DECISION OF THE UNITED STATES

COURT OF APPEALS

APPENDIX-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10787-K

MACKENDY STRACHAN,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

DECISION OF THE UNITED STATES DISTRICT COURT

APPENDIX-B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 17-22935-CIV-WILLIAMS

MACKENDY STRACHAN,

Petitioner,

vs.

JULIE JONES,

Respondent.
_____/

ORDER

THIS MATTER is before the Court on Magistrate Judge Reid's Report & Recommendation. (DE 16). In her Report, Judge Reid recommends that the Court deny *pro se* Petitioner's Mackendy Strachan's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his conviction and sentence, entered following a guilty plea in the Eleventh Judicial Circuit, Miami-Dade County, case no. F12-17516. Petitioner filed objections to the Report. (DE 17)

Based on an independent review of the Report, the record, and the applicable law, the Court agrees with Judge Reid that Petitioner's 2254 petition—alleging ineffective assistance of counsel in connection with his guilty plea—fails on the merits. As Judge Reid explains, nothing in Petitioner's post-conviction proceedings, nor in this habeas proceeding, shows that Petitioner was mentally incompetent and could not understand the nature of his proceedings. Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Report (DE 16) is **AFFIRMED AND ADOPTED**.
2. This case is **DISMISSED**.
3. The Clerk is directed to **CLOSE** this case.

4. No certificate of appealability shall issue.

5. All pending motions are **DENIED AS MOOT.**

DONE AND ORDERED in chambers in Miami, Florida, this 12 day of February, 2019.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

cc:
Mackendy Strachan
M06927
Wakulla Correctional Institution
Inmate Mail/Parcels
110 Melaleuca Drive
Crawfordville, FL 32327

FINDINGS AND RECCOMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE

APPENDIX - C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-22935-WILLIAMS
MAGISTRATE JUDGE REID

MACKENDY STRACHAN,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *Pro Se* Petitioner, **MacKendy Strachan**, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, challenging the constitutionality of his conviction and sentence, entered following a guilty plea in the Eleventh Judicial Circuit, Miami-Dade County, case no. F12-17516.

This Cause has been referred to the undersigned for consideration and report, pursuant to 28 U.S.C. §636(b)(1)(B), (c); S.D.Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2019-2; and the Rules Governing Habeas Corpus Petitions in the United States District Courts.

For its consideration of the petition (DE#1), the court has the respondent's response (DE#14) to this court's order to show cause, along with its supporting

appendices containing copies of relevant state court records (DE#8, 9), as well as Petitioner's reply (DE#10).

Construing the arguments liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 419 (1972), the Petitioner asserts that his counsel rendered ineffective assistance by failing to further inquire regarding Petitioner's mental capacity at the October 29, 2012 change of plea hearing. (DE#1). After reviewing the pleadings, for the reasons stated in this Report, the Undersigned recommends that Petitioner's motion be denied because Petitioner is not entitled to relief on the merits.

II. Procedural History

Petitioner's Guilty Plea and Sentence

On August 1, 2012, the state charged Petitioner by information with strong arm robbery in violation of *Fla. Stat.* §812.13(2)(c), a second-degree felony punishable by up to 15 years in state prison. (DE# 8, App. B). The state also filed notice that the Petitioner qualified as a Prison Release Reoffender ("PRR") and, therefore, the state was seeking enhanced penalties. The score sheet prepared by the state reflects that Petitioner's lowest permissible sentence was approximately 42 months. (DE# 8, App. C).

On **October 29, 2012**, Petitioner appeared before the trial court to enter a guilty plea. After he was sworn, he stated his name, that he was 33 years old, and

that he had a ninth-grade education. (DE#8-2, App. D, 10/19/12 Plea Hearing Transcript, p. 7). The following exchange then took place:

THE COURT: Have you ever been treated for a mental illness?

DEFENDANT: Yes, ma'am.

THE COURT: Are you under the influence of alcohol, narcotics, or any medication today?

DEFENDANT: No, ma'am.

(*Id.*:8). Petitioner acknowledged that as part of his probation, he had to receive mental health treatment from a doctor approved by probation officials. (*Id.*:9).

Petitioner understood that had he gone to trial, he was facing up to fifteen years' imprisonment. (*Id.*). Petitioner stated no one had made any promises or threats to compel him to enter a guilty plea. (*Id.*:9-10).

Petitioner understood that he was giving up the right to a jury trial where the state would have to prove his guilt beyond a reasonable doubt, his right to have his attorney further investigate the case and cross-examine witnesses, and his right to appeal the sentence and conviction. (*Id.*:10-11). Petitioner also understood he could be subject to deportation. (*Id.*:11).

Petitioner agreed that he had enough time to discuss all possible legal defenses with his attorney and that he was satisfied with his counsel's representation. (*Id.*:11).

Petitioner answered in the affirmative when the court asked whether he was pleading guilty. (*Id.*:12).

The trial court found that Petitioner freely, voluntarily, and intelligently waived his rights, and that he knowingly entered the plea, understanding the charges and consequences of the plea. (*Id.*:12-13). The court found there was a factual basis for the plea. (*Id.*). Petitioner confirmed he understood he was agreeing to be sentenced as a habitual violent offender ("HVO"). (*Id.*:13).

On October 29, 2012, the court sentenced Petitioner to one year of probation as an HVO, with a special condition that he attend mental health counseling and imposed other monetary and drug testing conditions. (DE# 8-2:App.E).

Petitioner's Probation Violation

On February 8, 2013, the Petitioner was arrested for violating his probation. (DE#8-2, App. H). On February 11, 2013, the trial court ordered competency evaluations from Dr. Sanford Jacobson and Dr. Sonia Ruiz. (DE# 8-2, App. G, App. O). On March 18, 2013, the state filed an information under case F13-4532 charging the Petitioner with a new strong-arm robbery offense (DE# 8-2, App. H). Petitioner was released to a residential mental health facility for stabilization and later returned to jail. On June 10, 2013, the state filed an amended affidavit of violation of probation imposed in case no. F12-17516 adding the 2013 strong-arm robbery as the

basis for the violation. (DE# 8-2, App. I). The score sheet prepared for the 2013 strong-arm robbery stated that his lowest permissible sentence was 64.05 months. (DE# 8-2, App. J).

