IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Attachment B
1 page

No. 19-14799-G

ROBERT WILLIAM MOYNIHAN,

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:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Appellant's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Attachment C
1 page

No. 19-14799-G

ROBERT WILLIAM MOYNIHAN,

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: WILSON and NEWSOM, Circuit Judges.

BY THE COURT:

Robert Moynihan has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 14, 2020, 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, Moynihan's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix "A"

All Appendices page numbers Designated here → (1)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Attachment A

ROBERT W. MOYNIHAN,

Petitioner,

v. **Case No: 5:17-cv-17-Oc-37PRL**

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

Respondents.
_____/

ORDER

Petitioner seeks a Writ of Habeas Corpus ("Petition," Doc. 1) under 28 U.S.C. § 2254. Respondents filed a Response. ("Response," Doc. 22). Petitioner replied ("Reply," Doc. 24), and it is ripe for review.

Petitioner asserts nine grounds for relief. The Petition is denied.

I. Procedural History

The State Attorney's Office for the Fifth Judicial Circuit in and for Citrus County, Florida charged Petitioner by amended information with trafficking in controlled substance (Count One) and strongarm robbery (Count Two). ("Appendix," Doc. 23-1 at 33). The jury found Petitioner guilty as charged. (Doc. 23-1 at 81-82). The state court sentenced Petitioner to thirty years with a twenty-five year minimum mandatory on Count One and to a consecutive term of fifteen years on Count Two. (Doc. 23-1 at 91-105). Petitioner appealed. (Doc. 23-1 at 106). The Fifth District Court of Appeal ("Fifth DCA")

Appendix "B"

per curiam affirmed, denied a motion for rehearing, and issued mandate. (Doc. 23-1 at 823, 828, 830); *Moynihan v. State*, 145 So. 3d 862 (Fla. 5th DCA 2014) (Table).

Petitioner petitioned for writ of habeas corpus in the Fifth DCA alleging ineffective assistance of appellate counsel. (Doc. 23-1 at 832-79). The State responded in opposition. (Doc. 23-1 at 881-90). The Fifth DCA denied the petition without written opinion. (Doc. 23-1 at 892).

Petitioner moved for postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure raising nine grounds of ineffective assistance of counsel: (1) failure to move to suppress evidence; (2) failure to move to suppress his confession; (3) deceiving him from having a *Nelson* hearing; (4) failure to file any motions to dismiss, investigate the case, and argue for a judgment of acquittal; (5) failure to move to have "irrelevant evidence from the prosecution's case to be viewed by the jury;" (6) failure to request a competency evaluation; (7) mishandling evidence, failure to object to prosecutorial misconduct; (8) not moving for a competency evaluation after Petitioner attempted suicide during the trial; and (9) permitting him to enter a plea agreement while under duress. (Doc. 23-1 at 972-1042). The state court summarily denied the motion. (Doc. 23-1 at 898-970). Petitioner appealed, and the Fifth DCA *per curiam* affirmed. (Doc. 23-2 at 21); *Moynihan v. State*, 202 So. 3d 430 (Fla. 5th DCA 2016) (Table).

Petitioner moved to correct illegal sentence under Rule 3.800(a) of the Florida Rules of Criminal Procedure claiming that his consecutive sentences were illegal and violated double jeopardy. (Doc. 23-2 at 34-38). The state court dismissed the motion

finding it was not cognizable under Rule 3.800 and untimely under Rule 3.850. (Doc. 23-2 at 40-44). Petitioner did not appeal.

Petitioner filed a second motion to correct illegal sentence under Rule 3.800(a) raising the same argument as the first Rule 3.800(a) motion. (Doc. 23-2 at 46-54). The state court dismissed the motion finding this was the same claim as his previous motion. (Doc. 23-2 at 56-58). Petitioner appealed and the Fifth DCA *per curiam* affirmed. (Doc. 23-2 at 64).

After suing, Petitioner moved for leave to refile his Rule 3.850 motion alleging that the prison mail room failed to date stamp or mail a supplement to the original motion. (Doc. 23-2 at 68-116). The state court denied motion. (Doc. 23-2 at 118-24). Petitioner appealed, but voluntarily dismissed the appeal. (Doc. 23-2 at 131-32, 134).

II. Legal Standards

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

Under the AEDPA, federal habeas relief may not be granted on 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.

(3)

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 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 that [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 finds that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."[1] *Id.* 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

[1] In considering the "unreasonable application" inquiry, the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. 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).

