No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EFRAIN CAMARILL CRUZ,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14201-B

EFRAIN CAMARILL CRUZ,

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:

Efrain Cruz, a Mexican national, filed a counseled 28 U.S.C. § 2254 habeas corpus petition while he was serving three years' probation in Florida after he pled guilty to using a device to lure a child, using a device to lure the parent or guardian of a child, traveling to meet a minor for illegal sexual conduct, and attempted lewd or lascivious battery with a child. He raised the following three claims in his § 2254 petition:

(1) his guilty plea was not voluntary because of his mental illness, and his counsel was ineffective for failing to argue that Cruz was incompetent to enter a guilty plea;

(2) counsel was ineffective for failing to move to dismiss the count in the indictment for attempted lewd or lascivious battery; and

(3) his convictions and sentences violated the Double Jeopardy Clause.

After the state's response and Cruz's reply, the district court denied the § 2254 petition, concluding that Claims 1 and 2 were meritless and that Cruz had waived Claim 3 with his guilty plea. The district court also denied Cruz a certificate of appealability ("COA"). Cruz has appealed and now moves this Court for a COA, repeating his arguments for Claims 1 and 3 that he raised in his § 2254 petition.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

As an initial matter, Cruz has waived Claim 2 because he did not raise it in his COA motion to this Court. *See Jones v. Sec'y, Dep't of Corrs.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010) (stating that this Court "will not entertain the possibility of granting a" COA on an issue as to which the petitioner "does not provide facts, legal arguments, or citations of authority that explain why he is entitled to a certificate").

Here, the state post-conviction court's decision that Cruz's guilty plea was knowing and voluntary was not contrary to, or an unreasonable application of, federal law, or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1). Based on the representations made by

Cruz and his counsel during the plea colloquy, Cruz was competent to plead guilty because (1) he had the ability to consult with, and understand the advice of, his counsel; and (2) he understood that he was pleading guilty to the charged offenses and what the consequences of his guilty plea would be. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (holding that a defendant is competent if he has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has "a rational as well as factual understanding of the proceedings against him"); *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991) (*en banc*) ("If a defendant understand the charges against him, understand the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coercered to do so, the guilty plea . . . will be upheld on federal review."). Because Cruz failed to show that he was incompetent to plead guilty, counsel could not have been ineffective for failing to raise this issue. *See Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (stating that counsel is not ineffective for failing to raise non-meritiorious issues). Accordingly, no COA is warranted as to Claim 1.

Furthermore, reasonable jurists would not debate the district court's conclusion that Claim 3 was waived by Cruz's guilty plea. Cruz's voluntary and counseled guilty plea waived any double-jeopardy claim because the indictment, on its face, charged him with conduct related to two different minors. *See United States v. Broce*, 488 U.S. 563, 569, 574-75 (1989) (holding that a voluntary and counseled guilty plea waives double-jeopardy issues, specifically when the defendant pleads guilty to an indictment that, on its face, describes different offenses).

Accordingly, Cruz's motion for a COA is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

EFRAIN CAMARILL CRUZ,

Petitioner,

v. Case No. 5:16-cv-531-Oc-39PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

I. Introduction

Petitioner, Efrain Camarill Cruz, a former detainee of the Citrus County Jail, proceeds on a petition for writ of habeas corpus under 28 U.S.C. § 2254, filed by counsel (Doc. 1; Petition). Petitioner challenges a 2013 Citrus County judgment of conviction. Respondents filed a response (Doc. 12; Response), and Petitioner's counsel replied (Doc. 22; Reply).[1]

Petitioner raises three grounds for habeas relief: (1) his guilty plea was not voluntary because of his mental illness, or alternatively, the ineffective assistance of counsel for failure to argue Petitioner was incompetent to enter a guilty plea and for

[1] The Court will cite to the exhibits in the Appendix as "Ex." The Court will reference page numbers using the Bates stamps where provided (primarily for Ex. A). Otherwise, the document's internal page numbering will be used, not the Court's electronic docket system numbering.

failure to request a competency hearing under the Florida Rules of Criminal Procedure; (2) the ineffective assistance of counsel for failure to move to dismiss count four of the indictment; and (3) his convictions and sentence under Florida Statutes sections 847.0135(3)(a) and (4)(a) violate double jeopardy principles. Petition at 10, 17, 18.

II. Procedural History

Petitioner, a Mexican citizen, was convicted on August 19, 2013, and sentenced to serve 90 days in the county jail followed by three years of probation with possible deportation. Petition at 1. As of the date of this Order, Petitioner completed his sentence. However, when Petitioner filed his Petition, on August 19, 2016, he met the "custody" requirement under § 2254 because his probationary term had not expired. Id. It appears Petitioner faces a possible collateral consequence related to his conviction because he alleges he was subject to deportation as a result. Id.

Petitioner was arrested on June 22, 2012, following an undercover operation. Ex. A at 27. According to the probable cause affidavit, Petitioner used his "email account to seduce, solicit, lure or entice or attempt to seduce, solicit, lure or entice a parent of a child to commit any illegal sex act." Id. at 28. An undercover agent, Deputy Phil Graves, posing as an adult single mother, posted an advertisement online, titled "ready for training–W4M." Id. That same day, Petitioner responded to the

advertisement using an online email service. Id. Deputy Graves responded immediately and identified the child as a 13-year-old girl. Id. Petitioner exchanged numerous text messages with whom he thought was the parent of the child. Id. The two also exchanged pictures through email. Id. Petitioner spoke by phone with the supposed parent and the supposed daughter, talking to the daughter about engaging in sex acts with her. Id. at 28-29. Deputy Graves provided Petitioner an address and the two arranged to meet. Id. at 29. When Petitioner arrived, officers arrested him, confiscating two cell phones and a thumb drive device, each of which was believed to contain pertinent information. Id. at 59, 66.[2] After being read his rights, Petitioner stated he made a mistake. Id.

On July 16, 2012, Petitioner was charged by Information with four counts: (1) use of the internet or device to lure a child identified as Tiffany Wright; (2) use of the internet or device to lure the parent of a child; (3) traveling to meet a minor, identified as Jenny,[3] for illegal sexual conduct; and (4) attempted lewd/lascivious battery on a child identified as Jenny. Id. at 38.

[2] A search warrant subsequently was issued and executed for the devices. Ex. A at 64-68.

[3] The Information references two fictitious minors: Tiffany Wright and Jenny. Ex. A at 38. The parties do not dispute Petitioner believed there was only one minor involved. It is unclear why two different names are referenced in the Information.

On August 19, 2013, Petitioner entered a guilty plea as "an open plea to the Court," not as a result of a plea negotiation with the prosecutor. Id. at 3, 4. After Petitioner was sworn in, Petitioner's attorney, Mr. Grant, informed the trial judge he spoke with Petitioner prior to the proceedings to explain the terms of the plea, including the sentence:

> MR. GRANT: Mr. Cruz, Judge, for the record, reads and writes English, is extremely articulate. He, in addition to that, Your Honor, did acquire his GED and one year of college. He's been in the United States for 16 years. I have, Judge, in this case, we have not taken any depositions . . . because Mr. Cruz, through the decision-making process, has agreed to take the deal that the State of Florida – well, that the court is going to offer.[4]
>
> . . . .
>
> Specifically, Your Honor, we discussed it, I gave him my professional opinion, the likelihood of success at trial which was limited in this case. There are post-Miranda admissions written and oral. There were text messages, there were – the government had a very strong case
>
> . . . .
>
> I want to make sure that I have advised Mr. Cruz that as a foreign national, it is my opinion that he will be deported from the

[4] Petitioner's plea was not negotiated with the prosecutor. As such, there was no written plea agreement. Ex. A at 3. Defense counsel stated the plea was the result of "a judge's conference" at which the parties seemingly discussed whether Petitioner would change his plea in exchange for "90 days, three years, standard probation." Id.

> United States upon . . . entering of the plea of guilty.
>
> . . . .
>
> I want to make it abundantly clear that my client understands that, is prepared to go to Mexico if the United States government does, in fact, deport him.

Id. at 5-6. Mr. Grant also informed the judge the following:

> Your Honor, we have discussed that [my client is] waiving his right to a jury trial, waiving the right to confront witnesses, waiving his right to an appeal other than for any legal [sic] sentence, that he has waived – that he's going to be getting DNA from the Court, and that he's waiving all his other constitutional rights that relate to a jury trial and the right to confront witnesses and challenge the witnesses and the evidence that the government may present against him. In light of that, we're here to change our plea today, enter a plea of guilty, receive 90 days in the Citrus County Jailhouse and three years standard probation.

Id. at 9.