On June 13, 2013, Dr. Jacobson and Dr. Ruiz filed psychological evaluation reports finding Petitioner competent. The state and defense attorney stipulated that Petitioner was competent and the trial court issued a June 17, 2013 order adjudging him competent. (DE# 8-2, App. K).

Petitioner's Combined Guilty Plea

On July 10, 2013, Petitioner entered a guilty plea to the new strong arm robbery and to the probation violation. (DE# 8-2, App. L, 7/10/13 Plea Hearing Transcript). Defense counsel explained that counsel and Petitioner had watched a video of the 2013 armed robbery and Petitioner wanted to enter a guilty plea. (*Id.*:3). Petitioner was placed under oath. (*Id.*:5-6). Petitioner then provided background information, age, education. (*Id.*). The following exchange then took place:

THE COURT: Have you ever been treated for a mental illness?

DEFENDANT: Yes, ma'am.

THE COURT: Are you taking medication for that mental illness?

DEFENDANT: Yes, ma'am.

THE COURT: Does your mental illness stop you from understanding

what's going on here today?

DEFENDANT: No, ma'am.

THE COURT: [Defense counsel], have you met with [Defendant]?

DEFENSE COUNSEL: I've had discussions with him, Judge, and I met with him today –

THE COURT: Are you satisfied that he understands his plea and that he's competent to take it based on your discussions with him?

DEFENSE COUNSEL: Yes, Judge. I've had several conversations with him, yes.

THE COURT: Are you under the influence of alcohol, narcotics, or any medication?

DEFENDANT: No, ma'am.

(*Id.*:6-7).

Petitioner acknowledged that he had informed his counsel that he wanted to admit to the affidavit of probation violation, which would result in the court's revoking his probation in the 2012 case. (*Id.*:7). He would then be sentenced to a ten-year concurrent sentence with a ten year sentence imposed in the 2013 case. (*Id.*). Petitioner understood that the court would adjudicate him guilty of the 2012 charge.

(*Id.*). Petitioner acknowledged that had he gone to a hearing on the probation violation, he was facing fifteen years in prison and, if he had gone to trial in the 2013 case, was facing thirty years in prison. (*Id.*:8).

Petitioner agreed that no one had made any promises or threats to cause him to enter a guilty plea. (*Id.*). Petitioner stated that he was satisfied with defense counsel's representation. (*Id.*:10).

Petitioner understood that he was waiving his right to proceed to a jury trial in the 2013 case, where the state would have to prove his guilt beyond a reasonable doubt, his right to a hearing before the court on his probation violation where the state would have to prove his violation by a preponderance of the evidence, his right to have his attorney further investigate both cases, his right to present and cross-examine witnesses, and his right to appeal. (*Id.*:9). Petitioner confirmed he was pleading guilty in connection with the 2012 probation violation and 2013 case. (*Id.*:11).

The court found that Petitioner had freely, voluntarily, and intelligently waived his rights and that Petitioner had knowingly entered into the plea. (*Id.*). The court accepted the plea. (*Id.*:12). The court sentenced Petitioner to ten years as a habitual violent felony offender in case no. F13-4532 and to a concurrent term of ten years in case no. F12-17516. (DE# 8-2, App. M). The trial court entered the ten-year

sentence in case no. F12-17516 on **July 17, 2013**. (Miami-Dade Circuit Court Docket, Case No. F12-17516, #161).

Petitioner's conviction and sentence became final on **August 16, 2013**, the expiration of the thirty-day period in which to appeal the judgment.[1] *See* Fla.R.App.P. 9.110(b); *Demps v. State*, 696 So. 2d 1296, 1297, n.1 (Fla. 3d Dist. 1997); *Ramos v. State*, 658 So.2d 169 (Fla. 3d Dist. 1995); *Caracciolo v. State*, 564 So.2d 1163 (Fla. 4th Dist. 1990); *Gust v. State*, 535 So. 2d 642 (Fla. 1st Dist. 1988). *Ferreira v. Dep't of Corr's*, 494 F.3d 1286, 1293 (11th Cir. 2007) (concluding that the "AEDPA's statute of limitations begins to run from the date both the **conviction *and* the sentence** the Petitioner is serving at the time he files his application become final because judgment is based on both the conviction and the sentence.") (emphasis added).

Petitioner's First State Post-Conviction Motion & Appeal

Before the judgment and sentence became final, Petitioner filed an **August 5, 2013** post-conviction motion pursuant to *Fla.R.Crim.P.* **3.850**. (DE# 8-3, App. N).[2]

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1 Under Fed.R.Civ.P. 6(a)(1), "in computing any time period specified in ... any statute that does not specify a method of computing time . . . [the court must] exclude the day of the event that triggers the period [,] count every day, including intermediate Saturdays, Sundays, and legal holidays [, and] include the last day of the period," unless the last day is a Saturday, Sunday, or legal holiday.

2 Petitioner filed an amended Rule 3.850 motion on August 8, 2013 which is substantively identical to the August 5, 2013 motion.

Petitioner argued that his counsel was ineffective for allowing him to enter a guilty plea on October 29, 2012 when he was not taking his psychotropic medication and was hearing voices. He further argued that counsel was ineffective in failing to file a motion to determine competency. (*Id.*).

On December 3, 2013, the **state** filed a **response**. (DE# 8-2, App. O). The state countered that the transcript established that Petitioner's plea was knowingly, voluntarily, and intelligently entered. Furthermore, there were no outward signs of mental incompetence contained in the record. (*Id.*). The state attached an unsigned and undated proposed order denying the Rule 3.850 motion for the trial court to sign. (*Id.*).