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 to rebut 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

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person may have relief because his counsel rendered ineffective assistance. 466 U.S. 668, 687-88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)).

The focus of inquiry under *Strickland*'s performance prong is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner must "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690).

Petitioner's burden to show *Strickland* prejudice is also high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[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." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

C. Exhaustion

The AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights[.]" *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)). The 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 (11th Cir. 1998). In addition, a federal habeas court is precluded from considering unexhausted claims that would be barred if returned to state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

If a petitioner attempts to raise a claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994). So a federal court must dismiss those claims or

portions of claims denied on adequate and independent procedural grounds under state law. *Coleman*, 501 U.S. at 750.

A petitioner can avoid the application of procedural default by establishing: (1) objective cause for failing to properly raise the claim in state court; and (2) actual prejudice from the alleged constitutional violation. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Murray v. Carrier*, 477 U.S. 478 (1986). To show prejudice, a petitioner must show there is a reasonable probability the outcome of the proceeding would have been different. *Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

A second exception, known as the fundamental miscarriage of justice, only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray*, 477 U.S. at 479-80. Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To be credible, a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

III. ANALYSIS

A. Grounds One and Two

Petitioner challenges the state court's denial of his Rule 3.850 claims alleging ineffective assistance of counsel. (Doc. 1 at 6-9). Petitioner claims that his counsel failed to move to suppress the items obtained from an illegal search and seizure. (*Id.* at 6). Petitioner asserts that he was prejudiced by the admission of this evidence. *Id.* Petitioner further argues that counsel failed to move to suppress his confession because he was coerced, under the influence, and not read his *Miranda* rights. (*Id.* at 8).

Petitioner raised these grounds in his Rule 3.850 motion. (Doc. 23-1 at 979-90). The state court denied this claim:

> In Grounds One and Two of the Defendant's motion he claims his trial counsel was ineffective for failing to file a motion to suppress evidence from his vehicle and his confession. Defendant argues his trial counsel failed to seek suppression of illegally obtained evidence from his vehicle as well as his confession. Defendant has failed to allege sufficient facts to show that his counsel has a valid basis for filing the motion to suppress and that there is a reasonable probability that the motion would have been granted. *See State v. Curley*, 691 So. 2d 618 (Fla. 5th DCA 1997). Motion to suppress is filed to suppress evidence gained improperly or illegally. *See* Fla. R. Crim. P. 3.190(g) (2015). Here, Defendant fails to cite any improper conduct by law enforcement in obtaining the evidence he seeks to suppress. Defendant was initially stopped for driving with expired driver's license. *See* attached here Arrest Affidavit. Upon his arrest his vehicle was inventoried and the officer found "large amount[s]" of tools, oxycontin pills, and other drug paraphernalia. *Id.* Moreover, the Defendant's statements to law enforcement were made after he was advised of his *Miranda* rights. *See* attached hereto Trial Transcript November 6, 2012, Volume III, pp. 397-402. Therefore, trial counsel had no basis to file a motion to suppress.

(Doc. 23-1 at 900). Petitioner appealed these grounds to the Fifth DCA. (Doc. 23-1 at 1051-53). The State declined to submit an answer brief, unless the appellate court so requested.

(Doc. 23-2 at 18-19). The Fifth DCA affirmed the postconviction court's decision. (Doc. 23-2 at 21).

The state court findings and conclusions about this claim were reasonable, in accord with, and not contrary to, the principles of *Strickland*, which the state court cited as the controlling authority on ineffective assistance of counsel claims; and were not unreasonable, given the evidence in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2). *See also Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975) ("a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'").

B. Ground Three

Petitioner challenges the state court's denial of his Rule 3.850 claim alleging ineffective assistance of counsel. (Doc. 1 at 9-11). Petitioner claims that counsel failed to request a *Nelson* hearing,[2] but "went straight to *Faretta*." (*Id.* at 9). Petitioner states this tricked him into representing himself when there were other alternatives. *Id.*

Petitioner raised this ground in his Rule 3.850 motion. (Doc. 23-1 at 990-994). The state court denied the claim:

> Next, in Ground Three, Defendant alleges his trial counsel was ineffective for denying him a right to a *Nelson* hearing. Defendant contends his trial counsel "tricked" him into seeking to represent himself. Defendant maintains he was not willing to accept a plea and his trial counsel advised against going to trial. This led to him "firing" him for "dissatisfaction,"

[2] In Florida, when a defendant requests his appointed counsel be removed for incompetence, "the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether ... there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." *Nelson v. State*, 274 So. 2d 256, 258–59 (Fla. 4th DCA 1973).