Upon receiving Mr. Grant's assurances that Petitioner wished to enter a guilty plea understanding the implications and potential consequences, the judge engaged Petitioner in the following exchange:

> THE COURT: Mr. Cruz, you heard your attorney's representations. Is that how you want to handle this matter?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you presently under the influence of any alcohol or intoxicant

> that would negatively affect your good judgment here today?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you ever been found to be insane, incompetent, or mentally challenged?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay. Are you comfortable in the English language?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you been able to understand everything I've said in English as well as what [your attorney] has said in English?
>
> THE DEFENDANT: Yes, I did, sir.
>
> THE COURT: Very good. Now, then, Mr. Cruz, you heard about your situation regarding your immigration status, residency status, and/or likely deportation status. Do you understand that this plea could and likely would subject you to deportation by the federal authorities, you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: [A] guilty plea is one saying that I am guilty of this offense, that you heard your attorney indicate the rights you're giving up. Do you need me to go over each one of those rights individually like he's already done in your presence?
>
> THE DEFENDANT: No, sir.

Id. at 10-11.

The trial judge then stated the factual predicate for the plea, as follows:

> Mr. Cruz, the facts of the case would tell me that on or about June the 22nd, of 2012 . . . you did knowingly utilize a computer online service, Internet service, local bulletin board, or other electronic status storage device to seduce, solicit, lure, entice a Tiffany Wright believed by you, Mr. Cruz, to be a child to commit an illegal act as defined by Florida [laws], this by conversing or chatting or sending emails or messages to this person.

Id. at 11-12.

The judge further explained Petitioner communicated with someone Petitioner believed to be the parent of the child to solicit the parent's consent for the child to participate in an illegal act. Id. at 12. The judge explained Petitioner traveled some distance "to conduct sexual contact with Jenny or Tiffany or somebody else utilizing this electronic data storage matter," and explained:

> In other words, you traveled for the purpose of having sex with Jenny and that further on or about this same date, that you did attempt to engage in sexual activity with Jenny who was believed by you to be a person over the age of 12 but less than 16, this [sic] by attempting to have sexual contact . . . .

Id. at 13.

After setting forth the factual predicate, the judge explained to Petitioner that Mr. Grant was not appointed as Petitioner's immigration attorney and reiterated Petitioner's plea may result in his deportation. Id. at 14. The judge said:

> If you are, in fact, deported, you can't come back later on and say that Mr. Grant has done anything improper or has given you bad advice or anything. He's given you the best that he has and you know your situation. Is that correct, Mr. Cruz?

Id. Petitioner responded, "Yes, sir."[5] The judge explained to Petitioner his guilty plea would result in the waiver of certain rights:

> So you're forever waiving your rights to appeal or challenge any of the facts of this case as we've already discussed the facts of the case or any legalities of any decisions that have already been made by me and of course, you still have the right to, you know, have an immigration hearing . . . . You understand that?

Id. at 14-15. Petitioner responded, "Yes, sir." Id. at 15. Petitioner agreed Mr. Grant "answered all of [his] questions to complete and utter satisfaction," and Mr. Grant confirmed Petitioner was "competent." Id. The judge explained Petitioner would be designated a sexual offender and would be subject to the requirements of the Jimmy Ryce and Lunsford Acts. Id. at 19-20. The judge accepted Petitioner's plea of guilty, finding it "freely and voluntarily entered into after knowing waiver of rights" and after the factual basis was established. Id. at 17.

[5] Notably, Petitioner's immigration attorney was present in the courtroom when Petitioner entered his guilty plea. Ex. A at 23.

Petitioner, through counsel, filed a direct appeal, id. at 82, which he voluntarily dismissed, Ex. B. Petitioner's counsel then filed a motion under Florida Rule of Criminal Procedure 3.850 requesting the trial court vacate Petitioner's judgment. Ex. D-5. The trial court denied the 3.850 motion. Ex. D-3; Ex. G.[6] Petitioner appealed the trial court's ruling. Ex. H. On August 18, 2015, the appellate court affirmed without opinion. Ex. M. The appellate court denied Petitioner's motion for rehearing on September 2, 2015, Ex. O, and the mandate issued on October 8, 2015, Ex. P.

III. Timeliness & Exhaustion

Respondents assert the Petition appears to have been timely filed[7] and the claims have been exhausted in state court except for one portion of ground one. See Response at 9, 11. Respondents contend "the portion of claim one relying on 'Exhibit A' . . . has not been exhausted in state court," due to Petitioner's failure to present a copy of the exhibit. Id. at 11. Exhibit A is a letter from a neuropsychologist, Dr. Ginart, who evaluated Petitioner at the request of Petitioner's lawyer in furtherance of his postconviction proceedings. See Petition at 10, 26. Petitioner

[6] The trial court issued two orders on the 3.850 motion. Ex. D-3; Ex. G. On the day the court issued the first order, it reserved ruling on one claim and directed the state to respond to that claim. Ex. D-2. After the state responded, the trial court issued a final order. Ex. G.

[7] For purposes of this Order, the Court construes the Petition as timely filed.

asserts Florida law does not require him to have provided the exhibit to the state court because he referenced Dr. Ginart's opinion in his 3.850 motion. Reply at 3-4.

Upon review of the record, the Court finds Petitioner's position is well-founded. In his 3.850 motion, Petitioner asserted he suffered a mental illness, and his counsel referenced the neuropsychologist's opinion, stating "Dr. Ginart has concluded [Petitioner] was incompetent to enter a guilty plea." Ex. D-5 at 6. Petitioner was not required to attach the written opinion to his motion. See Mann v. State, 21 So. 3d 894, 895 (Fla. 2d DCA 2009) (recognizing Florida law does not require a prisoner to support his sworn motion with evidence). The Court concludes Petitioner has exhausted all claims in his Petition. Accordingly, in analyzing ground one, the Court will consider, to the extent relevant, the exhibit Plaintiff attaches to his Petition.

IV. Evidentiary Hearing

Petitioner requests an evidentiary hearing on grounds one and two. See Petition at 14, 15, 18. Petitioner has the burden to establish the need for a federal evidentiary hearing. Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011). A district court is not required to hold an evidentiary hearing if the record refutes the asserted factual allegations or otherwise precludes habeas relief. A petitioner fails to demonstrate an

evidentiary hearing is warranted based upon conclusory allegations. Id. at 1061.

In determining whether an evidentiary hearing is warranted, a federal court should take into consideration the deferential standards of federal habeas review under § 2254. Schriro v. Landrigan, 550 U.S. 465, 474 (2007). "Therefore, before a habeas petitioner may be entitled to a federal evidentiary hearing . . . he must demonstrate a clearly established federal-law error or an unreasonable determination of fact on the part of the state court, based solely on the state court record." Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1295 (11th Cir. 2015).

After a thorough review of the record, the Court finds Petitioner fails to carry his burden to demonstrate the need for an evidentiary hearing. The Court finds the pertinent facts are fully developed in this record or the record otherwise precludes habeas relief. Consequently, this Court can "adequately assess [Petitioner's] claim[s] without further factual development." Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003).

V. Standard of Review

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs a state prisoner's federal petition for habeas corpus. See § 2254. "'The purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error

correction.'" Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 642 (11th Cir. 2016), cert. denied, 137 S. Ct. 1432 (2017) (quoting Greene v. Fisher, 565 U.S. 34, 38 (2011)). As such, federal habeas review of final state court decisions is "'greatly circumscribed' and 'highly deferential.'" Id. (quoting Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011)).

The first task of a federal habeas court is to identify the last state court decision, if any, that adjudicated the petitioner's claims on the merits. Marshall v. Sec'y Fla. Dep't of Corr., 828 F.3d 1277, 1285 (11th Cir. 2016). The state court need not issue an opinion explaining its rationale for its decision to qualify as an adjudication on the merits. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). Where the state court's adjudication on the merits is unaccompanied by an explanation, the district court should presume the unexplained decision adopted the reasoning of the lower court:

> the federal court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.

Id. The presumption is rebuttable by a showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision. Id. at 1192, 1196.

When a state court has adjudicated a petitioner's claim on the merits, a federal court cannot grant habeas relief unless the state court's adjudication of the claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). The burden of proof is high; "clear error will not suffice." Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017). A state court's factual findings are "presumed to be correct" unless rebutted "by clear and convincing evidence." § 2254(e)(1).

As such, "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, 19 (2013). "Federal courts may grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'" Tharpe v. Warden, 834 F.3d 1323, 1338 (11th Cir. 2016), cert. denied, 137 S. Ct. 2298 (2017). (quoting Harrington v. Richter, 562 U.S. 86, 102-03 (2011)).

The AEDPA standard is intended to be difficult for a petitioner to meet. Richter, 562 U.S. at 102. A district court's obligation is to "train its attention" on the legal and factual

basis for the state court's ruling, not to "flyspeck the state court order or grade it." Meders v. Warden, Ga. Diagnostic Prison, 911 F.3d 1335, 1349 (11th Cir. 2019) (citing Wilson, 138 S. Ct. at 1191-92). A federal district court must give appropriate deference to a state court decision on the merits. Wilson, 138 S. Ct. at 1192. Appropriate deference requires the court to defer to the reasons articulated by the state, if they are reasonable. Id.