Erroneously believing the proposed order attached to the state's response constituted the court's denial of his Rule 3.850 motion, Petitioner filed a **notice of appeal**. (DE# 8-3, App. P). In his initial brief, he argued that the trial court should have conducted an evidentiary hearing on the competency issue and on whether his 2012 plea was voluntary. (DE# 8-3, App. R). Although Petitioner appealed an unsigned proposed order, the Third District Court of Appeal ("Third DCA") *per curiam* affirmed without written opinion in *Strachan v. State*, 133 So.3d 940 (3d DCA Feb. 19, 2014) (Table). Mandate issued **March 19, 2014**.

In the meantime, the trial court set an evidentiary hearing, which it later

cancelled upon learning of Petitioner's pending appeal. (DE# 8-3, App. T). In light of the cancellation, Petitioner filed in the Third DCA a May 5, 2014 motion to recall the mandate and relinquish jurisdiction back to the trial court, which the Third DCA denied on May 15, 2014. (*Id.*). Petitioner filed a May 29, 2014 motion for rehearing and for rehearing *en banc*, which the Third DCA denied on July 17, 2014. (*Id.*).

Petitioner's Second State Post-Conviction Motion & Appeal

On **September 22, 2014**, Petitioner filed a **second amended motion** for post-conviction relief under Rule 3.850. (DE#8-3, App. V). He first raised the same argument he raised in his August 2013 motion challenging the 2012 plea. (*Id.*:5-6). Next, he argued that his counsel was ineffective at the 2013 hearing for failing to raise an insanity defense and for allowing him to waive his right to a probation violation hearing. (*Id.*:11-16). The **state** filed a November 4, 2014 **response** wherein the state argued that Petitioner was competent to enter the 2013 plea and that the record of the 2013 proceedings established that counsel was not ineffective and the plea was voluntary. (DE#8-3, App. W). Notably, the state made no mention of Petitioner was competency at the 2012 plea hearing. (DE#8-3, App. W).

In the **December 10, 2014 order** denying the second amended motion, the trial court provided:

> The Defendant reasserts that on the day of his plea, **July 10, 2013**, he was incompetent. The defendant's claims are refuted by the record.

> The defendant next asserts that his plea should have been vacated because his counsel failed to properly investigate his case. However, his claim is refuted by the record and deemed waived, since during the plea colloquy he told the court he wished to waive his right to have his attorney further investigate his case in exchange for a favorable plea offer from the state.

(DE# 8-4, App. X) (internal citations omitted).

Petitioner **appealed**. (DE# 8-4, App. Y). He first argued that the trial court never ruled on his August 2013 Rule 3.850 motion regarding his 2012 plea. (*Id.*). He next argued that his 2013 plea was not voluntary and that counsel was ineffective during the 2013 proceedings. (*Id.*). The Third DCA *per curiam* affirmed without written opinion in *Strachan v. State*, 160 So. 3d 444 (Fla. 3d DCA 2015). Mandate issued **March 30, 2015**. (DE# 8-4, App. ZZ).

Petitioner's Third State Post-Conviction Motion & Motion to Correct Illegal Sentence

Before the mandate issued, Petitioner filed a **March 16, 2015 third amended motion** for post-conviction relief under Rule 3.850 in the trial court. (DE# 8-4, App. AA). The motion was identical to his August 2013 Rule 3.850 motion challenging the 2012 plea. (*Id.*). He made no mention of the 2013 plea. (*Id.*). On April 15, 2015, the **state** filed a **response** wherein it argued that the motion was successive. (DE# 8-4, App. BB). The state only mentioned the 2013 plea in arguing the Petitioner's second amended post-conviction motion had been denied and affirmed on appeal,

rendering the third amended motion successive. (*Id.*).

While his third amended Rule 3.850 motion was pending, Petitioner filed a **June 8, 2015 motion to correct illegal sentence** where he argued that his "plea to the substantive offense and the resulting violation of probation . . . was insufficient because the trial court failed to determine a factual basis for his plea, rendering the defendant's sentence illegal on July 10, 2013." (DE# 8-5, App. CC). He filed a **June 10, 2015 amended motion to correct illegal sentence** wherein he re-raised the first claim and added that his plea was involuntary where the trial court failed to inquire into his mental health status when he entered a plea in 2012. (DE# 8-5, App. CC).

In an **August 13, 2015** order, the trial court denied all three motions, finding in pertinent part:

> In his Third Amended Motion for Post-Conviction Relief, Strachan raises one ground: that his plea was not voluntary, and therefore rendered invalid—specifically because the failure to take psychotropic medication prior to entry of the plea rendered him not competent . . . . This motion must be denied because the grounds asserted have already been litigated and decided, and therefore are **successive** and prohibited under Rule 3.850(h)(2). On December 10, 2014, the court denied Strachan's Second Amended Post-Conviction Motion stating: "The Defendant reasserts that on the day of his plea, July 10, 2013, he was incompetent. The defendant's claims are refuted by the record." (citing and attaching the **July 10, 2013** plea colloquy transcript). . . . The Third DCA affirmed that order on March 30, 2015, case no. 3D15-232.

(DE# 8-5, App. DD, 1-2).

The court did not refer to the October 29, 2012 plea. (*Id.*). Turning to the Petitioner's argument in his motion to correct illegal sentence that the plea was not supported by facts, the court stated:

> This ground must be rejected because not only did the State and counsel for Strachan stipulate that there was a factual basis for the guilty plea, *see* July 10, 2013 transcript, at 10, but the arrest affidavits for both cases, F13-4532 and F12-17516, as well as the amended affidavit of violation of probation in case F12-17516, were all in the court file and therefore of record at the time the plea was taken.

(*Id.*:2).

The court also addressed Petitioner's mental health argument as follows:

> Strachan tosses in one additional argument at the conclusion of [his amended motion to correct illegal sentence]: "that he is not guilty of the offense to which he pleaded because he did not know what he was doing or it's [sic] consequences at the time of the crime due to his mental illness." While such would not be proper grounds for a motion under Rule 3.800, even if the Court were to treat this as couched under Rule 3.850, the Court notes that the issue of his sanity was previously addressed in his Second Amended Motion for Post-Conviction Relief, . . . [The trial court] denied the motion, that was affirmed by the Third DCA. Thus, this too would be an impermissible successive motion which can provide no basis for relief.

(*Id.*).

Petitioner did not appeal this order.

