IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11357-B

TIMOTHY M. THOMAS,

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:

Timothy M. Thomas, a Florida prisoner proceeding *pro se*, seeks a certificate of appealability ("COA"), to challenge the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition and denial of his motions for leave to amend his § 2254 petition. He has also moved for leave to proceed on appeal *in forma pauperis* ("IFP").

Thomas pled *nolo contendere*, pursuant to a written plea agreement, in 2009 in seven separate criminal cases to one count of possession of a firearm by a

convicted felon, one count of possession of drug paraphernalia, one count of grand theft of a firearm, one count of aggravated assault on a law enforcement officer,[1] one count of grand theft, three counts of burglary of a dwelling, and one count of attempted burglary of a dwelling.

Prior to his sentencing, Thomas moved to withdraw his plea. The state trial court conducted a hearing on Thomas's motion, which it denied.

At Thomas's 2010 sentencing, the state trial court found that he qualified as both a Habitual Felony Offender ("HFO") and a Prison Releasee Reoffender ("PRR") under Florida law. The court sentenced him to concurrent 30-year terms of imprisonment as a HFO for possession of a firearm by a convicted felon, burglary of a dwelling, grand theft, and aggravated assault on a law enforcement officer, which included a mandatory-minimum 15-year sentence as a PRR. As to Thomas's convictions for grand theft of a firearm and attempted burglary of a dwelling, the court sentenced him to concurrent 5-year terms of imprisonment.

Shortly after his sentencing, Thomas appealed the denial of his motion to withdraw his plea, arguing that the trial court erred in denying the motion. In 2011, the Florida Fifth District Court of Appeal ("Fifth DCA") *per curiam* affirmed.

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[1] Thomas was originally charged with aggravated battery on a law enforcement officer.

In 2011, Thomas filed a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, raising several ineffective-assistance-of-trial-counsel claims. The state court denied the motion, finding that all of the claims had been raised and argued in Thomas's motion to withdraw his plea that had been denied. Thomas appealed the denial of the Rule 3.850 motion, and the Fifth DCA *per curiam* affirmed.

In February 2015, Thomas filed a *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, arguing that:

> (1) his plea was involuntary, and, thus, violated the Due Process Clause of the Fourteenth Amendment ("Claim One"); and
>
> (2) trial counsel was ineffective for (1) failing to complete depositions; (2) failing to compel the police officers to attend depositions; (3) failing to investigate the police officer's injuries with regard to the aggravated-battery charge; (4) failing to obtain or research the agent's statements and move to suppress his statement to the agent; (5) refusing Thomas's discovery requests; (6) failing to investigate and prepare his cases for trial; (7) misadvising Thomas with regard to the plea; (8) failing to research the GPS monitoring device used to place Thomas at the crime scene; (9) failing to investigate legal challenges, including the legality of the traffic stop, search, arrest, the officer's be-on-the-lookout ("BOLO") announcement, and file appropriate motions to suppress; (10) failing to develop defenses to the charges; and (11) failing to research the amended aggravated-assault charge and object to the information ("Claim Two").

Prior to the State's response, Thomas moved for leave to amend his § 2254 petition. He contended that he recently learned that the U.S. Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), required that he make a

substantial showing that his underlying ineffective-assistance-of-counsel claims that were procedurally defaulted had merit. Also, he asserted that his post-conviction counsel did not provide enough facts in his Rule 3.850 motion to show prejudice as to his ineffective-assistance-of-counsel claims.

The State objected to Thomas's motion to amend his § 2254 petition. The State asserted that *Martinez* did not provide any basis for Thomas to amend his § 2254 petition because Thomas's post-conviction counsel raised each of his claims in his Rule 3.850 motion, and, thus, there was no procedurally defaulted claim in his § 2254 petition.

The district court denied Thomas's motion to amend his § 2254 petition. The court noted that Thomas wished to amend his § 2254 petition to demonstrate cause and prejudice for an alleged procedural default, but Thomas did not state which claims he wished to amend. Also, the court noted that the State contended that amendment was unnecessary because the § 2254 petition did not contain any procedurally defaulted claims. The court found that, in light of the State's response, any amendment of the § 2254 petition would be futile.