Petitioner asserts AEDPA's presumption of correctness does not apply because the trial court did not conduct an evidentiary hearing. Petition at 15, 18. In support of his contention, Petitioner cites three opinions from other circuits.[8] Petitioner provides no binding precedent holding that a state court's factual conclusions are not entitled to a presumption of correctness solely because the court reaches those conclusions without the benefit of an evidentiary hearing. In fact, the Eleventh Circuit has held an evidentiary hearing is not a prerequisite to trigger AEDPA's presumption of correctness, recognizing:

[8] Alston v. Redman, 34 F.3d 1237 (3d Cir. 1994); Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998), abrogation recognized by Smith v. Aldridge, 904 F.3d 874, 886 (10th Cir. 2018); and Valdez v. Cockrell, 288 F.3d 702 (5th Cir. 2002). Not only are these decisions not binding, one of the opinions upon which Petitioner relies is a dissent from a petition for rehearing en banc. See Valdez, 288 F.3d at 702. In the underlying opinion, the Fifth Circuit held a "full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact." Valdez v. Cockrell, 274 F.3d 941, 951 (5th Cir. 2001) (emphasis added).

> [T]here does not appear to be any binding Supreme Court or Eleventh Circuit precedent on whether § 2254(d)(2) deference is conditioned on a state court having held an evidentiary hearing . . . . More broadly, the Supreme Court seems to have foreclosed a per se rule that a state court must conduct an evidentiary hearing to resolve every disputed factual question. . . . Thus, we conclude that an evidentiary hearing in state court cannot be a requirement for § 2254(d)(2) deference for all disputed factual issues in a state court proceeding.

Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1297 (11th Cir. 2015). In accordance with binding precedent, this Court must give appropriate deference to the relevant state court decision. Wilson, 138 S. Ct. at 1192.

VI. Ineffective Assistance of Counsel

Petitioner claims he received the ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. To demonstrate his trial counsel was ineffective, Petitioner must satisfy a rigorous two-prong test by showing (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 688, 692 (1984). Restated, a criminal defendant's Sixth Amendment right to effective assistance of counsel "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Wiggins v. Smith, 539 U.S.

510, 521 (2003); Strickland, 466 U.S. at 687). The prejudice prong requires a showing that there is a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. Strickland, 466 U.S. at 695.

The two-prong Strickland test applies when a petitioner challenges his counsel's performance with respect to the entry of a guilty plea such that a petitioner still must demonstrate counsel's performance was deficient. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). To establish prejudice, however, a petitioner must show there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

Notably, there is no "iron-clad rule requiring a court to tackle one prong of the Strickland test before the other." Ward v. Hall, 592 F.3d 1144, 1163 (11th Cir. 2010). Since both prongs of the two-part Strickland test must be satisfied to show a Sixth Amendment violation, "a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa." Id. (citing Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)).

When a petitioner claims his counsel was ineffective, "[r]eviewing courts apply a 'strong presumption' that counsel's representation was 'within the wide range of reasonable professional assistance.'" Daniel v. Comm'r, Ala. Dep't of Corr.,

822 F.3d 1248, 1262 (11th Cir. 2016) (quoting Strickland, 466 U.S. at 689). When the "strong presumption" standard of Strickland is applied "in tandem" with the highly deferential AEDPA standard, a review of the state court's determination as to the "performance" prong is afforded double deference. Richter, 562 U.S. at 105.

Accordingly, the question for a federal court is not whether trial counsel's performance was reasonable, but "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. If there is "any reasonable argument that counsel satisfied Strickland's deferential standard," a federal court may not disturb a state-court decision denying the claim. Id. As such, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

VII. Findings of Fact & Conclusions of Law

A. Ground One

Petitioner asserts his guilty plea was involuntary because he was mentally incompetent at the time. Petition at 10. Alternatively, Petitioner argues his counsel was ineffective for failure to request a competency hearing under the Florida Rules of Criminal Procedure. Id.[9] Petitioner raised these claims in ground one of his 3.850 motion, Ex. D-5 at 6.

[9] Respondents contend Petitioner's argument that counsel failed to request a competency hearing under the Florida Rules of Criminal Procedure presents solely a state-law issue. Response at 17. Petitioner presents his competency claim as a denial of

In its order, the trial court paraphrased Petitioner's first claim as follows:

> In light of [Petitioner's] mental illness, [he] was not able to fully comprehend his guilty plea and therefore the plea was involuntary. . . . Alternatively, the [Petitioner] alleges that his defense Counsel was ineffective by failing to properly evaluate and argue that [he] was incompetent to enter a guilty plea and failing to request a hearing pursuant to [Florida Rule of Criminal Procedure] 3.210.

D-3 at 2. The trial court found the record conclusively refuted Petitioner's assertions. Ex. D-3 at 4.

As to Petitioner's claim of incompetency, the trial court referenced the plea transcript, which the court found revealed the following:

> [Petitioner] had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, understood the rights he was giving up in his plea agreement, understood that he would be subject to deportation, understood the sexual offender registration and monitoring requirements, was satisfied with the representation of his attorney, and that there was simply no indication of any mental incompetency.

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effective assistance of counsel, invoking the Sixth Amendment. Therefore, his claim is cognizable under § 2254.

Id. at 4 (emphasis added). The trial court further found Petitioner's claim that counsel was ineffective for failing to request a competency hearing was without merit. Id.

The Fifth District Court of Appeal (DCA) affirmed without opinion. Ex. M. To the extent the Fifth DCA affirmed the trial court's denial on the merits, the Court will address the claim in accordance with the deferential standard for federal court review of state court adjudications. See Wilson, 138 S. Ct. at 1194. As such, the Court will "look through" the unexplained opinion to the trial court's order on Petitioner's 3.850 motion. Id.[10] The trial court's factual findings are presumed correct unless Petitioner overcomes the presumption with clear and convincing evidence. See § 2254(e).

After a review of the record and the applicable law, the Court concludes the state court's adjudication of the claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Thus, Petitioner is not entitled to relief on this claim.

[10] In looking through the appellate court's per curiam affirmance to the circuit court's "relevant rationale," the Court presumes the appellate court "adopted the same reasoning." Wilson, 138 S. Ct. at 1194.

Even if the state court finding is not entitled to deference, Petitioner's claim fails. A habeas petitioner who asserts he was tried or convicted while he was incompetent raises a substantive due process claim. James v. Singletary, 957 F.2d 1562, 1571-72 (11th Cir. 1992). "It has long been established that the conviction of an incompetent defendant denies him or her the due process of law guaranteed in the Fourteenth Amendment." Id. at 1573. To succeed on a substantive competency claim, a petitioner must demonstrate by a preponderance of the evidence that he was in fact incompetent at the relevant time. Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995); see also Johnston v. Singletary, 162 F.3d 630, 637 n.7 (11th Cir. 1998).

The relevant standard for assessing a criminal defendant's mental competency is set forth in Dusky v. United States, 362 U.S. 402, 402 (1960). The Dusky standard requires a court to determine 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." Id. See also Godinez v. Moran, 509 U.S. 389, 401-02 (1993) (holding the Dusky standard similarly applies in the context of guilty pleas). To demonstrate actual incompetence, a petitioner's burden is exceedingly high. Sheley v. Singletary, 955 F.2d 1434, 1438 (11th Cir. 1992). "Courts in habeas corpus proceedings should not consider claims of mental

incompetence [to enter a plea] where the facts are not sufficient to positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to the mental capacity of the petitioner." Id. (quoting Reese v. Wainwright, 600 F.2d 1085, 1091 (5th Cir. 1979)). When a petitioner contends he was substantively incompetent to enter a plea, he is entitled to an evidentiary hearing only "upon a presentation of 'clear and convincing evidence [raising] a substantial doubt' as to his or her competency." James, 957 F.2d at 1572 (quoting Fallada v. Dugger, 819 F.2d 1564, 1568 (11th Cir. 1987)).

Whether a petitioner has the present ability to consult with his lawyer and understand the proceedings may be gleaned from hearing and trial transcripts: "The best evidence of [a petitioner's] mental state . . . is the evidence of his behavior" at the relevant time, such as during trial or during a plea hearing. See Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1259 (11th Cir. 2002). A petitioner must do more than simply assert he has low intelligence or was suffering from a mental deficiency at the time:

> "[N]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." Similarly, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.

Medina, 59 F.3d at 1107 (internal citations omitted). In Wright, the court held the petitioner failed to carry his heavy burden even though he had been declared incompetent to stand trial seventeen years previously, he pled not guilty by reason of insanity in the underlying criminal case, and expert witnesses testified (in support of his insanity plea) that he was "actively psychotic" at the time he committed the crime. Id.

The court reasoned the petitioner, at the relevant times, acted "perfectly normal," communicated with others, including his attorney, and understood the charges. Id. As such, the court found immaterial that, months after his trial in the underlying case, the defendant was declared incompetent to stand trial on subsequent charges. Id. n.4. See also Medina, 59 F.3d at 111 (finding relevant that petitioner coherently testified at trial and at sentencing, spoke "rationally and with understanding," and when he acted out during trial, responded appropriately to the judge's reprimands); Sheley, 955 F.2d at 1438 (holding the petitioner failed to carry his heavy burden where the trial judge's questioning of him showed "verbal coherence" even though the petitioner claimed he had taken psychotropic medication on the day of the plea and he had a history of mental illness).