> however trial counsel failed to advise him of his right to seek alternate counsel. These claims are conclusively refuted by the record. During a status hearing the Court was advised by defense counsel that he would like to represent himself. *See* attached hereto *Faretta* Hearing Transcript pp. 3-6. The Court advised the Defendant of his rights and specifically, inquired whether he wanted to represent himself at which time Defendant chose self-representation. *Id.* at 6-8. Additionally, the Court reviewed his rights to have any attorney and the Defendant chose to represent himself without requesting a substitute attorney. *Id.* at 9-25. It appears to this Court that the Defendant's request to dismiss his court appointed counsel was made voluntarily, knowingly, and intelligently.

Where is this in the transcript?

(Doc. 23-1 at 901). Petitioner appealed this ground to the Fifth DCA. (Doc. 23-1 at 1054-55). The Fifth DCA affirmed the postconviction court's decision. (Doc. 23-2 at 21).

The state court findings and conclusions about this claim were reasonable, in accord with, and not contrary to, the principles of *Strickland*, which the state court cited as the controlling authority on ineffective assistance of counsel claims; and were not unreasonable, given the evidence in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2).

C. Ground Four

Petitioner challenges the state court's denial of his Rule 3.850 claim alleging ineffective assistance of counsel. (Doc. 1 at 11, 15). Petitioner claims that his counsel failed to investigate his case or file any motions. (*Id.* at 11). Petitioner asserts that his counsel told him that filing any motions would be frivolous and improper. *Id.*

Petitioner raised this ground in his Rule 3.850 motion. (Doc. 23-1 at 994-1000). The state court denied this claim:

> Furthermore, in Ground Four of Defendant's motion he alleges his trial counsel was ineffective for failing to investigate, file motion to dismiss, and failing to argue for a judgment of acquittal. Defendant contends his charges

> violated double jeopardy and that uncharged evidence was used to prejudice him at trial. The Court finds there was no basis for a double jeopardy challenge. The established test for double jeopardy is set forth in *Blockburger v. United States*, 284 U.S. 299 (1932): whether each offense requires proof of an additional fact or element that the other does not. *See also, Valdes v. State*, 3 So. 3d 1067 (Fla. 2009). Florida has codified the *Blockburger* test at section 775.021, Florida Statutes (2012). Here, the Defendant was charged with one count of Trafficking in Controlled Substance thus double jeopardy does not apply. Furthermore, trial counsel had no basis to seek a judgment of acquittal. The Defendant was representing himself with trial counsel as stand by. *See* attached hereto Trial Transcript November 6, 2012, Volume III, pp. 470-472. The Court advised him as to the time to seek a judgment of acquittal and inquired whether he or his trial counsel would be making the argument. *Id.* at 470-472. Rather than making the arguments he requested time to consider a plea. *Id.* at 472. Accordingly, Defendant's Ground Four is without merit.

(Doc. 23-1 at 901-02). Petitioner did not appeal this ground to the Fifth DCA. *See* Doc. 23-1 at 1044-1126; Doc. 23-2 at 1-16.

Petitioner failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey v. Nagle*, 172 F.3d 1299, 1302, 1306 (11th Cir. 1999). Petitioner failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

D. Ground Five

Petitioner challenges the state court's denial of his Rule 3.850 claim alleging ineffective assistance of counsel. (Doc. 1 at 12). Petitioner claims that his counsel failed to

have irrelevant evidence suppressed and misadvised him that the *Williams* Rule covered this evidence. *Id.*

Petitioner raised this ground in his Rule 3.850 motion. (Doc. 23-1 at 1000-02). The state court denied this claim:

> Also, in Ground Five, Defendant alleges his trial counsel was ineffective for failing to move to exclude irrelevant evidence. Defendant maintains that law enforcement's search of his vehicle was illegal. As noted above, the search of the Defendant's vehicle was valid. *See Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983) (finding that inventory after lawful arrest does not violate search and seizure protection). At trial, the inventory of the vehicle was entered into evidence by the officer that performed the inventory. *See* attached hereto Trial Transcript November 6, 2012, Volume III, pp. 373-81. Defendant representing himself did not object to the introduction of the evidence. *Id.* Therefore, trial counsel had no basis to seek exclusion of evidence.