After the court denied Thomas's motion to amend his § 2254 petition, the State responded to Thomas's § 2254 petition. The State responded that Claim One was procedurally defaulted, Claim Two was meritless, and that his § 2254 petition should be denied.

Prior to filing a reply, Thomas filed a second motion for leave to amend his § 2254 petition. He asserted that the facts that his post-conviction counsel included under his ineffective-assistance-of-counsel claims in his Rule 3.850 motion were lacking. He requested that he be able to provide more facts to support those claims in his § 2254 petition. Alternatively, he wished to raise claims that had not been exhausted based on *Martinez*.

The State responded to Thomas's second motion for leave to amend his § 2254 petition. The State contended that Thomas repeated the arguments under his first motion for leave to amend his § 2254 petition, and, therefore, the motion should be denied. The State also noted that, after full examination of the state court proceedings, Thomas did not exhaust Claim One because he did not raise a federal due process argument in state court. As to *Martinez*, the State contended that Claim One did not implicate *Martinez* because it was raised on direct appeal and did not involve post-conviction counsel's failure to challenge trial counsel's performance. The State also reiterated that Claim Two did not implicate *Martinez* because it was not defaulted.

The district court denied Thomas's second motion for leave to amend his § 2254 petition. The court noted that it appeared that Thomas wished to amend his § 2254 petition in order to better argue his ineffective-assistance-of-counsel claims. However, Thomas had not shown why he could not have included additional

argument in his § 2254 petition, and, therefore, justice did not require amendment of the § 2254 petition.

After the court denied Thomas's second motion for leave to amend his § 2254 petition, Thomas replied to his § 2254 petition, arguing that Claim One was exhausted and that Claim Two was not fully addressed by the state trial court's denial of his motion to withdraw his plea.

The district court denied Thomas's § 2254 petition and denied him a COA. As to Claim One, the court determined that this claim was procedurally defaulted because it was unexhausted and Thomas could not return to state court to raise it because he had already filed a direct appeal. Also, the court found that Thomas did not demonstrate any cause and prejudice or actual innocence to excuse the procedural default. Additionally, notwithstanding the procedural default, the court concluded that Thomas was not entitled to relief on the merits because he did not demonstrate that his plea was involuntary. The court determined that Claim One should be denied because Thomas did not show that the state court's determination of this claim was contrary to, or involved an unreasonable application of, clearly established federal law. As to Claim Two, the court determined that Thomas's knowing and voluntary plea barred his arguments under Claim Two. However, to the extent Thomas's arguments were not barred, Thomas could not demonstrate prejudice. Specifically, Thomas did not demonstrate that, but for his counsel's

actions, he would not have entered the plea and instead would have insisted on going to trial. The court determined that Claim Two should be denied because Thomas did not show that the state court's determination of this claim was contrary to, or involved an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984).

Thomas appealed the district court's denial of his § 2254 petition and the denial of his first and second motions for leave to amend his § 2254 petition. He also moved the district court for leave to proceed on appeal IFP, which the court denied. In his motion for a COA, Thomas argues that reasonable jurists would find debatable the district court's denial of Claims One and Two, as well as his first and second motions for leave to amend his § 2254 petition.

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 must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526

U.S. 838, 842 (1999); *see Footman v. Singletary*, 978 F.2d 1207, 1210-11 (11th Cir. 1992) (noting that the petitioner must afford the state a full and fair opportunity to address and resolve the claim on the merits); *see* 28 U.S.C. § 2254(b)(1). A federal claim is subject to procedural default where the petitioner failed to properly exhaust it in state court, and it is obvious that the unexhausted claim would now be barred under state procedural rules. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). To overcome the bar arising from a procedural default, a petitioner must demonstrate either: (1) cause for the failure to properly present the claim and actual prejudice from the default; or (2) a fundamental miscarriage of justice that would result if the claim is not considered. *Id.* at 1306.

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a "highly deferential standard for evaluating state-court rulings . . . and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quotations

omitted). Thus, we review the district court's decision *de novo*, but review the state habeas court's decision with deference. *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1239 (11th Cir. 2010).