Here, Petitioner has not met his high burden to demonstrate by a preponderance of the evidence he was incompetent when he entered his guilty plea. See Medina, 59 F.3d at 1106. The record

demonstrates Petitioner was able to communicate with his attorney and the judge; understood the judge's questions, the charges against him, and the waiver of rights associated with his plea; exhibited no confusion; and responded appropriately when the judge asked him questions. Ex. A at 10-11. Petitioner chose, through "the decision-making process," to plead guilty and understood his plea resulted in the waiver of certain rights and could result in his deportation. Id. at 6, 7. Petitioner's rational and appropriate responses, and his full and lucid participation in the plea proceeding, demonstrate Petitioner's reasonable degree of rational understanding of the proceedings.

Petitioner's reliance on Storey v. State, 32 So. 3d 105 (Fla. 2d DCA 2009), is misplaced. See Petition at 12. In Storey, the state appellate court remanded the case to the trial court to conduct an evidentiary hearing, finding the plea colloquy did not clearly refute the petitioner's claim of incompetency. Storey, 32 So. 3d at 107. Petitioner here argues the plea colloquy similarly did not refute his claim of incompetency and he, therefore, should have been afforded an evidentiary hearing. Petition at 12.

Importantly, it is not the province of this Court to review whether the trial court should have held an evidentiary hearing on Petitioner's 3.850 motion. This Court's review is limited to whether the trial court's findings were contrary to or involved an unreasonable application of federal law. § 2254(d). Here, as

discussed, the state court's conclusion that counsel satisfied the Strickland standard is supported by the record. And the plea colloquy demonstrates Petitioner was competent to enter a guilty plea. Based on the record, Petitioner decidedly had the ability to consult with his lawyer and understand the plea proceedings.

Petitioner's only proffered evidence of his alleged incompetence is the opinion of neuropsychologist Dr. Ginart. Dr. Ginart's opinion does not "positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to the mental capacity" of Petitioner at the time he entered his guilty plea. Sheley, 955 F.2d at 1438. First, Dr. Ginart concludes Petitioner, "at the time of the evaluation," functioned at the "[e]xtremely [l]ow range of functioning," and prior to Petitioner's legal problems, he "was not considered to be much higher than just above the upper level of the [m]ild [m]ental [r]etardation range (i.e., in the lower end of the [b]orderline range of functioning." Petition at 26. Mild mental retardation, however, does not equate to incompetency under the Dusky standard. See Medina, 59 F.3d at 1107 ("[N]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.").

Second, Dr. Ginart explains Petitioner "suffered a mild traumatic head injury during his childhood." Petition at 26. But Dr. Ginart does not explain the nature of the injury or its effects

on Petitioner at the time of the plea hearing. In fact, Dr. Ginart offers no explanation as to how Petitioner's head injury impacted Petitioner at all. Instead, Dr. Ginart explains in general terms how "[v]ictims of mild head injuries" are impacted by such conditions and react to stressors. Id.

Finally, and most importantly, Dr. Ginart concludes Petitioner "was cognitively, intellectually, and psychiatrically incompetent to enter a plea (on his own), under stress/duress without adequate legal representation." Id. (emphasis added). Petitioner was represented by counsel who explained the nature of the charges, the rights Petitioner waived by entering a plea, and potential consequences of his plea, including possible deportation. Ex. A at 9-11. Aside from Petitioner's assertion that his counsel failed to request a competency hearing, there is no suggestion Petitioner was denied adequate legal representation. In fact, the trial judge stated Petitioner's counsel provided "excellent representation[]." Ex. A at 17, 25. Considering the circumstances under which Petitioner entered his guilty plea (with counsel), Dr. Ginart's opinion can be interpreted to imply Petitioner was competent at the time.

In short, Dr. Ginart does not conclude that on the day Petitioner entered his plea, he exhibited neurological problems such that he was unable to understand the proceedings or aid in his defense. Nor could Dr. Ginart have reached such a conclusion

because his opinion was based on an evaluation of Petitioner after the fact,[11] and there is no indication Dr. Ginart reviewed the plea transcript or mental health/medical records generated close in time to the plea hearing. Indeed, Dr. Ginart states his opinion is based solely on the results of a neuropsychological evaluation he administered. See Petition at 26.

To the extent Petitioner may have demonstrated cognitive impairments or limitations at the time Dr. Ginart examined him, there is nothing in the record to demonstrate Petitioner was incompetent under the Dusky standard at or near the time he entered his plea. See Wright, 278 F.3d at 1259 (holding the defendant's declared incompetence seven months after trial was "not enough to counter the best evidence of what his mental condition was at the only time that counts," which was the time of the proceedings against him). Upon review of the plea transcript, Petitioner demonstrated a "sufficient present ability to consult with his lawyer . . . [and] he had a rational as well as factual understanding of the proceedings against him." Id. at 1257 (quoting Dusky, 362 U.S. at 402).

[11] The date of the neurological examination and the date on which Dr. Ginart rendered his opinion are unknown because Dr. Ginart's letter is undated. However, it is undisputed Dr. Ginart's examination was conducted after the plea hearing and in aid of Petitioner's postconviction proceedings. See Petition at 10; Ex. D-5.

A claim of ineffective assistance for counsel's failure to request a competency hearing requires a petitioner to demonstrate both deficient performance and prejudice under the Strickland standard. As with other Strickland claims, a counsel's performance is presumed reasonable; a petitioner must show "counsel's representation fell below an objective standard or reasonableness." Lawrence v. Sec'y, Fla. Dep't of Corr., 700 F.3d 464, 477 (11th Cir. 2012) (quoting Strickland, 466 U.S. at 688). Under the prejudice prong, however, a petitioner must show "there was a reasonable probability that he would have received a competency hearing and been found incompetent had counsel requested the hearing." Id. at 479 (emphasis in original). Under this standard, the prejudice prong of the ineffective assistance claim demands the same showing as that under a substantive competency claim. Under both claims, a petitioner must demonstrate he was actually incompetent at the time of the plea. Id. As such, the evidence supporting a substantive competency analysis is "largely the same" as the evidence supporting an ineffective-assistance-of-counsel analysis. Id. at 481-82.

Even when a defendant exhibits some questionable behavior during the proceedings and has a history of mental issues, a trial counsel's "decision not to request a competency hearing [is] within [counsel's] reasoned professional judgment." Id. at 477-78. For instance, in Lawrence, the defendant, who had "some limitations in

his functioning," pleaded guilty. The court accepted his guilty plea after counsel represented the defendant understood the proceedings. Id. at 467. During the penalty phase, the defendant reported having flashbacks and asked to be excused from the courtroom during certain testimony. Id. at 469.

The court held trial counsel's decision not to request a competency hearing was reasonable even though trial counsel admitted at the postconviction evidentiary hearing that, in hindsight, she erred by not requesting a competency evaluation of her client. Id. at 478. The court noted trial counsel's performance is to be viewed objectively, and counsel's after-the-fact self-critique carried little weight. Id. The court found significant that trial counsel did not state the defendant "was ever unable to communicate with [her] or assist . . . in his defense." Id. Additionally, after the defendant reported hallucinating, the trial court engaged the defendant in a lengthy discussion, after which trial counsel concluded the defendant was simply having a "bout with his conscience." Id. Accordingly, the court held trial counsel's decision not to request a competency hearing "did not fall below an objectively reasonable standard of performance." Id. at 478-79.

With respect to the prejudice (actual incompetency) prong, the court held the state court's determination was not an unreasonable application of Strickland, even though two mental

health experts testified at the postconviction evidentiary hearing (five years after the plea) that the defendant was incompetent at the time of his plea and during the penalty phase. Id. at 472, 479, 480. The court reasoned, in part, that the plea colloquy with the defendant and trial counsel demonstrated the defendant understood the proceedings and entered his plea willingly. Id. at 479. The court held as follows:

> While the state trial court did not make a specific competency finding, the trial court's detailed colloquy, [the petitioner's] rational and consistent responses to the trial court's questions, and the state trial court's findings that [the petitioner's] guilty plea was knowing and voluntary nonetheless support the reasonableness of the Florida Supreme Court's conclusion on Strickland prejudice.

Id.

Here, Petitioner fails to demonstrate his counsel performed deficiently. Petitioner offers no evidence to show a reasonably competent attorney would have questioned his competence to enter a plea. Indeed, nothing in the record even hints at a possible competency issue before or at the time Petitioner entered his plea. The first time a competency issue arose was during Petitioner's postconviction proceedings when Dr. Ginart evaluated him. There is no indication defense counsel knew Petitioner sustained a head injury when he was a child or functioned at a low level of intellectual ability. Even if counsel had known as much, these conditions do not speak to incompetency at the relevant time, which

was when Petitioner entered his plea. See, e.g., Lawrence, 700 F.3d at 478-79.