Petitioner's Fourth State Post-Conviction Motion

On **November 23, 2015**, Petitioner filed a **fourth amended motion** for postconviction relief under Rule 3.850. (DE# 8-5, App. EE). He again argued that

counsel was ineffective at his 2012 plea hearing because he was not competent. (*Id.*). The state filed a January 8, 2016 response wherein it argued that the motion was successive. (DE# 8-5, App. FF). The trial court entered a **January 12, 2016 order** denying the motion as successive "as all issues raised to attack the voluntariness of his plea have previously been addressed by this court as well as the Third District Court of Appeals." (DE# 8-5, App. GG). Petitioner did not appeal.

Petitioner's Notice of Inquiry

On **January 21, 2016**, Petitioner filed a **notice of inquiry**/case disposition regarding the failure of the trial court to conduct the evidentiary hearing originally ordered following his first Rule 3.850 motion. (DE# 8-5, App. HH). The trial court previously cancelled the January 30, 2014 hearing because Petitioner's appeal of the unsigned order attached to the state's response was pending. The trial court issued an order denying Petitioner's request for a ruling on his August 2013 Rule 3.850 motion which provided as follows:

> Defendant asks "the court for its disposition on holding the ruling that it never made on 1/30/14 to hold an evidentiary hearing." . . . [A]n evidentiary hearing [] was originally scheduled to take place on January 30, 2014 (by the predecessor judge). That hearing ultimately did not go forward, and it appears that was because the court was able to rule without the need for such a hearing.
>
> The court has, in fact, already ruled on Defendant's several post-conviction motions, as discussed below:

> After reviewing the instant motion/request as well as the court file and the docket entries, and having heard from the State Attorney, it appears that the referenced hearing originally set for January 30, 2014, was intended to address the Defendant's then pending motion, or motions, for post-conviction relief. Up to such time the Defendant had filed the following motions:
>
> - Motion for post-conviction relief, filed on August 5, 2013;
> - Amended motion for postconviction relief, filed on August 13, 2013;
> - Second amended motion for postconviction relief, filed on September 26, 2014
>
> In ***each*** of these motions, Defendant asserted that he was incompetent to enter into the plea bargain which resulted in his judgment and sentence. As noted, the Court entered an order explicitly denying the last of these three motions (the second amended motion), on **December 10, 2014**, and did so without the need for an evidentiary hearing. Thus, **all of Defendant's then pending potential postconviction challenges were addressed, and rejected, on the merits**. Accordingly, Defendant's request for a ruling as to the matters that were set to be heard on January 30, 2014, is moot. The court has already ruled, and did so without need for an evidentiary hearing. Notably, these grounds (Defendant's asserted incompetency) were precisely the same grounds raised in Defendant's third and fourth amended motions, which too were denied.

(DE# 8-5, App. HH) (emphasis added).

Petitioner did not appeal.

Petition for Writ of Habeas Corpus & Mandamus In The Third DCA

On January 25, 2016, Petitioner filed a **petitions for writ of habeas corpus** and **for writ of mandamus** in the Third DCA. (DE# 8-5, App. II). The Third DCA consolidated the filings into a single case. (DE# 8-5, App. JJ). The habeas corpus petition argued that the Third DCA erred in denying his motion for reconsideration

in his original appeal (from the unsigned order). (DE# 8-5, App. II). His mandamus petition argued he should get an evidentiary hearing which was scheduled for January 30, 2014 regarding his original Rule 3.850 motion. (*Id.*). The **Third DCA denied both** petitions without comment on **February 4, 2015**. (DE# 8-5, App. JJ).

Petitioner filed a **June 6, 2016 petition for writ of mandamus** with the Third DCA again complaining that the trial court never ruled on his original August 2013 Rule 3.850 motion regarding his 2012 plea. (DE# 8-5, App. NN). He argued that the Third DCA should have dismissed his original appeal from the unsigned proposed order and the trial court should have allowed him to go forward with the evidentiary hearing. (*Id.*).

Pursuant to the Third DCA's directions, the **state** filed a **response** addressing Petitioner's argument that the trial court never ruled on the Rule 3.850 motion he filed in August of 2013 as follows:

> Although Strachan appealed an alleged order denying [the August 2013] motion in case no. 3D14-13, the order appealed was an unsigned, undated, unfiled order; it was merely a proposed order attached by the State Attorney's Office to its written response in the trial court. *Such an order would not have vested jurisdiction for an appeal in this Court,* as an appeal is authorized only from a final rendered order, which is defined in the appellate rules as a written, signed and filed order. Fla.R.App.P. 9.020(i), 9.140(b)(3).
>
> Notwithstanding the absence of jurisdiction and the absence of an appealable order, this Court "affirmed" the non-existent order. It is the State's position that that "affirmance" has no legal significance since

there was no appealable order to vest jurisdiction in this Court. Although the affirmance of that order has no significance, *Strachan then proceeded to go through several amendments of the amended motion that resulted in the affirmance. All subsequent amended pleadings resulted in orders of denial by the lower court. As the motion of August 2013, for which Strachan seeks an order, was subjected to subsequent amendments, that motion of August 2013 was effectively subsumed within the next amended motion, and when that amended motion was denied in December 2014, the motion of August 2013 was denied as a part of that denial.*

(DE# 8-6, App. OO) (emphasis in original).

As a result, the state argued that the issuance of a writ of mandamus was not appropriate. (*Id.*). The Third DCA **denied the petition** for writ of mandamus on **August 29, 2016** without comment. (DE# 8-6, App. PP).

Petitioner's "Second or Successive" State Motion for Post-Conviction Relief

On **June 17, 2016**, Petitioner filed a motion titled "**second or successive motion** for postconviction relief" in the state court (DE# 8-5, App. KK). He raised the same ground raised in his original Rule 3.850 motion, challenging his competency to enter the 2012 plea. (*Id.*).