A state court's decision is "contrary to" federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Additionally, habeas relief is not warranted if this Court finds that the state court merely applied federal law incorrectly, but rather, relief is warranted only if that application was objectively unreasonable. *See Harrington v. Richter*, 562 U.S. 86, 100-01 (2011); *Renico*, 559 U.S. at 773, 778-79. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quotation omitted).

For an ineffective-assistance claim raised in a § 2254 petition, the inquiry turns upon whether the relevant state court decision was contrary to, or an unreasonable application of, *Strickland*. *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). To succeed on an ineffective-assistance claim under *Strickland*, the § 2254 petitioner must show that his Sixth Amendment right to counsel was violated because (1) his attorney's performance was deficient, and (2) the deficient

performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 697. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 688. Prejudice is established by a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Because judicial review of counsel's performance already "must be highly deferential," a federal habeas court's review of a state court decision denying a *Strickland* claim is "doubly deferential." *See Cullen*, 563 U.S. at 189-90 (quotations omitted). Further, because "*Strickland*'s general standard has a substantial range of reasonable applications," *Harrington*, 562 U.S. at 89-90, "a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard," *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 (2009). In sum, the pertinent inquiry under § 2254(d) "is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

Denial of § 2254 petition

Claim One

Under Claim One, Thomas argued that his plea was involuntarily entered into, and, thus, violated the Due Process Clause of the Fourteenth Amendment. He asserted that he did not understand the potential sentences that he faced for each charge due to the confusing discussions during the plea hearing. He contended that, due to his mental health issues, the confusion surrounding his sentences, and the pressure he faced because his counsel was unprepared for trial, he felt obligated to enter the plea.

As to this claim, reasonable jurists would not find debatable the district court's finding that Claim One was procedurally defaulted. Thomas raised Claim One in his motion to withdraw his plea. In his motion to withdraw his plea, he asserted that his plea was involuntary and violated the Fourteenth Amendment, pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969). However, Thomas did not cite the Fourteenth Amendment, *Boykin*, or any other federal law or constitutional provision in his initial brief on appeal. Therefore, Claim One was unexhausted. *See Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 457 (11th Cir. 2015) (stating that a petitioner can exhaust a federal claim by, "for example, including . . . the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim [as a federal one]").

Florida's procedural rules do not provide for successive direct appeals. *See* Fla. R. App. P. 9.140(b)(1). Thomas could have raised Claim One on direct appeal, and, thus, this claim is procedurally defaulted. *See Bailey*, 172 F.3d at 1302-03. Also, as discussed below, Thomas's ineffective-assistance arguments under Claim Two could not excuse the procedural default. *See United States v. Nyhuis*, 211 F.2d 1340, 1344 (11th Cir. 2000) (stating that only a meritorious ineffective-assistance claim may satisfy the cause exception to a procedural default). Additionally, Thomas did not allege any other cause and resulting prejudice or a fundamental miscarriage of justice to excuse the procedural default. *Bailey*, 172 F.3d at 1306.

Additionally, notwithstanding the procedural default, reasonable jurists would not find debatable the district court's determination that Thomas was not entitled to relief on the merits because he did not demonstrate that his plea was involuntary. Thomas's signed plea agreement provided that he entered the plea freely and voluntarily and that no one threatened or coerced him into entering the plea or made any promises to induce him to enter the plea. The plea agreement noted that Thomas's aggravated-battery-on-a-law-enforcement-officer charge was punishable by life in prison, but that Thomas would receive a 30-year sentence for pleading to the lesser-included offense of aggravated assault on a law enforcement officer.

During Thomas's plea hearing, the State explained that it would reduce the aggravated-battery-on-a-law-enforcement-officer charge in exchange for a 30-year sentence with a 15-year minimum-mandatory term. The State also noted that Thomas faced a life sentence if he was convicted at trial. The parties also discussed the fact that Thomas qualified for a sentence as a HFO.