Regardless of Petitioner's level of functioning at the post-plea neuropsychological examination conducted by Dr. Ginart, the plea colloquy demonstrates a reasonably competent attorney would have had no reason to question whether Petitioner had a rational, as well as factual understanding of his criminal proceedings. During the plea colloquy, Petitioner's counsel told the judge he spent time speaking with Petitioner, who counsel described as a good person, articulate, and educated, and the trial judge noted on the record that Petitioner's attorney "indicated [Petitioner was] competent." Ex. A at 15, 24, 34. There is nothing to indicate Petitioner struggled to comprehend the proceedings or had difficulty communicating or understanding, which would have put his attorney on notice of a competency concern. Defense counsel stated he explained the strength of the state's case to Petitioner, and Petitioner chose, through "the decision-making process," to plead guilty rather than have his attorney take depositions. Id. at 24, 25.[12]

[12] It is worth highlighting Petitioner received an extremely lenient sentence as a result of his guilty plea. The judge sentenced him to six months in jail followed by three years of probation. Ex. A at 78. At the plea proceedings, Petitioner's counsel expressed the strength of the state's case against Petitioner. Id. at 6. If convicted, Petitioner faced a minimum of 84 months in prison. Id. at 78. Not only did Petitioner receive a much lighter sentence than the minimum under the sentencing

Even assuming counsel acted deficiently, Petitioner cannot meet the high threshold of prejudice because he fails to demonstrate he was incompetent when he entered his plea, as analyzed in detail above. Petitioner does not allege he suffered from mental conditions or illnesses that are associated with "incompetency" under Dusky; he offers no evidence of a history of mental illness or documentation of such; and there is no evidence Petitioner was receiving or had received treatment for a mental illness. Indeed, at the plea hearing, Petitioner denied ever having been "found to be insane, incompetent, or mentally challenged." Ex. A at 10.

In sum, considering the totality of the circumstances surrounding Petitioner's plea, Petitioner fails to carry his heavy burden to demonstrate he was actually incompetent at the time he entered his guilty plea. As such, he concomitantly fails to demonstrate counsel's alleged deficient performance prejudiced his defense.

B. Ground Two

In ground two, Petitioner claims his counsel was ineffective for his failure to move to dismiss the attempted lewd or lascivious battery charge (count four). Petition at 17. Petitioner contends an element of that offense requires the victim be of a certain

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scoresheet, but the sentence was even lower than what the state had offered Petitioner, which was a prison sentence. Id. at 17.

age, and the victim was undisputedly outside the statutory age-range. Id. Respondents argue Petitioner cannot demonstrate deficient performance because Petitioner was charged with attempt, not a completed offense. Response at 22-23. Additionally, Respondents maintain, Petitioner cannot demonstrate prejudice because the state's case against him was strong, and Petitioner received an "extremely lenient downward departure sentence" under his plea agreement. Id. at 23-24.

Petitioner exhausted this claim in ground two of his postconviction motion, Ex. D-5 at 8, and by appealing the trial court's order to the Fifth DCA, Ex. H at 1; Ex. I at 12. The Fifth DCA affirmed the trial court's decision without opinion. Ex. M. Under Wilson, this Court presumes the Fifth DCA adopted the reasoning of the trial court, and the state has not attempted to rebut this presumption. See 138 S. Ct. at 1192. As such, the Court will "look through" the unexplained opinion to the trial court's order on Petitioner's 3.850 motion. Id.

In its order denying Petitioner's motion for postconviction relief, the trial court set forth the applicable two-prong Strickland test. Ex. D-3 at 3, 5-6. In denying ground two of Petitioner's postconviction motion, the trial court found the primary authority upon which Petitioner relied was inapposite. Id. at 5 (citing Pamblanco v. State, 111 So. 3d 249, 252 (Fla. 5th DCA 2013)). The trial court recognized Pamblanco stands for the

proposition that "for the completed offense of solicitation of a child under the age of sixteen to commit lewd or lascivious conduct, the request must be made to someone under sixteen." Ex. D-3 at 5. The trial court also acknowledged the "victim" in Petitioner's case was actually an undercover officer and therefore over the age of sixteen. Id. However, the court continued, Petitioner was charged with "attempted" lewd/lascivious conduct, and "Pamblanco makes clear that the holding does not apply to 'attempted' lewd/lascivious charges." Id. The trial court further stated, "[e]ven if the sentence . . . is eventually vacated as illegal, there is no showing that confidence in the outcome, based on the remaining charges, is undermined." Id. at 5-6.

Upon review, the record demonstrates the trial court properly applied the Strickland standard and found no deficient performance on the part of counsel and no prejudice to Petitioner's defense. As such, Petitioner is unable to establish the state court's decision is inconsistent with Supreme Court precedent, including Strickland, or is based on an unreasonable determination of the facts. Under AEDPA's deferential standard, Petitioner is not entitled to habeas relief on ground two.

C. Ground Three

In ground three, Petitioner asserts his convictions on an Information charging both "solicitation" and "traveling" under two subsections of Florida Statutes section 847.0135 (subsections

(3)(a) and (4)(a)) violate double jeopardy because those charges were based on the same conduct. Petition at 18-19. Petitioner states the postconviction court's reasoning, in denying this ground, has since been rejected by the Second DCA in Shelley v. State, 134 So. 3d 1138, 1141-42 (Fla. 2d DCA 2014).[13] Respondents contend Petitioner's "negotiated guilty plea waived any double jeopardy claims regarding his convictions." Response at 25.

Petitioner exhausted this claim in ground three of his postconviction motion, Ex. D-5 at 10, and by appealing the trial court's order to the Fifth DCA, Ex. H at 1; Ex. I at 12. The Fifth DCA affirmed the trial court's decision without opinion. Ex. M. In its order denying Petitioner's motion for postconviction relief,[14] the trial court found Petitioner's "convictions under subsection[s] (3)(a) and (3)(b) were for separate offenses; thus, no double jeopardy violations occurred." Ex. G at 3-4. The record shows the Fifth DCA affirmed the decision of the trial court in denying this ground. Ex. M. Under Wilson, this Court presumes the

[13] Significantly, the Shelley opinion was decided in 2014, after Petitioner was charged (July 16, 2012) and after he entered his plea (August 19, 2013).

[14] The trial court addressed the double jeopardy claim in its final order on Petitioner's 3.850 motion after directing the state to respond to the issue. Ex. D-2. The trial court's initial order on Petitioner's postconviction motion addressed his alternative ground for relief, ineffective assistance of counsel for failure to move to dismiss the duplicative count in the Information. Ex. D-5 at 10. Petitioner has not asserted ineffective assistance of counsel in ground three in his Petition before this Court.

Fifth DCA adopted the reasoning of the trial court, and the state has not attempted to rebut this presumption. See 138 S. Ct. at 1192. As such, the Court will "look through" the unexplained opinion to the trial court's order on Petitioner's 3.850 motion. Id.

After a review of the record and the applicable law, the Court concludes the state court's adjudication of the claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Thus, Petitioner is not entitled to relief on this claim.

Even if the state court finding is not entitled to deference, Petitioner's claim fails. The Supreme Court makes clear that a defendant who voluntarily and with counsel's advice pleads guilty to criminal charges waives his right to contest the conviction on double jeopardy grounds. United States v. Broce, 488 U.S. 563, 569 (1989).

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily whether the underlying plea was both counseled and voluntary.

Id. A guilty plea is not only a confession but a recognition that the defendant committed the substantive crimes in the charging document. Id. at 570. In Broce, the defendants argued their convictions violated double jeopardy because they engaged in only one conspiracy but entered guilty pleas to two separate charges of conspiracy, as alleged in the indictment. Id. at 565, 570. The Court held their pleas resulted in a waiver of such a collateral attack even though their attorney did not discuss double jeopardy issues with them beforehand. Id. at 572, 573. While the defendants may have "made a strategic miscalculation," their pleas were entered voluntarily and freely and with the advice of counsel. Id. at 574. The Court held, "[r]elinquishment [of the right to object on double jeopardy grounds] derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty." Id. at 573-74.

Upon review of the applicable law and the record, the Court finds Plaintiff freely and voluntarily entered his plea with the assistance of competent counsel, thus waiving his right to collaterally attack his conviction on double jeopardy grounds. See id. at 565, 570. Importantly, Petitioner does not contest the voluntariness of his plea, and the plea colloquy demonstrates his plea was in fact voluntarily entered. Petitioner specifically acknowledged he was waiving certain rights, which were explained

by his attorney and the judge; he confirmed he wished to proceed with the plea under the factual predicate provided by the judge and on his attorney's representations that Petitioner understood the consequences of his plea; he acknowledged his plea would result in his being labeled a sexual offender and could subject him to deportation; he agreed his attorney answered all his questions; and he affirmed he was not under the influence of any intoxicants at the time. Ex. A at 9-10, 14, 15. Petitioner's solemn declarations in court carry a strong presumption of truth. Blackledge v. Allison, 431 U.S. 63, 74 (1977); see also Winthrop-Redin v. United States, 767 F.3d 1210, 1217 (11th Cir. 2014) (recognizing statements made under oath at a plea colloquy are presumed true). Thus, Petitioner's representations that he understood the plea agreement and the rights he was giving up "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge, 431 U.S. at 73-74.