State Court Order Prohibiting Petitioner From Filing *Pro Se* Petitions

The trial court issued a **July 14, 2016 order** denying the latest motion and requiring Petitioner to "show cause as to why he should not be held in contempt for frivolous/successive filings." (DE# 8-5, App. LL). When petitioner failed to timely file a response to the show cause order, the trial court issued a **September 15, 2016**

"order prohibiting the filing of any further *pro se* petitions or motions in the trial court." (DE# 8-5, App. MM).

Petitioner **appealed** the trial court's September 15, 2016 order. (DE# 8-6, App. QQ). Petitioner rejected the state's position that the argument raised in his August 2013 Rule 3.850 motion was subsumed within the trial court's December 2014 order denying his September 22, 2014 second amended motion. (DE# 8-6, App. RR). The state filed an answer brief. (DE# 8-6, App. SS). Petitioner filed a reply wherein he reiterated that his second amended motion was challenging the 2012 plea. (DE# 8-6, App. TT). The Third DCA *per curiam* affirmed without written opinion in *Strachan v. State*, 224 So.3d 230 (Fla. 3d DCA March 22, 2017) (Table). Mandate issued **April 17, 2017**. (DE# 8-6, App. UU).

Second Petition For Writ of Habeas Corpus In The Third DCA

On **May 1, 2017 and May 8, 2017**, Petitioner filed a **petition for writ of habeas corpus** and amended petition for writ of habeas corpus, respectively, in the Third DCA. (DE# 9-1, App. VV). Petitioner took issue with the Third DCA's affirmance of an unsigned order in *Strachan v. State*, 133 So.3d 940 (3d DCA Feb. 19, 2014), the trial court's July 14, 2016 order denying his June 17, 2016 second successive motion, and argued that his 2012 plea was not voluntary as he was not competent at the time. (*Id.*). The Third DCA **denied** his petition without comment

on **May 8, 2017**. (DE# 9-1, App. WW).

Petition For Writ of Mandamus In The Third DCA

On **June 19, 2017**, Petitioner filed another **petition for writ of mandamus** in the Third DCA in which he again argued that he had not received a ruling on his arguments regarding the 2012 plea in the trial or appellate courts. (DE# 9-1, App. XX). The Third DCA **denied** the petition on **June 21, 2017** without comment. (DE# 9-1, App. YY).

Petitioner's Present 28 U.S.C. §2254 Motion

Petitioner next came to this court filing the instant §2254 motion on **July 19, 2017**, when he handed it to prison officials for mailing.[3] (DE# 1:20). Petitioner argues, as he had in the state court, that his appointed trial counsel was unconstitutionally ineffective because she failed to requrest a competency hearing on October 29, 2012, the day he entered a guilty plea to the 2012 robbery, Case No. F12-017516 (DE#1). He argues that he told his counsel on the day of the plea proceedings that "he was hearing voices, agitated and confused at times because the jail medical personnel in the jail were not supplying him with the psychotropic medication he was required to take in order to be functional" (DE#1:10).

3 "Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009).

III. Threshold Issues

A. Limits of Habeas Relief

Federal habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (citations omitted). As such, federal habeas "does not lie for errors of state law." *Id.* at 475 (quotations omitted). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* As such, federal courts may not review claims based exclusively on state law issues even if the claims are "couched in terms of equal protection and due process." *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) (quotation omitted).

B. Timeliness

1. Statutory Tolling

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Abdul-Kabir v. Quarterman*, 550 U.S. 233, (2007); *Penry v. Johnson*, 532 U.S. 782, 792 (2001); *Davis v. Jones*, 506 F.3d 1325, 1331, n.9 (11th Cir. 2007). The AEDPA imposes a one-year statute of limitations on petitions for writ of habeas corpus filed by state

prisoners.[4] *See* 28 U.S.C. §2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus ....").

As is indicated above, Petitioner appears to be challenging his conviction and sentence entered on July 17, 2013 in case no F12-017516. Because Petitioner did not appeal, this conviction and sentence became final on **August 16, 2013**, when the time in which to file an appeal came to an end. *See Fla.R.App.P.* 9.110(b); *Demps v. State*, 696 So. 2d 1296, 1297, n.1 (Fla. 3d DCA 1997); *Ramos v. State*, 658 So.2d 169 (Fla. 3d DCA 1995); *Caracciolo v. State*, 564 So.2d 1163 (Fla. 4th DCA 1990); *Gust v. State*, 535 So. 2d 642 (Fla. 1st Dist. 1988). Importantly, the court must rely on the July 17, 2013 sentence, rather than the October 29, 2012 judgment, in light of *Ferreira*, 494 F.3d at 1293 (concluding that the "AEDPA's statute of limitations begins to run from the date both the conviction and the sentence the Petitioner is serving at the time he files his application become final because judgment is based

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[4]The statute provides that the limitations period shall run from the latest of —

(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 action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that 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.

28 U.S.C. §2244(d)(1).

on both the conviction and the sentence.") (emphasis in original).

Thus, Petitioner had one year from the time his conviction and sentence became final on **August 16, 2013,** or until **August 16, 2014,** to timely file his §2254 petition. *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (limitations period should be calculated according to "anniversary method," under which limitations period expires on the anniversary of date it began to run) (*citing Ferreira*, 494 F.3d at 1289 n. 1 (11th Cir. 2007) (noting that limitations period should be calculated using "the anniversary date of the triggering event"). Petitioner did not file his §2254 motion until **July 19, 2017**.

However, the one-year limitations period is statutorily tolled during times when a "properly filed" application for post-conviction relief is pending in the state forum. *See* 28 U.S.C. §2244(d)(2). An application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

Before his conviction and sentence became final on **August 16, 2013**, he filed his first motion for post-conviction relief on **August 5, 2013**. The state filed a December 3, 2013 response, attaching an unsigned proposed order denying the motion. Mistakenly thinking the proposed order constituted the trial court's order on his motion, Petitioner appealed. The Third DCA affirmed in *Strachan v. State*, 133

So.3d 940 (3d DCA Feb. 19, 2014) (Table). Mandate issued March 19, 2014. On May 15, 2014, the Third DCA denied Petitioner's subsequent motion to recall the mandate and relinquish jurisdiction to the trial court and, on July 17, 2014, denied Petitioner's motion for rehearing.