Also, at his plea hearing, Thomas told the state trial court that he had not been treated for any mental illnesses and that he understood the maximum sentences that he faced and the sentences that he would receive pursuant to the plea agreement. Thomas stated that he understood the rights that he was giving up and that he had read and signed the plea agreement. He stated that he had no questions regarding the charges, the sentence exposure, the rights he was giving up, or any other aspects of his cases, and that he had enough time to speak with his counsel about his cases. He also stated that he had not been threatened, pressured, or induced into entering the plea and that no other promises had been made. Thomas's representations to the state trial court are presumed true and he has not shown that his statements should be overlooked. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (stating "the representations of the defendant . . . [at a plea proceeding] constitute a formidable barrier in any subsequent collateral proceedings"). Thomas has not demonstrated that his plea was involuntary or that

he had a misunderstanding about the sentences he faced if convicted at trial or the sentences he would receive by entering a plea.

Furthermore, the state trial court held a hearing on Thomas's motion to withdraw his plea. After hearing Thomas's testimony that he did not understand that he could be sentenced to 30 years in prison, that counsel had assured him that he would only receive a 15-year sentence, and that he felt that his plea was coerced because his counsel had not investigated his cases or filed any motions, the state trial court denied the motion. The state trial court made a finding that, in light of Thomas's statements during his plea hearing and in his plea agreement, his testimony was not credible. The Fifth DCA *per curiam* affirmed. This Court must accept the state trial court's credibility determination. *Baldwin v. Johnson*, 152 F.3d 1304, 1316 (11th Cir. 1998). A federal habeas court must defer to the factual findings of the state court, and Thomas did not overcome the presumption of correctness afforded to the state court's findings. *See* 28 U.S.C. § 2254(e)(1). The record reflected that Thomas's plea was knowing and voluntary. Thus, reasonable jurists would not find debatable the district court's determination that Claim One should be denied because Thomas did not show that the state court's determination of this claim involved an unreasonable application of clearly established federal law or that it was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

Claim Two

Under Claim Two, Thomas argued that his counsel was ineffective for (1) failing to complete depositions; (2) failing to compel the police officers to attend depositions; (3) failing to investigate the police officer's injuries with regard to the aggravated-battery charge; (4) failing to obtain or research an agent's statements and move to suppress his statement to the agent; (5) refusing Thomas's discovery requests; (6) failing to investigate and prepare his cases for trial; (7) misadvising Thomas with regard to the plea; (8) failing to research the GPS monitoring device used to place Thomas at the crime scene; (9) failing to investigate legal challenges, including the legality of the traffic stop, search, arrest, the officer's be-on-the-lookout ("BOLO") announcement, and file appropriate motions to suppress; (10) failing to develop defenses to the charges; and (11) failing to research the amended aggravated-battery charge and object to the information.

As to this claim, reasonable jurists would not find debatable the district court's determination that Thomas was not entitled to relief. A defendant's knowing and voluntary plea, with the benefit of competent counsel, waives all non-jurisdictional defects in the proceedings. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Thomas's arguments under Claim Two, therefore, were barred by the entry of his plea.

However, to the extent Thomas's assertions were not barred, Thomas could not demonstrate prejudice. *See Strickland*, 466 U.S. at 687, 694. Thomas did not demonstrate that, but for his counsel's actions, he would not have entered the plea and instead would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (stating that, in the context of a guilty plea, "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 pleaded guilty and would have insisted on going to trial"). As noted above, Thomas signed the written plea agreement, which provided that he understood his rights, including the right to a jury trial, the right to confront witnesses, the right to present defenses, and the right to speedy trial, and that he was waiving those rights by entering a plea. The plea agreement also provided that Thomas and his counsel had reviewed the discovery and evidence, and that Thomas was satisfied with his counsel's representation. Furthermore, during his plea hearing, Thomas stated that he understood the rights he was giving up and that he had read and signed the plea agreement. Thomas stated that he had no questions regarding the charges, the sentence exposure, the rights he was giving up, or any other aspects of his cases, and that he had enough time to speak with his counsel about his cases.