The Broce Court acknowledged an exception to the general rule "barring collateral attack on a guilty plea," which narrowly applies when a presiding trial judge should have determined the charge, on the face of the charging document, was not one the state could constitutionally prosecute. 488 U.S. at 574, 575. In Broce, the exception did not apply because the defendants pleaded guilty to "indictments that on their face described separate conspiracies." Id. at 576. See also Dermota v. United States, 895

F.2d 1324, 1325, 1326 (11th Cir. 1990) (holding the defendant's voluntary and counseled guilty plea waived a double jeopardy challenge because the indictment described separate offenses and the prosecutor "unquestionably [was] entitled to prosecute simultaneously" for both charges even though a conviction under both charges may have violated double jeopardy).

The exception to the general rule of waiver recognized by the Broce Court does not apply here. There is no indication on the face of the Information the charges were not ones the state could constitutionally prosecute. 488 U.S. at 575. The Information charged separate offenses against Petitioner. Ex. A at 38. Count one charged Petitioner with "use of internet or device to lure a child" under section 847.0135(3) and count three charged Petitioner with "traveling to meet minor for illegal sexual conduct" under section 847.0135(4)(a). Each charge named a seemingly different victim: count one referenced a victim named "Tiffany Wright," and count three referenced a victim named "Jenny." Id.

Even though Tiffany Wright and Jenny were in fact references to the same fictitious child,[15] the Information, to which Petitioner pleaded guilty, identified two separate charges against different victims. Id. The victims were not described as the same

[15] The record is clear Petitioner believed he was traveling to meet one child, not two. Ex. A at 28-29.

person in the Information. That the trial judge, during the plea colloquy, referenced the victim(s) as "Jenny or Tiffany or somebody else" suggests it was not readily apparent the two charges referenced the same victim. Ex. A at 12-13. There is also no indication the Information on its face was constitutionally infirm.[16]

The state court opinion upon which Petitioner heavily relies does not entitle Petitioner to federal habeas relief. See Shelley v. State, 134 So. 3d 1138, 1141-42 (Fla. 2d DCA 2014). The Shelley court held a conviction under both subsections (3)(a) and (4)(a), when based upon the same transaction, violates double jeopardy: "[D]ual convictions for soliciting and traveling in the course of one criminal transaction or episode violate the prohibition against double jeopardy." Id. The defendant in Shelley entered a guilty plea, but explicitly reserved his right to, and did, appeal the trial court's denial of his motion to dismiss the duplicative charges as violating double jeopardy. Id. at 1139. Petitioner here

[16] Petitioner seemingly invokes the limited exception recognized by Broce, though he relies upon a Florida Supreme Court decision instead. See Petition at 18 n.12; Reply at 7 (citing Novaton v. State, 634 So. 2d 607 (Fla. 1994)). Petitioner argues that because his plea was an "open" plea, not a "negotiated" plea, he did not waive his right to later object on double jeopardy grounds. The binding precedent does not distinguish between an open or a negotiated plea, however. Broce, 488 U.S. at 574; Dermota, 895 F.2d at 1325. Rather, as the Supreme Court held, the "inquiry is . . . confined to whether the underlying plea was both counseled and voluntary." Broce, 488 U.S. at 569. As discussed, Petitioner's plea was both counseled and voluntary.

did no such thing; on the contrary, he explicitly waived his rights when he entered his plea. Ex. A at 9-11, 14-15.

Additionally, the Shelley court acknowledged, "convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of computer devices to solicit." Shelley, 134 So. 3d at 1142. The record here suggests the prosecutor may have been able to prove "separate uses of computer devices to solicit," which would have resulted in "legally imposed" convictions under both subsections. Id. For instance, the search warrant authorized the search of two mobile phones and a digital storage device, all of which were seized from Petitioner's possession upon his arrest. Ex. A at 65. The trial court, in its final order on Petitioner's 3.850 motion, noted Petitioner used the devices to exchange 117 text messages, 16 phone calls, and numerous emails with the supposed parent of a 13-year-old girl. Ex. G at 3.

Moreover, at the early stage of the proceedings when Petitioner pleaded guilty, the prosecutor's theory was premised, in part, on the solicitation and the traveling offenses occurring on different days, see Ex. K at 15, which could have supported convictions under both subsections of the statute. See Shelley, 134 So. 3d at 1142 (citing with approval cases that held convictions for both soliciting and traveling are lawful if based on conduct that occurred on different dates).

Whether the prosecutor would have been able to prove the separate violations against Petitioner is a different inquiry than whether Petitioner freely and voluntarily entered a plea to the Information, which charged him under both subsections (3)(a) and (4)(a). See Dermota, 895 F.2d at 1325 (distinguishing the case on the facts because in the precedent upon which the defendant relied, the defendant was convicted of the two offenses, which the court held violated double jeopardy, while the defendant in Dermota pleaded guilty).

To the extent the facts were not fully developed when Petitioner entered his plea, he expressly waived his right to object based on double jeopardy principles. Broce, 488 U.S. at 572. Petitioner may not now "withdraw his plea merely because he [has] discover[ed] . . . that his calculus misapprehended the quality of the State's case. . . . [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Id. at 572. For these reasons, Petitioner is not entitled to relief on ground three.

Accordingly, it is now

ORDERED AND ADJUDGED:

1. The Petition (Doc. 1) is **DENIED**.

2. This action is **DISMISSED WITH PREJUDICE**.

3. The **Clerk** shall enter judgment accordingly and close this case.

4. If Petitioner appeals the denial of his Petition, **the Court denies a certificate of appealability**.[17] The **Clerk** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

DONE AND ORDERED at Jacksonville, Florida, this 23rd day of September, 2019.

BRIAN J. DAVIS
United States District Judge

Jax-6
c:
Counsel of Record

[17] This Court should issue a certificate of appealability only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

EFRAIN CAMARILL CRUZ,

Petitioner,

v. CASE NO. 5:16-cv-531-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

RESPONSE TO PETITION

Respondents, Secretary, Department of Corrections, et. al, by and through the undersigned counsel, pursuant to Rules 4, 5, and 11, Rules Governing Section 2254 Cases in the United States District Courts, file the instant Response to the Petition for Writ of Habeas Corpus, and request that this Court dismiss/deny the petition with prejudice, and in support thereof state:

PROCEDURAL AND FACTUAL STATEMENT

The instant petition challenges Petitioner Efrain Camarill Cruz's conviction in Case No. 2012-CF-000696 in the Fifth Judicial Circuit in and for Citrus County, Florida. On August 19, 2013, Cruz entered a plea of guilty and was adjudicated

guilty and sentenced for the following offenses: Count I: Use of internet or device to lure a child; Count 2: Use of Internet or Device to Lure Parent/Guardian of Child; Count 3: Traveling to meet minor for illegal sexual conduct; Count 4: Attempted lewd/Lascivious Battery on a Child 12 Years of Age but less than 16 years of age. (App A, 4, 16-17, 38-39, 69, 74) 1. Cruz was sentenced to a downward departure sentence of 90 days of the county jail followed by three years of standard probation. (App A, 17, 69). Cruz acknowledged that he understood that he would likely be deported as a result of his plea and that, while on probation, he would be a registered sex offender and would be subject to the Lunsford Act and the Jimmy Ryce Act. (App A, 19-21).

Defense counsel initially filed a notice of appeal, but later filed a Notice of Voluntary Dismissal which was approved by the Florida Fifth District Court of Appeal. (App A, R 82). The appeal was dismissed on December 19, 2013. (App B, C).

On January 31, 2014, private counsel filed a motion for postconviction relief. (App D-5). The motion raised three claims for relief: (1) Cruz's plea was

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1 (App) refers to Respondent's Appendix, which will be e-filed within ten days of the instant Response.

involuntary because, due to mental illness, he was unable to fully comprehend his guilty plea; or alternatively, trial counsel was ineffective for failing to properly evaluate and argue that Cruz was incompetent, and for failing to request a competency hearing pursuant to Florida Rule of Criminal Procedure 3.210; (2) trial counsel was ineffective for failing to move to dismiss the attempted lewd or lascivious battery charge; and (3) two of Cruz's convictions (for solicitation and traveling after solicitation) were barred by double jeopardy. (App D-5). Private Counsel also filed a motion for a competency determination. (App D-6). Following a Response by the State, (App D-4), the trial court entered an order summarily denying the motion for postconviction relief and the motion for competency determination. (App D-3).

The court denied the motion for competency determination because the postconviction proceedings were not "material stage of a criminal proceeding" under Florida Rule of Criminal Procedure 3.210. (App D-3, 3). Regarding the request to withdraw the plea, the trial court held that a request to withdraw the plea was untimely under Fla. R. Crim. P. 3.170(1), as it was filed more than 30 days after rendition of sentence. (App D-3, 2).