On September 22, 2014, Petitioner filed a second amended motion for post-conviction relief in the trial court wherein he challenged his 2012 plea and his 2013 plea. The state filed a November 4, 2014 response. The trial court issued a December 10, 2014 order denying the second amended motion, but only expressly mentioning the 2013 plea proceedings. Petitioner appealed. The Third DCA *per curiam* affirmed without written opinion in *Strachan v. State*, 160 So.3d 444 (Fla. 3d DCA 2015). Mandate issued **March 30, 2015**.

Because of the issues with the direct appeal from the unsigned order denying the August 2013 motion, the Undersigned takes the position that the Petitioner's original Rule 3.850 proceedings did not come to an end until the March 30, 2015 mandate. For unknown reasons, the state courts failed to expressly address the argument challenging his 2012 plea in the rulings on Petitioner's second amended motion for postconviction relief. However, both the trial and appellate courts were aware of Petitioner's argument. As a result, he did in fact receive a ruling on this argument at both the trial and appellate levels, in the December 10, 2014 order and

in *Strachan*, 160 So.3d 444, respectively.

Review of the record, detailed above, establishes that there were no properly filed post-conviction motions pending from **March 30, 2015** until Petitioner filed the instant petition on **July 10, 2017**. The state trial court repeatedly denied Petitioner's motions as successive during this time period and ultimately entered an order prohibiting Petitioner from filing any additional *pro se* motions at the trial court level. As a result, **over two years** of untolled time elapsed before Petitioner filed his §2254 in this court. Thus, this federal petition was not timely filed under §2244(d)(1)(A).

II. Equitable Tolling

Given the detailed procedural history narrated above, however, the AEDPA statute of limitations was likely tolled. Both the United States Supreme Court and Eleventh Circuit Court of Appeals have held that equitable tolling can be applied to prevent the application of the AEDPA's statutory deadline when extraordinary circumstances have worked to prevent an otherwise diligent Petitioner from timely filing his petition. *Holland v. Florida*, 560 U.S. 631 (2010) ("We have previously made clear that a 'Petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing.") (*quoting Pace v.*

DiGuglielmo, 544 U.S. 408, 418 (2005)); *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011); *Chavez v. Secretary, Dept. of Corrections*, 627 F.3d 1057, 1066 (11th Cir. 2011).

"The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 560 U.S. at 652 (*quoting Lonchar v. Thomas*, 517 U.S. 314, 326 (1996)). "As for the 'extraordinary circumstances' prong...a defendant [must] show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." *San Martin*, 633 F.3d at 1267.

The Eleventh Circuit has also cautioned that a Petitioner's efforts to learn the disposition of pre-federal habeas steps are crucial to determining whether equitable tolling is appropriate. *See Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002) (*per curiam*); *Drew v. Dep't of Corr's*, 297 F.3d 1278, 1288 (11th Cir. 2002)("A lengthy delay between the issuance of a necessary order and an inmate's receipt of it might provide a basis for equitable tolling *if the Petitioner has diligently attempted to ascertain the status of that order and if the delay prevented the inmate from filing a timely federal habeas corpus petition.* (emphasis supplied)"), *overruled on other grounds by Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005); *see also, Mashburn v. Comm'r, Alabama Dep't of Corr.*, 713 F. App'x 832, 839 (11th Cir. 2017)

(unpublished). "Equitable tolling is available only if a Petitioner establishes both extraordinary circumstances and due diligence." *Spears v. Warden*, 605 F. App'x 900, 905 (11th Cir. 2015) (*quoting Diaz v. Sec'y for Dep't of Corr's*, 362 F.3d 698, 702 (11th Cir. 2004)).

Here, the record arguably **does** support a finding that equitable tolling is appropriate in this case. To his credit, Petitioner raised the issue regarding his competency at the 2012 plea hearing in the first Rule 3.850 post-conviction motion he filed in August 2013. The trial court did not rule on the motion. Admittedly, Petitioner made the mistake of appealing an order drafted by the state attorney and unsigned by the trial court. However, the Third DCA affirmed this unsigned order without written opinion, creating confusion for the Petitioner. In Petitioner's second amended motion for post-conviction relief, Petitioner again raised the issue regarding the 2012 plea, while adding issues related to the 2013 plea hearing. In its December 10, 2014 order, the trial court ruled only on Petitioner's competency during the 2013 plea proceedings and did not expressly address the argument regarding the 2012 plea. The Third DCA simply affirmed. Petitioner came to the conclusion that his argument regarding his 2012 plea had been overlooked in the proceedings that came to an end with the Third DCA's **March 30, 2015** Mandate. In an attempt to obtain a ruling from the state courts on the August 2013 Rule 3.850

motion, Petitioner filed multiple motions and petitions in the trial and appellate courts. These efforts to obtain a clear ruling on the issue regarding the 2012 plea delayed Petitioner's filing of a §2254 motion.

Petitioner has established due diligence, in light of his many filings and repeated efforts to inform the state courts that he wanted a ruling on the 2012 plea hearing issue. Petitioner has arguably also established "extraordinary circumstances," in light of the Third DCA's confusing affirmance of an unsigned order and the trial court's failure to address the 2012 plea issue in its December 10, 2014 order. As a result, it appears that Petitioner is arguably entitled to equitable tolling of his petition.

C. Exhaustion

The respondent concedes that Petitioner properly exhausted the claim raised here in the state courts and, indeed, that conclusion is correct. (DE# 8:48). Issues raised in a federal habeas corpus petition must have been fairly presented to the state courts and thereby exhausted prior to their consideration on the merits. *See* 28 U.S.C. §2254(b), (c). Exhaustion requires that a claim be pursued in the state courts through the appellate process. *Leonard v. Wainwright*, 601 F.2d 807 (5th Cir. 1979). Both the factual substance of a claim and the federal constitutional issue itself must have been expressly presented to the state courts to achieve exhaustion for purposes of

federal habeas corpus review. *Baldwin v. Reese*, 541 U.S. 27 (2004); *Gray v. Netherlands*, 518 U.S. 152 (1996).