During the hearing on Thomas's motion to withdraw plea, Thomas testified regarding his counsel's alleged lack of investigation into his cases and his failure to

schedule depositions. Thomas also testified that his counsel had told him that depositions were not warranted and that there were no grounds for filing any motions to suppress. Thomas stated that he felt that he had no alternative to entering a plea because his counsel was unprepared for trial. The state trial court concluded that Thomas's testimony was not credible. As noted above, a federal habeas court must defer to the factual findings of the state court, and Thomas did not overcome the presumption of correctness afforded to the state court's determination that his testimony was not credible. *See* 28 U.S.C. § 2254(e)(1); *Devier v. Zant*, 3 F.3d 1445, 1456 (11th Cir. 1993) (stating that, "[f]indings by the state court concerning . . . assessments of witness credibility are . . . entitled to the same presumption accorded findings of fact under 28 U.S.C. § 2254(d)").

Based on Thomas's representations to the state trial court during his plea hearing and the state trial court's credibility determination at his hearing on his motion to withdraw plea, Thomas did not demonstrate that, but for his counsel's actions, he would not have entered the plea and instead would have insisted on going to trial. *See Hill*, 474 U.S. at 59. As noted above, Thomas bargained for and received a significantly shorter sentence than the life sentence he could have received if convicted at trial. Thus, reasonable jurists would not find debatable the district court's determination that Claim Two should be denied because Thomas did not show that the state court's determination of this claim involved an

unreasonable application of *Strickland* or that it was based on an unreasonable determination of the facts. *See Cullen*, 563 U.S. at 189; 28 U.S.C. § 2254(d).

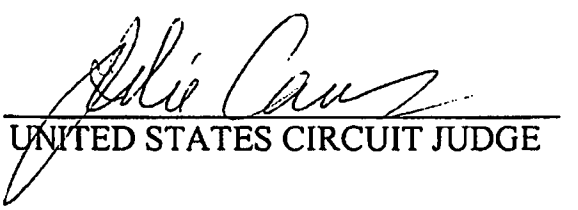
Denial of first and second motions to amend § 2254 petition

In general, a district court's denial of a motion to amend a complaint is reviewed for an abuse of discretion, although questions of law are reviewed *de novo*. *Coventry First, LLC v. McCarty*, 605 F.3d 865, 869 (11th Cir. 2010). Under Federal Rule of Civil Procedure 15, a plaintiff may amend his complaint once as a matter of right "within 21 days after serving it." Fed. R. Civ. P. 15(a)(1); *see also Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) (applying Rule 15 to a § 2255 motion). In all other cases, the district court should grant leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A district court need not allow a party to amend, however, where (1) there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) allowing an amendment would cause undue prejudice to the other party; or (3) where the amendment would be futile. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

As to the denial of Thomas's motions for leave to amend his § 2254 petition, reasonable jurists would not find debatable whether the district court abused its discretion in denying his motions for leave to amend his § 2254 petition. Thomas first moved to amend his § 2254 petition 82 days after the district court docketed

the § 2254 petition. Thus, he could no longer amend the § 2254 petition as a matter of right. *See* Fed. R. Civ. P. 15(a)(1). In Thomas's motions for leave to amend his § 2254 petition, he contended, in part, that the U.S. Supreme Court's decision in *Martinez* applied to his case. However, *Martinez* does not provide any basis for Thomas to amend his § 2254 petition. *See Martinez*, 132 S. Ct. at 1318-19 (creating a limited, equitable exception to the general rule that lack of an attorney, or attorney error, in state post-conviction proceedings does not establish cause to excuse a procedural default where (1) a state requires a prisoner to raise an ineffective-assistance claim in a collateral proceeding, as opposed to on direct appeal; (2) appointed counsel in the initial review collateral proceeding, where the claim should have been raised, rendered ineffective assistance under *Strickland*; and (3) the underlying ineffective-assistance claim is a substantial one).

Because Thomas has not shown that reasonable jurists would find debatable the denial of his § 2254 petition and the denial of his motions for leave to amend his § 2254 petition, he has not made the requisite showing, and his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484. Thomas's motion for leave to proceed on appeal IFP is DENIED AS MOOT.



UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11357-B

TIMOTHY M. THOMAS,

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

Before: NEWSOM and JULIE CARNES, Circuit Judges.