(Doc. 23-1 at 902). Petitioner appealed this ground to the Fifth DCA. (Doc. 23-1 at 1056-57). The Fifth DCA affirmed the postconviction court's decision. (Doc. 23-2 at 21).

The state court findings and conclusions about this claim were reasonable, in accord with, and not contrary to, the principles of *Strickland*, which the state court cited as the controlling authority on ineffective assistance of counsel claims; and were not unreasonable, given the evidence in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2).

E. Grounds Six and Eight

Petitioner challenges the state court's denial of his Rule 3.850 claims alleging ineffective assistance of counsel. (Doc. 1 at 12-14). Petitioner claims that counsel failed to have his competency evaluated despite his previous mental competency issues, his previous suicide attempts, and his need for prescription medicine. (*Id.* at 12). Petitioner

further claims that counsel failed to have his competency evaluated after he attempted suicide in the holding cell during the trial. (*Id.* at 13-14).

Petitioner raised these grounds in his Rule 3.850 motion. (Doc. 23-1 at 1002-04, 1007-10). The state court denied these claims:

> In Grounds Six and Eight of Defendant's motion he claims trial counsel was ineffective for failing to seek a competency evaluation and failing to seek a competency evaluation after attempted suicide. He argues that his trial counsel was aware of his previous mental health problems but failed to request competency evaluation. In determining competency pursuant to Florida Rules of Criminal Procedure 3.210(b), "the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition ..." Courts are to order competency hearings "whenever it appears necessary based on the defendant's history or behavior in court." *Boyd v. State*, 910 So. 2d 167, 187 (Fla. 2005) (citation omitted). *See also Alston v. State*, 723 So. 2d 148, 157 (Fla. 1998) ("[R]ule 3.215(c) is triggered only when there is a prior adjudication of incompetency or restoration, or when a defendant exhibits inappropriate behavior and it is shown that the inappropriate behavior is a result of the psychotropic medication.").
>
> In the instant case, trial court had no basis to seek a competency evaluation. *See Nelson v. State*, 43 So. 2d 20 (Fla. 2010) (where there is no evidence calling a defendant's competency into question, counsel is not bound to seek an evaluation). In a post-conviction setting that raises the issue of competency, "the trial court is faced with two questions: (1) whether the court could make a meaningful retrospective evaluation of the defendant's competence at the time of trial; and, if so, (2) whether the defendant was in fact competent at the time of trial." *Jones v. State*, 740 So. 2d 520, 523 (Fla. 1999). "In order to demonstrate prejudice from counsel's failure to investigate his competency, a petitioner has to show that there exists at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial." *Nelson v. State*, 43 So. 3d 20, 29 (Fla. 2010) (quoting *Futch v. Dugger*, 874 F.2d 1483 (11th Cir. 1989)). Moreover, "while a suicide attempt is an indication of possible mental instability, it alone does not necessarily create a reasonable doubt about a defendant's competency to stand trial." (*Id.*) (citing *Drope v. Missouri*, 420 U.S. 162 (1975)). Here, trial counsel had no basis to request a competency evaluation. Defendant was found competent to represent

himself and the attempted suicide alone does not require evaluation. *See* attached hereto Trial Transcript November 7, 2012, Volume IV, pp. 507-16.

(Doc. 23-1 at 902-03). Petitioner appealed these grounds to the Fifth DCA. (Doc. 23-1 at 1057-61). The Fifth DCA affirmed the postconviction court's decision. (Doc. 23-2 at 21).

The test for determining competence to stand trial or to plead guilty is whether the defendant "has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding" and whether the defendant "has a rational as well as factual understanding of the proceedings against him [or her]." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). A trial court must conduct, *sua sponte*, a competency hearing when the information known to the trial court during the trial or plea hearing raises a bona fide doubt about the defendant's competence. *Pate v. Robinson*, 383 U.S. 375, 385 (1966); *McNair v. Dugger*, 866 F.2d 399, 401 (11th Cir.), *cert. denied*, 493 U.S. 834 (1989). Courts focus on three factors in determining whether the trial court violated the defendant's procedural due process rights by failing to hold *sua sponte* a competency hearing: (1) evidence of the defendant's irrational behavior; (2) the defendant's demeanor; and (3) prior medical opinion regarding the defendant's competence to stand trial. *Drope*, 420 U.S. at 180. Such an analysis focuses on what the trial court did given what it knew during the trial or plea hearing. *Reese v. Wainwright*, 600 F.2d 1085, 1091 (5th Cir.), *cert. denied*, 444 U.S. 983 (1979).[3]