In summarily denying claim one as to postconviction relief (involuntary plea/ineffective assistance of counsel due to alleged mental illness/incompetency) the court noted that the transcript of the plea hearing revealed that appellant answered questions revealing:

> ...[t]hat he had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, unde3rstood the rights he was giving up in his plea agreement, under that he would be subject to deportation, understood the sexual offender registration and monitoring requirements, was satisfied with the representation of his attorney, and that there was simply no indication of mental incompetency. In fact, the transcript points out that the Defendant's immigration attorney was present at the plea hearing to ensure that the Defendant understood he would be deported. Thus, the claim that trial Counsel was ineffective for failing to evaluate the Defendant as incompetent or request a hearing pursuant to Rule 3.210, is without merit.
> (App D-3, 4).

In summarily denying claim two, the trial court noted that the Fifth DCA's opinion in *Pamblanco v. State*, 111 So.3d 249, 252 (Fla. 5th DCA 2013), "makes clear that the holding does not apply to "attempted" lewd/lascivious charges." (App D-3, 5). The court thus held that trial counsel was not ineffective in failing to move to dismiss the charge of attempted lewd or lascivious battery. (App D-3, 5,6).

Regarding claim three (double jeopardy and counsel's alleged ineffectiveness for failing to move to dismiss the solicitation charge as violative of double jeopardy), the court held noted that the case on which Cruz relied was issued in November of 2013. The court held that counsel was not ineffective in failing to argue caselaw which did not exist at the August, 2013 plea hearing. (App D-3, 5). The court also noted that the state had been ordered to respond, in a separate order, to the underlying double jeopardy issue. (App D-3, 4).

The state's Response as to the double jeopardy claim contended that between 1:44 p.m. on June 22, 2014, and midnight or shortly after midnight of the same day, appellant responded to a Craig's list ad, exchanged 117 text messages, 16 phone calls and multiple email/photographs with the undercover officer who purported to be the mother of a 13-year-old child, in order to solicit sexual activity with the minor. (App D-4, 1-2). (State's Response, 2). Cruz's Reply contended that the traveling offense occurred on the same day as the solicitations, and the State's Response contended that it was impossible to determine whether the traveling offense occurred on the same day as the solicitation or on the following day. (App D-4, 2; App E-2, 2).

Following the State's Response and Appellant's Reply, the trial court denied claim three in its "Final Order After State's Response to the Motion for Postconviction Relief and Motion for Competency Determination,". (App G). The court cited to *Pinder v. State, 128 So. 3d 141, 143–44* (Fla. 5th DCA 2013), which held that if a defendant solicited unlawful sexual activity with a minor through multiple uses of a computer device prior to traveling to meet the minor for unlawful sexual activity, double jeopardy principles would not preclude convictions for both traveling and solicitation offenses. *See* § 775.021(3)(B) & (4)(b) 3., Fla. Stat. (2011). The court thus held that Cruz's convictions for traveling and solicitation did not violate double jeopardy. (App G, 4).

On appeal, counsel argued that the trial court erred in summarily denying his claims because the claims were facially sufficient and were not refuted by the record. (App I, 4). On August 18, 2015, following the filing of the State's Answer Brief and Cruz's Reply Brief, the Florida Fifth District Court of Appeal per curiam affirmed the summary denial of the motion for postconviction relief. (App K, L, M). A motion for rehearing was denied on September 21, 2015, and mandate issued on October 8, 2015. (App N, O, P).

The instant petition was filed by private counsel on August 19, 2016, and raises three claims: (1) Cruz's plea was involuntary because, due to mental illness, he was unable to fully comprehend his guilty plea; or alternatively, trial counsel was ineffective for failing to properly evaluate and argue that Cruz was incompetent and failing to request a hearing pursuant to Fla. R. Crim.P. 3.210; (2) trial counsel was ineffective for failing to move to dismiss the attempted lewd or lascivious battery; and (3) Cruz's convictions in Counts I and III violated double jeopardy. (Doc. 1, p. 10, 17, 18).

STATEMENT AS TO JUDGE OR MAGISTRATE JUDGE

It does not appear that the United States Court District Judge or the United States Magistrate Judge assigned to this case were involved in any of Cruz's state court proceedings.

EVIDENTIARY HEARING

Respondents assert that no evidentiary hearing is necessary in connection with the instant petition. Title 28 U.S.C. §2254(e) governs evidentiary hearings in federal habeas corpus cases. Pursuant to section 2254(e)(1), " [i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made

by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." A petitioner must rebut this presumption by clear and convincing evidence, and a federal court may not issue a writ of habeas corpus unless the state decision was based on an unreasonable determination of the facts in light of the evidence. 28 U.S.C. §2254(d)(2); *Carter v. Johnson*, 110 F.3d 582, 590-592 (5th Cir. 1997). The record in this case is sufficiently clear for this court to resolve Cruz's claims on the basis of the record itself without further evidentiary development. *Diaz v. United States*, 930 F.2d 832, 834 (11th Cir. 1991). Cruz has not met his burden under section 2254(e)(1).

ONE YEAR TIME LIMIT UNDER THE AEDPA

The instant petition is timely under the AEDPA. Title 28 U.S.C.§2244(d) was amended by section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA), and became effective on April 24, 1996. Section 2244(d)(1) specifically requires that a petition filed in federal court by a person in custody pursuant to a state conviction be filed within one year from the date the conviction became final. Section 2244(d)(2) provides that the one-year time limit is tolled for any properly filed state collateral petitions or motions.

In the present case, petitioner's judgment and sentence were rendered on August 19, 2013. (App A, 74-79). Cruz's direct appeal was voluntary dismissed on December 19, 2013, and the 1 year AEDPA limitations period began on this date. *See* 28 U.S.C. § 2244(d)(1)(A) (defining the starting date for purposes of the 1–year AEDPA limitations period as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."). Cruz's state motion for postconviction relief was filed one day later on December 20, 2013, and the appeal of the denial of that motion was pending until mandate issued on October 8, 2015. From this date, 316 days passed until private counsel filed the instant petition on August 19, 2016. Thus, a total of 317 days of the limitations period passed prior to the filing of the petition, and the petition appears to be timely under the AEDPA.

EXHAUSTION, PROCEDURAL DEFAULT AND PROCEDURAL BAR/ CONSTITUTIONAL ISSUE

A federal habeas petitioner is required to provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. *Walker v. Dugger*, 860 F.2d 1010, 1011 (11th Cir. 1988). A state prison inmate who seeks release from custody on the ground that his conviction or sentence is in violation of the Constitution or laws of the United

States must first exhaust remedies available to him in the courts of the convicting state. *Heath v. Jones*, 863 F.2d 815, 818 (11th Cir. 1989). The requirement of exhaustion mandates that the precise issues and arguments set forth in the federal petition must have been presented to the state courts. *Id.*; *see also Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995); *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). Furthermore, pursuant to *Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992) (footnote omitted), a habeas petitioner may not present instances of ineffective assistance of counsel in his federal habeas petition that the state court has not evaluated previously.

Finally, pursuant to *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S.Ct. 2546, 2557 n.1, 115 L.Ed.2d 640 (1991), the United States Supreme Court held that there is a procedural default for purposes of federal habeas review if a petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. A petitioner who fails to exhaust his claim is procedurally barred from pursuing that claim on habeas review in federal court unless he shows either cause for and actual prejudice from

the default or a fundamental miscarriage of justice from applying the default." *Lucas v. Sec'y Dep't of Corr.*, 682 F.3d 1342, 1353 (11th Cir.2012).

In the present case, Cruz's three claims were presented in his motion for postconviction relief in state court. (App D-5). The trial court summarily denied the claims on the merits, and the Florida Fifth DCA per curiam affirmed the summary denial and denied a motion for rehearing. (App M, N, O). The claims have thus been exhausted in state court.

However, the portion of claim one relying on "Exhibit A" to the instant petition has not been exhausted in state court. In support of his claim of mental illness/involuntary plea, Counsel has attached, as "Exhibit A" to the instant petition, a letter from a neuropsychologist. (Doc. 1, p. 26). Respondent notes that this letter was not presented to the state court in Cruz's postconviction proceedings. This portion of claim one was not exhausted in state court, would be procedurally barred if petitioner attempted to present it in a successive Rule 3.850 motion, and is procedurally defaulted from consideration the instant petition. *See* Fla. R. Crim. P. 3.850(f).

MERITS/ SUMMARY JUDGMENT/ STANDARD OF REVIEW

Dismissal of a petition for writ of habeas corpus is appropriate when it plainly appears from the face of the petition that the petitioner is entitled to no relief. 28 U.S.C., section 2254. Respondent submits that, in the present case, it is plainly apparent from the face of the petition as well as the record before this Court that petitioner is entitled to no relief.

Pursuant to 28 U.S.C. §2254(d),

[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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.

According to the United States Supreme Court, . . . [section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner□s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under §2254(d)(1), the writ may issue

only if one of the following two conditions is satisfied - the state-court adjudication resulted in a decision that (1) was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States, or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States. Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this 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 this Court's decision but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 120 S.Ct. at 1523.

The "contrary to" clause suggests that the state court's decision must be substantially different from the controlling legal precedent. A state court's decision that applies the correct legal rule would not fit within the contrary to clause even if the federal court might have reached a different result relying on the same law. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002) (citations omitted).