In Petitioner's case, he alleged ineffective assistance of counsel for failing to raise the competency issue during the 2012 plea hearing in his September 22, 2013 second amended motion for post-conviction relief. Because the claim was raised before the state trial court, and in constitutional terms by challenging his sixth amendment right to counsel, and then affirmed on appeal, although not expressly, the claim appears ripe for federal habeas corpus review. In any event, however, for the reasons put forth below, Petitioner is not entitled to relief on the merits.

IV. Governing Legal Principles

A. Standard of Review

This Court's review of a state prisoner's federal petition for habeas corpus is "'greatly circumscribed' and 'highly deferential.'" *Ledford*, 818 F.3d at 642 (*quoting Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011). "The purpose of [the] 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." *Ledford*, 818 F.3d at 642 (*quoting Greene v. Fisher*, 565 U.S. 34, 38 (2011)). This standard is both mandatory and difficult to meet. *White v. Woodall*, 572 U.S. 415, 419 (2014). Deferential review under §2254(d) is generally 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).

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 Marshall v. Sec'y, Fla. Dep't of Corr's*, 828 F.3d 1277, 1285 (11th Cir. 2016). The state court is not required to issue an opinion explaining its rationale, because even the summary rejection of a claim, without explanation, qualifies as an adjudication on the merits which warrants deference. *See Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). Where the state court's adjudication on the merits is unaccompanied by an explanation, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, ___ U.S. ___, ___, 138 S.Ct. 1188, 1192 (2018). The Supreme Court explained that the presumption may be rebutted "by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.* at 1192.

When there is no reasoned state court adjudication on the merits at all, the

Supreme Court has instructed federal courts to "determine what arguments or theories . . . could have supported the state court's decision; and then . . . ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Sexton v. Beaudreaux*, ___ U.S. ___, ___, 138 S.Ct. 2555, 2558 (2018) (*quoting Harrington v. Richter*, 562 U.S. 86, 102 (2011)). The courts must deny a petition where "such disagreement is possible." *Id.*

Where the claim was adjudicated on the merits, in the state forum, §2254(d) prohibits relitigation of the claim unless the state court's decision was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law,[5] as determined by the Supreme Court of the United States;" or, (2) "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); *Harrington*, 562 U.S. at 97-98.

Because the "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court," *Burt v. Titlow*, 571 U.S. 12, 20 (2013); federal courts may "grant habeas relief only when a state court

[5]"Clearly established Federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the United States Supreme Court at the time the state court issues its decision. *White*, 572 U.S. at 419; *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (*citing Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

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 v. Warden*, 834 F.3d 1323, 1338 (11th Cir. 2016) (*quoting Harrington*, 562 U.S. at 102). This standard is intentially difficult to meet. *Harrington*, 562 U.S. at 102. As applied here, to the extent the Petitioner's claims were adjudicated on the merits in the state courts, they must be evaluated under §2254(d).

B. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he/she is waiving by entering such a plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). *See also United States v. Ruiz*, 536 U.S. 622, 629 (2002).

"A plea is voluntary in a constitutional sense if the defendant receives real notice of the charge against him and understands the nature of the constitutional protections he is waiving." *United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005) (*citing United States v. Brown*, 117 F.3d 471, 476 (11th Cir. 1997)). The

standard for determining the validity of a guilty plea is "whether the plea represents a voluntary intelligent choice among the alternative courses open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Boykin*, 395 U.S. at 242.

C. Ineffective Assistance of Counsel Standard

The movant challenges counsel's effectiveness during his 2012 change of plea hearing. (DE#1). The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). When assessing counsel's performance under *Strickland*, the Court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

"[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance." *Burt v. Titlow*, 571 U.S. 12, 23 (2013). To prevail on a claim of ineffective assistance of counsel, the movant must demonstrate that: (1) his counsel's **performance was deficient**, i.e., the performance fell below an objective standard of reasonableness; and, (2) he suffered **prejudice** as a result of that deficiency. *Strickland*, 466 U.S. at 687-88.

To establish deficient performance, the movant must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional

competence. *Strickland, supra. See also Cummings v. Sec'y for Dep't of Corr's*, 588 F.3d 1331, 1356 (11th Cir. 2009) ("To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place.") (internal quotation marks omitted). The court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*), *cert. den'd*, 531 U.S. 1204 (2001) (*quoting Burger v. Kemp*, 483 U.S. 776 (1987)).

There are no absolute rules dictating what is reasonable performance because absolute rules would restrict the wide latitude counsel have in making tactical decisions. *Id.* at 1317. The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. *Id.* at 1313. Instead, the test is whether what counsel did was within the wide range of reasonable professional assistance. *Id.* at 1313, n.12.

Regarding the prejudice component, the Supreme Court has explained "[t]he 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."

Strickland, 466 U.S. at 694. In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. *Id.* at 689. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697. Further, counsel is not ineffective for failing to raise non-meritorious issues. *Chandler*, 240 F.3d at 917. Nor is counsel required to present every non-frivolous argument. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013).

Since the sentence ultimately imposed upon the defendant is a "result of the proceeding," in order for a Petitioner to satisfy the prejudice-prong of *Strickland*, he must demonstrate that there is a reasonable probability that his sentence would have been different but for his trial counsel's errors. *See United States v. Boone*, 62 F.3d 323, 327 (10th Cir.) (rejecting the defendant's claim that counsel was ineffective in part because the defendant failed to show "that the resulting sentence would have been different than that imposed under the Sentencing Guidelines"), *cert. den'd*, 516 U.S. 1014 (1995).

Furthermore, a §2254 movant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th

Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr's*, 697 F.3d 1320, 1333–34 (11th Cir. 2012).

V. Discussion

Petitioner alleges the trial court erred in failing to inquire into his competency to enter his plea in the 2012 robbery and counsel was ineffective in failing to move for a competency evaluation. (DE# 1:3). As is explained below, the Undersigned finds Petitioner's argument to be meritless.