BY THE COURT:

Timothy M. Thomas has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 31, 2018, order denying his motion for a certificate of appealability, and denying as moot his motion for leave to proceed *in forma pauperis*, following the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Thomas's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY M. THOMAS,

Petitioner,

v. **Case No: 6:15-cv-305-Orl-37TBS**

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

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

The Petition for Writ of Habeas Corpus filed by Timothy M. Thomas is DENIED, and this case is DISMISSED WITH PREJUDICE.

Date: March 1, 2017

SHERYL L. LOESCH, CLERK

s/L. Moyer, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY M. THOMAS,

Petitioner,

v. CASE NO. 6:15-cv-305-Orl-37TBS

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This cause is before the Court on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1). Respondents filed a response to the petition in accordance with this Court's instructions (Doc. 12). Petitioner filed a reply to the response (Doc. 25).

Petitioner alleges two claims for relief in the petition. For the following reasons, the petition is denied.

I. PROCEDURAL HISTORY

Petitioner was charged in state court case number 2008-CF-069232 with possession of a firearm by a convicted felon and possession of drug paraphernalia (Doc. 13-1 at 140). The State filed a notice of intent to seek habitual felony offender penalties. *Id.* at 144. Petitioner was later charged in six additional cases as follows: in case number 2009-CF-032591 with one count of grand theft of a firearm; in case number 2009-CF-039615 with one count of aggravated battery on a law enforcement officer; in case number 2009-CF-039616, with one count of burglary of a dwelling and grand theft; and in case numbers 2009-CF-

039617, 2009-CF-039618, and 2009-CF-03919 with one count each of burglary of a dwelling (Doc. 13-2 at 113-4; 13-3 at 72; 13-4 at 68; 13-5 at 52; 13-6 at 32). Petitioner entered a nolo contendere plea to the lesser included offense of aggravated assault on a law enforcement officer in case number 2009-CF-039615 and to the remaining counts as charged in each case (Doc. 13-2 at 7-8).

Prior to sentencing, Petitioner moved to withdraw his plea. *Id.* at 14-17. The trial court held a hearing on the matter and denied the motion (Doc. 13-1 at 31-81). The trial court sentenced Petitioner to concurrent thirty-year terms of imprisonment as an HFO for count one in case number 2008-CF-069232, for both counts in case number 2009-CF-039616 and for case numbers 2009-CF-39615, 2009-CF-039617, and 2009-CF-039618 (Doc. Nos. 13-1 at 122; 13-2 at 95-98; 13-4 at 35-39; 13-5 at 31-35; 13-6 at 1-5). In case numbers 2009-CF-32591 and 2009-CF-039619, the trial court sentenced Petitioner to concurrent five-year terms of imprisonment (Doc. 13-3 at 45-49; 13-6 at 102-06). Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam* (Doc. 13-7 at 44).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. *Id.* at 46-55. The trial court summarily denied the motion. *Id.* at 57-58. Petitioner appealed, and the Fifth DCA affirmed *per curiam*. *Id.* at 163.

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to

a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that 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) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.* Whether a state court's decision was an unreasonable application of law must be assessed

in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per curiam*); *cf. Bell v. Cone*, 535 U.S. 685, 697 n. 4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[1] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual

[1] In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989). In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Supreme Court of the United States held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel."

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Claim One

Petitioner alleges that his plea was involuntarily entered into and thus violated the Due Process Clause of the Fourteenth Amendment (Doc. 1 at 4). In support of this claim, Petitioner asserts that he did not understand the potential sentences he was facing for

each charge due to the confusing discussions during the plea colloquy. *Id.* at 4-7. Petitioner contends that due to his own mental health issues, the confusion surrounding his sentence, and the pressure he faced because counsel was unprepared for trial, he felt obligated to enter the plea. *Id.* at 6. Respondents assert that this claim is unexhausted because the federal constitutional basis of the claim was not raised in the state court (Doc. 12 at 18).

Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–44 (1999). In order to satisfy the exhaustion requirement a "petitioner must 'fairly present[ ]' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Isaac v. Augusta SMP Warden*, 470 F. App'x 816, 818 (11th Cir. 2012) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). A petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

Petitioner raised this claim in his Motion to Vacate Plea (Doc. 13-2 at 14-17). Petitioner's motion asserted that his plea was involuntary and violated the Fourteenth Amendment pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969). *Id.* However, Petitioner did not cite the Fourteenth Amendment, *Boykin*, or any other federal law or constitutional provision in his initial brief on appeal (Doc. 13-7 at 2-24). Therefore, this claim is

unexhausted. *See Snowden*, 135 F.3d at 735. The Court is precluded from considering this claim because it would be procedurally defaulted if Petitioner returned to state court. *See id.* at 736. Petitioner could not return to the state court to raise this ground because he already filed a direct appeal. Thus, Petitioner's claim is procedurally defaulted.

Procedural default may be excused only in two narrow circumstances: if a petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). Petitioner has failed to demonstrate cause or prejudice for the procedural default. Likewise, he cannot show the applicability of the actual innocence exception. Accordingly, this claim is procedurally barred.

Alternatively, Petitioner has not demonstrated that his plea was involuntarily. The written plea agreement, signed by Petitioner, provides that Petitioner entered the plea freely and voluntarily (Doc. 13-2 at 8). The plea also states that "[n]o person . . . threatened or coerced [Petitioner] into entering this plea" nor did anyone make any promises to induce him to enter the plea. *Id.* The plea agreement notes that in case number 2009-CF-39615, aggravated battery on a law enforcement officer is punishable by life in prison, however, Petitioner would receive a thirty-year sentence for pleading to the lesser included offense of aggravated assault on a law enforcement officer. *Id.* at 7.

During the plea hearing, the State explained that it would reduce the charge for case number 2009-CF-039615 in exchange for a thirty-year sentence with a fifteen-year minimum mandatory term (Doc. 13-1 at 9-10). The State also noted that Petitioner faced

a life sentence if convicted at trial. *Id.* at 9. The parties also discussed the fact that Petitioner qualified for an HFO sentence. *Id.* at 10.

Furthermore, Petitioner told the trial court he had not been treated for any mental illnesses and that he understood the maximum sentences he faced and the sentences he would receive pursuant to the plea agreement. *Id.* at 12-17. Petitioner stated that he understood the rights he was giving up and had read and signed the plea agreement. *Id.* at 17-18. Petitioner had no questions regarding the matter and affirmed that he had enough time to speak with his attorney about his cases. *Id.* at 18. Petitioner also stated that he had not been threatened, pressured, or induced into entering the plea and no other promises had been made. *Id.* at 27.

Petitioner's representations to the trial court are presumed true and he has not shown that the Court should overlook his statements. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (stating "the representations of the defendant . . . [at a plea proceeding] constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."). Petitioner has not demonstrated that that his plea was involuntary or that he had a misunderstanding about the sentences he faced if convicted at trial or the sentences he would receive by entering a plea.

Furthermore, the trial court held a hearing on Petitioner's motion to withdraw plea (Doc. 13-2 at 34). After hearing Petitioner's testimony that he did not understand he could be sentenced to thirty years in prison, that counsel had assured him he would only

receive a fifteen-year sentence, and that he felt he his plea was coerced because counsel had not investigated his case or filed any motions, the trial court denied the motion. *Id.* at 39-79. The trial court made a finding that in light of Petitioner's statements during the plea colloquy, his testimony was not credible. *Id.* at 79-80. The Fifth DCA affirmed *per curiam* (Doc. 13-7 at 44).

This Court must accept the state court's credibility determination. *See, e.g., Baldwin v. Johnson*, 152 F.3d 1304, 1316 (11th Cir. 1998) ("We must accept the state court's credibility determination and thus credit [counsels'] testimony over [petitioner's]."). Additionally, the state court's factual findings are presumed correct, and Petitioner has not rebutted those findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Parker v. Head*, 244 F.3d 831, 835-36 (11th Cir. 2001).

There is no indication that the Petitioner's plea was not knowing or voluntary. The record reflects that Petitioner made an intelligent choice to voluntarily enter a plea after consideration of the alternative courses of action. *See Hill*, 474 U.S. at 56; *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991) ("a reviewing federal court may set aside a . . . guilty plea only for failure to satisfy due process: If a defendant understands the charges against him, understands the consequences of his guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea . . . will be upheld on federal review."). The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim one is denied pursuant to § 2254(d).