[3] This case was decided before the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

During the many stages of the trial, the state court observed Petitioner and found him to be competent. The Court conducted a *Faretta* hearing and found Petitioner not only competent to stand trial, but competent to represent himself. Before jury selection, the trial court spoke with Petitioner and again found he was competent to represent himself. (Doc. 23-1 at 119-21). Petitioner actively participated in the jury selection process. Before trial began, the trial judge spoke to Petitioner and noted that the bailiffs stated that Petitioner has not given them any trouble and the judge called him "a gentleman." (Doc. 23-1 at 284-85). During the trial, Petitioner gave an opening statement, cross-examined the witnesses, and re-affirmed his decision to represent himself multiple times. Once Petitioner heard the recording of his confession, he decided to "just throw in the towel." (Doc. 23-1 at 588). The Court then called a recess to allow Petitioner to consult with standby counsel regarding how he wanted to proceed. *Id.* During this recess, Petitioner physically harmed himself.

Petitioner was back in court following the incident and the following discussion occurred:

> THE COURT: ... Now, Mr. Moynihan, let me - - we're of record.
>
> And I want to make sure that you know what's going on and that you continue to want to represent yourself. Now, the law on that point basically says that I can continue to allow you to represent yourself, so long as you are competent to make that decision, not whether or not you are actually doing as good a job as a trained attorney could do.
>
> You have expressed to me earlier on that you, in fact, did not disagree with the manner of which I was conducting the trial. You have conducted yourself, actually, with a fairly decent degree of cross-examination skills.
>
> But, nonetheless, at this point right now, it's been brought to my attention through court security that you have somehow injured yourself in the back -- notice, I'm not asking you any questions yet -- that you have

somehow injured yourself in the back. That would lead a prudent person to believe that maybe the stresses of self-representation -- a trial alone is tough enough on the attorneys and the participant, because any way you look at it, after the trial is over, the attorneys are going to go out that door. The Defendant in a particular case has the added burden of saying, "Well, if I lose this case, I could be facing a prolonged term of incarceration."

Now you have compounded the pressure on yourself the stress, by wanting to continue to self-represent. I have to be assured, through my determinations as to whether or not you are still competent to make the decision of self-representation.

And I can tell you Mr. Moynihan, the allegations are -- that you may have attempted to injure yourself in the back do not bode well for your continued self-representation. Do you understand what I'm saying to you?

MR. MOYNIHAN: Yes, sir.

THE COURT: Okay. Now then, do you want me to continue to allow you to represent yourself?

MR. MOYNIHAN: No, sir.

[Petitioner was sworn in.]

THE COURT: Put your hand down. Now, Mr. Moynihan, do you incorporate all the questions that were -- all the questions I asked of you and the answers you gave to me just moments ago to be the truth, the whole truth and nothing but the truth?

MR. MOYNIHAN: Yes, sir.

THE COURT: With that in mind, do you want me to assign Mr. Waatti to be your trial counsel?

MR. MOYNIHAN: Yes, sir.

THE COURT: Very good. Are you presently under the influence of any alcohol or intoxicant that would negatively affect your good judgment here today?

MR. MOYNIHAN: No, sir.

> THE COURT: While you have made a self-abusive motion to yourself or you have actually injured yourself, to your neck, do you think you are making good and informed choices now?
>
> MR. MOYNIHAN: Yes, sir.
>
> THE COURT: Okay. Has anyone threatened you, coerced you or exercised any pressure or threat in order to get you to change your decision about representing yourself and ask me to appoint Mr. Waatti?
>
> MR. MOYNIHAN: No, sir.
>
> THE COURT: Very good.
>
> Okay. That having been said, I once again, will continue to commend Mr. Waatti for his continued adherence to the strictest code of an attorney's conduct, which is to be prepared - - actually, that's the old Boy Scout motto. But nonetheless, I know that Mr. Waatti has continued to be with you through every phase of this trial, including the voir dire examination, the selection process, opening statements, direct examination of the witnesses, cross-examination of the witnesses, as well as handling some legal objections that you made that were actually sustained. So you won on those grounds, Mr. Moynihan.
>
> So I'm going to ask Mr. Waatti to step up to assume full representation of Mr. Moynihan.