Independent review of the record as a whole reveals no evidence that Petitioner was suffering from any possible mental health issues which affected his ability to understand the 2012 change of plea proceedings. Petitioner provided nothing in the post-conviction proceeding nor this habeas proceeding to confirm that he was suffering from a mental illness at that time, or that he was mentally incompetent and could not understand the nature of the proceedings. To the contrary, at his change of plea proceeding, Petitioner was coherent and responded appropriately to all of the court's questions.

During the 2012 change of plea hearing, Petitioner responded intelligently and appropriately when court questioned him directly (DE#8-2, App. D). At the outset of the hearing, the court asked him his name and age, questioned him on how his

name was pronounced, and asked him his level of education. The transcript reflects that he competently answered the court's questions. Next, with respect to Petitioner's **mental state**, the following took place:

> THE COURT: Have you ever been treated for a mental illness?
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: Are you under the influence of alcohol, narcotics, or any medication today?
>
> DEFENDANT: No, ma'am.

(DE# 8-2, App. D, 10/29/12 Plea Hearing Transcript, at 8).

In response to the court's questioning throughout the plea colloquy, he maintained that the understood the charges, the consequences of his plea, and had voluntarily decided to plead guilty after consultation with his attorney. *Id.* He also stated that he was satisfied with his attorney's services. *Id.* Notably, when the court informed him his probation required that he seek mental health evaluation and treatment, Petitioner asked the court whether he could continue to receive care from his present mental health provider. The court informed him that he could, if the provider met probation's requirements. He agreed that he understood. He later asked the court whether he would be able to "bond out" on another pending charge. *Id.* The record demonstrates not only the Petitioner's clear understanding of the proceedings,

but also his willingness to ask questions of the court, when necessary.

The record does not indicate that Petitioner was not competent or was hearing voices during the plea colloquy.

A defendant's **sworn answers** during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). *See also Kelley v. Alabama*, 636 F.2d 1082, 1084 (5th Cir. Unit B. 1981); *Scheele v. State*, 953 So.2d 782, 785 (Fla. 4th DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); *Iacono v. State*, 930 So.2d 829 (Fla. 4th DCA 2006) (holding that defendant is bound by his sworn answers during the plea).

Petitioner is, therefore, not entitled to relief in this habeas corpus proceeding on any challenge to the lawfulness of his plea because his plea is not in violation of federal constitutional principles. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v. United States*, 397 U.S. 742, 748 (1970).

The Supreme Court set the standard to be used in determining mental

competency as whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402; *Drope v. Missouri*, 420 U.S. 162, 171 (1975). *See also Indiana v. Edwards*, 554 U.S. 164 (2008).

In *Drope*, the Court elaborated as follows:

> [t]he import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Drope, 420 U.S. at 180.

The analysis must focus on "what the trial court did in light of what it then knew, [and] whether objective facts known to the trial court were sufficient to raise a bona fide doubt as to the defendant's competency." *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987) (citations omitted).

Under these circumstances, no showing has been made in this collateral proceeding that counsel was ineffective for failing to request a competency

evaluation before Petitioner entered his 2012 plea. The test for determining a defendant's competency to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he [she] has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). Petitioner fully satisfied this test.

The mere presence of mental illness or other mental disability at the time of the plea hearing or trial does not necessarily mean that a defendant is incompetent under the *Dusky* test. The mental illness or disability must have been so debilitating that the defendant was unable to consult with his lawyer and did not have a rational and factual understanding of the proceedings. *See generally Bolius v. Wainwright*, 597 F.2d 986, 990 (5 Cir. 1979).

Moreover, even if counsel had requested a competency evaluation, no showing has been made here that this would have affected the outcome of the proceeding. No prejudice has been established arising from counsel's failure to pursue this nonmeritorious claim. Petitioner has failed to meet either the deficient performance or the prejudice prong of the *Strickland* analysis. Consequently, the rejection of this claim in the state courts was neither contrary to nor an unreasonable application of federal constitutional principles, and should therefore not be disturbed

here. *Williams v. Taylor, supra.*

Finally, this court has considered all of the Petitioner's claims for relief, and arguments in support . *See Dupree v. Warden*, 715 F.3d 1295 (11th Cir. 2013) (*citing Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, Petitioner has failed to demonstrate how the state courts' denial of his claims, to the extent they were considered on the merits in the state forum, were contrary to, or the product of an unreasonable application of, clearly established federal law. To the extent they were not considered in the state forum, as discussed in this Report, none of the claims individually, nor the claims cumulatively warrant relief. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein or in the state forum, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail here.

VI. Evidentiary Hearing

Additionally, no evidentiary hearing is warranted here. 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's*, 647 F.3d 1057, 1060 (11th Cir. 2011). To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, are not refuted by the record and may entitle Petitioner to relief. *Schriro v. Landrigan*, 550 U.S. 465, 474,

(2007)(citation omitted); *Jones v. Sec'y, Fla. Dep't of Corr's*, 834 F.3d 1299, 1318-19 (11th Cir. 2016), *cert. den'd*, 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 v. Landrigan*, 550 U.S. at 474. The pertinent facts of this case are fully developed in the record before the Court. Here, this court can assess Petitioner's claim without further factual development.

VII. Certificate of Appealability

Finally, a prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. §2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. §2253(c)(2). 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 v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if Petitioner does not agree, he may bring this

argument to the attention of the district judge in objections.

VIII. Conclusion

Based upon the foregoing, it is recommended that the federal habeas petition be DENIED; that a certificate of appealability be DENIED; and, the case CLOSED.

Objections to this Report may be filed with the District Judge within fourteen days of receipt of a copy of the Report. Failure to file timely objections shall bar Petitioner from a *de novo* determination by the district judge of an issue covered in this Report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. §636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790,794 (1989); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

SIGNED this 28th day of January, 2019.

UNITED STATES MAGISTRATE JUDGE

cc: Mackendy Strachan, *Pro Se*
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DENIAL ON A TIMELY REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

APPENDIX - D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10787-K

MACKENDY STRACHAN,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: WILLIAM PRYOR AND NEWSOM, Circuit Judges.

BY THE COURT:

Mackendy Strachan has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 17, 2019, order denying a certificate of appealability in his appeal of the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Upon review, Strachan's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.