B. Claim Two

Petitioner contends trial counsel was ineffective for: (1) failing to complete depositions; (2) failing to compel the police officers to attend depositions; (3) failing to investigate the police officer's injuries with regard to the aggravated battery charge; (4) failing to obtain or research Agent Holiday's statements and move to suppress his statement to the agent; (5) refusing Petitioner's discovery requests; (6) failing to investigate and prepare his cases for trial; (7) misadvising Petitioner with regard to the plea; (8) failing to research the GPS monitoring device used to place Petitioner at the scene of the crime; (9) failing to investigate legal challenges including the legality of the traffic stop, search, arrest, the officer's be on the lookout ("BOLO") announcement, and file appropriate motions to suppress; (10) failing to develop defenses to the charges; and (11) failing to research the amended aggravated battery charge and object to the information (Doc. 1 at 8-12).

Petitioner challenged counsel's deficiencies in his motion to vacate plea (Doc. 13-2 at 14-17). The trial court denied the motion, and the Fifth DCA affirmed *per curiam* (Doc. Nos. 13-2 at 79-80; Doc. 13-7 at 44). Petitioner then raised these claims in his Rule 3.850 motion (Doc. 13-7 at 46-54). The trial court declined to address the claims, stating that they had been raised and addressed in the motion to vacate plea. *Id.* at 58. The Fifth DCA affirmed *per curiam*. *Id.* at 163.

First, the Court notes that the traditional rule is that a defendant's knowing and voluntary plea, with the benefit of competent counsel, waives all non-jurisdictional

defects in the proceedings. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Petitioner's claims, therefore, are barred by the entry of his plea. However, to the extent Petitioner's claims are not barred, Petitioner cannot demonstrate prejudice.

As noted above, Petitioner signed the written plea agreement, which provides that Petitioner understands his rights, including the right to a jury trial, the right to confront witnesses, the right to present defenses, and the right to speedy trial, and that he was waiving those rights by entering a plea (Doc. 13-2 at 7-8). The plea agreement also provides that Petitioner and his attorney have reviewed the discovery and evidence, and Petitioner is satisfied with counsel's representation. *Id.* at 8. Furthermore, during the plea hearing, Petitioner stated that he understood the rights he was giving up and had read and signed the plea agreement (Doc. 13-1 at 17-18). Petitioner had no questions regarding the matter and stated that he had enough time to speak with his attorney about his cases. *Id.* at 18.

During the motion to withdraw plea hearing, Petitioner testified regarding counsel's alleged lack of investigation into his case and his failure to schedule depositions. *Id.* at 39-41. Petitioner also testified that counsel had told him that depositions were not warranted and there were no grounds for filing any motions to suppress. *Id.* at 41. Petitioner stated that he felt he had no alternative to entering a plea because counsel was unprepared for trial. *Id.* The trial court concluded that Petitioner's testimony was not credible. *Id.* at 79-80.

Based on Petitioner's representations to the trial court during the plea colloquy

and the trial court's credibility determination at the motion to withdraw plea hearing, Petitioner has not demonstrated that but for counsel's actions, he would not have entered the plea and instead would have insisted on going to trial. *See Hill*, 474 U.S. at 58. Petitioner bargained for and received a significantly shorter sentence than the life sentence he could have received if convicted at trial. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim two is denied pursuant to § 2254(d).

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for 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 such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a Petitioner shows "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.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The Court concludes that Petitioner has not made the requisite showing in these circumstances. Petitioner is not entitled to a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Timothy M. Thomas (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

2. Petitioner is **DENIED** a certificate of appealability.

3. Petitioner's Motion for Ruling (Doc. 27) is **DENIED** without prejudice.

4. The Clerk of the Court is directed to enter judgment and close the case.

DONE AND ORDERED in Orlando, Florida, this 27th day of February, 2017.

ROY B. DALTON JR.
United States District Judge

Copies to:
OrlP-3 2/27
Counsel of Record
Timothy M. Thomas

Additional material from this filing is available in the Clerk's Office.