to move to suppress evidence of a firearm that he was charged with possessing and firing during the commission of

the crimes. The state post-conviction court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts by denying this claim. Counsel's decision not to move to suppress the evidence was not outside the range of professionally competent assistance because Ashley decided to plead guilty, and, even if the gun had been suppressed, multiple family members were willing to testify at trial that Ashley had possessed and used the weapon during the robbery. *See United States v. Fretwas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (explaining that counsel is ineffective if no competent counsel would have taken the action counsel took). Accordingly, because the state post-conviction court did not unreasonably apply *Strickland*, no COA is warranted for this claim.

Claim Three:

Ashley also asserted that his counsel was ineffective for failing to conduct an adequate pretrial investigation and raise a viable defense. The state post-conviction court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts by denying this claim. As noted above, Ashley failed to establish that his guilty plea was not entered knowingly, voluntarily, and intelligently. *See Stano*, 921 F.2d at 1141. Furthermore, the state post-conviction court reasonably determined that trial counsel's testimony that he had investigated Ashley's case prior to advising Ashley to plead guilty was more credible than Ashley's allegations. *See Renico*, 559 U.S. at 773. Accordingly, because the state post-conviction court did not unreasonably apply *Strickland*, no COA is warranted for this claim.

Claims Four and Seven:

In Claims Four and Seven, which were identical, Ashley argued that his counsel was ineffective for failing to research the law relating to the trial court's discretion to sentence Ashley as a youthful offender. The state post-conviction court did not unreasonably apply

clearly established federal law or make an unreasonable determination of the facts by denying this claim because Ashley failed to establish that he was prejudiced by his counsel's alleged ineffective assistance. The record reflected that his counsel, while believing that Ashley was not entitled to youthful-offender status, argued that it would be appropriate for him if the court determined he were eligible. Moreover, the record reflected that the state's attorney believed Ashley could receive a youthful-offender sentence and that the determination was within the discretion of the state trial court. Furthermore, Ashley's trial counsel testified at the post-conviction evidentiary hearing in state court that he and the court had fully discussed whether Ashley was eligible for the youthful-offender exception, and that the court understood the applicability of this section. The state post-conviction court determined this testimony was credible, and, as such, it is entitled to deference. *See Renico*, 559 U.S. at 773. Accordingly, because the state post-conviction court did not unreasonably apply *Strickland*, no COA is warranted for this claim.

Claim Five:

Ashley asserted that the state trial court lacked jurisdiction to try his case because neither the indictment nor the arrest warrant was based on a sworn affidavit. The state court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts by denying this claim. The record reflected that Detective T.W. Wildes tendered a sworn affidavit, both for the arrest warrant and the indictment. Accordingly, both of these documents were based on a sworn affidavit from a material witness. No COA is warranted for this claim.

Claim Six:

Finally, Ashley argued that the state trial court lacked jurisdiction to try his case because the charging instrument was defective. The district court did not err by determining that it

lacked jurisdiction to consider whether the indictment was faulty. The record reflects that Ashley was charged under Fla. Stat. Ann. §§ 812.13(2)(a) and 810.02(2)(b), both felonies Florida state law, so the state court had jurisdiction to convict him. *See* Fla. Stat. Ann. § 26.012(2)(d) (explaining that, under Florida law, the state circuit courts have jurisdiction over all felonies). Moreover, the indictment was not faulty because it contained a sworn statement by the prosecutor asserting that she had received testimony from material witnesses regarding the offense, which is sufficient to charge someone in an indictment. *See* Fla. R. Crim. P. 3.140(g) (providing that a sworn oath by the prosecutor that he received testimony under oath from the material witnesses for the offense is sufficient to charge someone in an indictment, pursuant to applicable Florida law). Because the issues presented addressed only matters of state law, the district court properly concluded it lacked jurisdiction to consider these claims. No COA is warranted for this claim.

Because Ashley has not established that the state court either unreasonably applied federal law or made an unreasonable determination of the facts, his motion for a COA is DENIED and his motion for IFP status is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

APPENDIX
J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ANTWAIN D ASHLEY,

Petitioner,

v. **Case No: 3:15-cv-7-J-34JRK**

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to this Court's Order, entered November 14, 2017, this case is hereby DISMISSED WITH PREJUDICE.

*** Any motions seeking an award of attorney's fees and/or costs must be filed within 14 days of the entry of judgment.**

Date: November 14, 2017

ELIZABETH M. WARREN,
CLERK

s/B. Davis
Deputy Clerk

Copy to:
Antwain D. Ashley, FDOC #J34708

CIVIL APPEALS JURISDICTION CHECKLIST

1. Appealable Orders: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims,** a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a):** Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. Time for Filing: The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. Format of the notice of appeal: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. Effect of a notice of appeal: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

No.

IN THE

Supreme Court of the United States

ANTWAIN D. ASHLEY,

Petitioner,

v.

STATE OF FLORIDA,

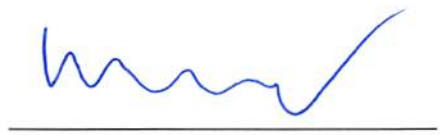
Respondent.

PROOF OF SERVICE

I, WILLIAM M. KENT, do declare that on this date, December 27, 2018, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached **PETITION FOR WRIT OF CERTIORARI** with attached *Motion to Proceed In Forma Pauperis* with Affidavit of Petitioner Gressett and **Proof of Service** on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

Antwain D. Ashley
J34708
New River CI
PO Box 900
Raiford, FL 32083

Office of Attorney General
State of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050



AFFIANT