(Doc. 23-1 at 589-93). Ultimately, the trial court found Petitioner competent to proceed.

The state court findings and conclusions on this claim were reasonable, in accord with, and not contrary to, the principles of *Strickland*, which the state court cited as the controlling authority on ineffective assistance of counsel claims; and were not unreasonable, given the evidence in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2). This whole response to this ground from the U.S.D.Ct is hogwash!

F. Ground Seven like Ground four not raised in Appellate court

Petitioner challenges the state court's denial of his Rule 3.850 claim alleging ineffective assistance of counsel. (Doc. 1 at 13). Petitioner claims that his counsel failed to

redact portions his confession and allowed the state to redact all instances of coercion. *Id.* Petitioner claims his confession was coerced and that he was not read his *Miranda* rights until after that agreement. *Id.*

Petitioner raised this ground in his Rule 3.850 motion. (Doc. 23-1 at 1005-7). The state court denied the claim:

> In Ground Seven, Defendant alleges his trial counsel was ineffective for mishandling evidence provided by the State and not objecting to the introduction of evidence at trial. He claims the State "mishandled butchered" the recording of his confession. To establish a due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant must show that the prosecution possessed evidence favorable to the defendant, including impeachment evidence; that the defendant did not possess the evidence nor could the defendant obtain it through reasonable diligence; that the prosecution suppressed the evidence following a request by the defense; that the evidence suppressed was favorable to the defendant or exculpatory; that the evidence suppress was material to the issues at trial; and that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *See Freeman v. State*, 761 So. 2d 1055 (Fla. 2000); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998), *Moore v. Illinois*, 408 U.S. 786 (1972). Here, the State provided all necessary evidence to the Defendant. Deputy John Bergen testified that the audio recording of the Defendant's confession was modified to remove irrelevant portions. *See* attached hereto Trial Transcript November 6, 2012, Volume III, pp. 395-400. The Defendant raised no objections to the modified recording entered into evidence. *Id.* There is no support to Defendant's contention that the recording was "butchered". Defendant has failed to demonstrate that the State violated the rules of discovery under *Brady*. Accordingly, this claim is without merit.

(Doc. 23-1 at 904). Petitioner did not appeal this ground to the Fifth DCA.

Petitioner failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a

fundamental miscarriage of justice would result if the claim were not considered. *Bailey v. Nagle*, 172 F.3d 1299, 1302, 1306 (11th Cir. 1999). Petitioner failed to show cause and prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

G. Ground Nine failed to exhaust like 4 and 7

Petitioner challenges the state court's denial of his Rule 3.850 claim alleging ineffective assistance of counsel. (Doc. 1 at 14). Petitioner claims that his counsel allowed him to sign a plea agreement while under duress from his incident of self-harm. *Id.*

Petitioner raised this ground in his Rule 3.850 motion. (Doc. 23-1 at 1010-12). The state court denied the claim:

> Finally, in Ground Nine of Defendant's motion, he claims his trial counsel was ineffective for pressuring him to signing a plea agreement and entering a plea. He alleges trial counsel advised him after his suicide attempt to enter a plea. However, Defendant ultimately chose not to enter a plea and proceeded to trial. *See* attached hereto Trial Transcript November 7, 2012, Volume IV, pp. 503-7. Defendant failed to demonstrate that this "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." *Strickland*, 466 U.S. at 687. Therefore, Defendant's claim is conclusively refuted by the record.

(Doc. 23-1 at 904-05). Petitioner did not appeal this ground to the Fifth DCA.

Petitioner failed to exhaust this claim in state court and is now procedurally defaulted from raising it here. Federal habeas courts may not review the merits of procedurally defaulted claims unless the petitioner shows either (1) cause for failing to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Bailey v. Nagle*, 172 F.3d 1299, 1302, 1306 (11th Cir. 1999). Petitioner failed to show cause and

prejudice for the default, and nothing in the record suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

IV. Certificate of Appealability

This Court should grant an application for certificate of appealability only if 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 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). But a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not shown that reasonable jurists would find the district court's assessment of the constitutional claims and procedural ruling debatable or wrong. And Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. Conclusion

Accordingly, it is **ORDERED** and **ADJUDGED**:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is DENIED, and this case is DISMISSED with prejudice.
2. Petitioner is DENIED a certificate of appealability.
3. The Clerk of Court shall enter judgment in favor of Respondents and close this case.

DONE and ORDERED in Orlando, Florida on October 22, 2019.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party