The AEDPA precludes a federal court from granting a writ of habeas corpus to a state prisoner unless the state court's adjudication of his claim "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." 28 U.S.C. § 2254(d)(1). "Under § 2254(d), a habeas court must determine what arguments or theories supported ... the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Wetzel v. Lambert*, 132 S.Ct. 1195, 1198 (2012) (quoting *Harrington v. Richter,* 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011)).

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 677–78, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to prevail on a constitutional claim of ineffective assistance of counsel, a defendant must demonstrate (1) that his counsel's performance was below an objective and reasonable professional norm, and (2) that he was prejudiced by this inadequacy. Strickland, 466 U.S. at 686. The court may dispose of the claim if a defendant fails to carry his burden of proof on either the performance or the prejudice prong. *Id.* at 697.

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir.2001) (emphasis omitted). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). *Id.*

Where a defendant has entered a plea, in order to satisfy the "prejudice" requirement of *Strickland,* "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985).

When, as in the present case, the state courts have denied an ineffective assistance of counsel claim on the merits, "the standard a petitioner must meet to obtain federal habeas relief is a difficult one." *Harrington v. Richter,* 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011). The standard is not whether an error was committed, but whether the state court decision is contrary to or an unreasonable application of federal law that has been clearly established by decisions of the Supreme Court. 28 U.S.C. § 2254(d)(1). "[E]ven a strong case for relief does not

mean the state court's contrary conclusion was unreasonable." *Id.* at 786. A federal habeas court "must determine what arguments or theories supported or, [if none were stated], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* So long as fairminded jurists could disagree about whether the state court's denial of the claim was inconsistent with an earlier Supreme Court decision, federal habeas relief must be denied. *Id.* Stated the other way, only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents" may relief be granted. *Harrington,* 131 S.Ct. at 786.

Even without the deference due under § 2254, the Strickland standard for judging the performance of counsel "is a most deferential one." *Id.* at 788. When combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case

in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding. *Id.*

Claim One:

Claim one of the instant petition alleges that Cruz's plea was involuntary because, due to mental illness, he was unable to fully comprehend his guilty plea. Claim one further alleges that trail counsel was ineffective in failing to properly evaluate and argue that Cruz was incompetent to enter a guilty plea and failing to request a hearing pursuant to Fla. R. Crim. P. 3.210.

Respondent notes that the claim that counsel was ineffective in failing to request a hearing pursuant to Fla. R. Crim. P. 3.210 is a state law claim and is not cognizable on federal habeas review.

With respect to the remainder of claim one, Cruz cannot show that the state court's decision rejecting the claim was either "contrary to, or involved an unreasonable application of" the clearly established law of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In summarily denying claim one, the state court noted that the transcript of the plea hearing revealed that appellant answered questions revealing:

> ...[t]hat he had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the

> influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, unde3rstood the rights he was giving up in his plea agreement, under that he would be subject to deportation, understood the sexual offender registration and monitoring requirements, was satisfied with the representation of his attorney, and that there was simply no indication of mental incompetency. In fact, the transcript points out that the Defendant's immigration attorney was present at the plea hearing to ensure that the Defendant understood he would be deported. Thus, the claim that trial Counsel was ineffective for failing to evaluate the Defendant as incompetent or request a hearing pursuant to Rule 3.210, is without merit.
> (App D-3, 4).

The transcript of the plea hearing supports these factual findings. Cruz respondent to the plea colloquy questions as noted by the state court; he stated that he had never been found to be insane, incompetent or mentally challenged; that he was comfortable in the English language; and that he understood everything that the court and counsel had said. (App A, 10-11). Additionally, counsel noted that Cruz could read and write English, was "very articulate," and had completed a year of college. (App A, 5). The court noted later during the hearing that trial counsel indicated that Cruz was competent. (App A, 15). Additionally, Cruz does not allege that he informed trial counsel of his alleged mental health issues, or that he exhibited any behavior which would have given counsel reason to doubt his competency.

The record supports that trial court's finding that there "was simply no indication of mental incompetency," and supports the court's conclusion that trial counsel was not ineffective failing to have appellant's competency evaluated or request a competency determination. (App D-3, 4).

In support of his claim of mental illness/involuntary plea, Counsel has attached, as "Exhibit A" to the instant petition, a letter from a neuropsychologist. (Doc. 1, p. 26). Respondent notes that this letter was not presented to the state court in Cruz's postconviction proceedings. This portion of claim one was not exhausted in state court, would be procedurally barred if petitioner attempted to present it in a successive Rule 3.850 motion, and is procedurally defaulted from the instant petition.

In any event, Respondent disputes Cruz's assertion that the neurophychologist's letter concludes that Cruz was incompetent "to enter a guilty plea on August 19, 2013." (Doc. 1, p. 10). Cruz alleges that he retained the neurophychologist after being retained for postconviction proceedings, and that the neurophychologist examined Cruz. The neurophychologist's letter is not dated, does not state the date of the exam, and does not indicate that the neuropsychologist reviewed any medical or mental health records. Moreover, the

letter does not state that Cruz was incompetent to enter a plea *at the time of the plea*. The letter merely states that appellant was "incompetent to enter a plea," without providing the date or any time frame when appellant was allegedly incompetent. In fact, the letter describes appellant's "level of intellectual functioning at the time of the evaluation," and describes his "psychiatric condition at the time the evaluation was conducted." (Doc. 1, p. 26). Even if the state court had been presented with this letter, it does not indicate that appellant was incompetent at the time of the plea, or that appellant exhibited any behavior which would have given his trial counsel reasonable grounds to believe that he was not mentally competent to proceed. *See* Fla. R.Crim. P. 3.210(b).

Further, in the present case, unlike the case which Cruz relied upon in state court, the defendant did not exhibit "odd behavior immediately preceding and subsequent to the plea hearing" and did not give "inappropriate answers to questions during the plea colloquy." *Compare, Storey v. State,* 139 So.3d 448, 450 (Fla. 2d DCA 2014). As noted by the state court, the plea transcript shows that appellant gave appropriate and rational responses during the plea hearing. Petitioner certainly has not shown that he did not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or that

he did not have "a rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396 (1993).

Finally, Cruz cannot establish that he was prejudiced by trial counsel's allegedly deficient performance. In order to establish prejudice, Cruz must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). At the plea hearing, trial counsel noted that he had advised Cruz of his limited likelihood of success at trial. Counsel noted "There are post-Miranda admissions written and oral. There were text messages, there were – the government had a very strong case on this cyber stalking case – cyber guardian case." (App A, 6). Although Cruz's sentencing guidelines scoresheet provided for a minimum sentence of 84 months in prison, pursuant to the plea offer made by the trial court during an earlier conference, Cruz received a downward departure sentence of 90 days in the county jail followed by three years of standard probation. (App A, 3, 17, 77-78). Given the strong evidence of guilt and the extremely lenient sentence Cruz received pursuant to the plea, he cannot show that but for counsel's alleged errors he would not have pleaded guilty and would have insisted on going to trial.

Cruz cannot show that the state court's decision rejecting his involuntary plea/ineffective assistance of counsel claim was either "contrary to, or involved an unreasonable application of" the clearly established law of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Harrington,* 131 S.Ct. at 786. Claim one should be denied.

Claim Two

Claim two alleges that trial counsel was ineffective for failing to move to dismiss the attempted lewd or lascivious battery charge (Count 4 of the information). Appellant alleges that the age of the victim of the lewd or lascivious battery is an element of the offense, and that the state was "unable to satisfy the essential element of age in this case" because he actually engaged in communication with an adult law enforcement officer and not a child "12 years of age or older but less than 16 years of age." He argues notes that in *Pamblanco v. State*, 111 So.3d 249, 252 (Fla. 5th DCA 2013), the Florida Fifth District Court of Appeal vacated a conviction for soliciting a minor to commit a lewd and lascivious act, because the defendant was (unknowingly) soliciting an undercover police officer rather than a minor. In *Pamblanco* the court held that the age of the person

solicited was an element of the offense, and that the evidence was "totally insufficient as a matter of law" to establish the commission of the offense. *Id.*

In the present case, in contrast to *Pamblanco,* the charge involved an *attempt* to commit an offense against a minor. As noted by the trial court below, *Pamblanco* addressed a completed offense and "makes clear that the holding does not apply to "attempted" lewd/lascivious charges." (App D-3, 5,6). The opinion in *Pamblanco* specifically noted that "The parties have not briefed the issue of attempted solicitation and whether a conviction could be obtained for attempted solicitation under the facts of this case." *Pamblanco*, 111 So.3d at 252 n. 3.

Nor can Cruz establish prejudice. Even if Count 4 had been dismissed, Cruz's scoresheet would nevertheless have provided for a minimum sentence of 63.75 months' imprisonment for the remaining three offenses. (App A, 78). The extremely lenient downward departure sentence imposed by the court pursuant to the plea - 90 days in the county jail followed by three years of standard probation – was well below the guidelines sentence. (App A, 17, 69). Moreover, at the plea hearing, trial counsel noted that he had advised Cruz of his limited likelihood of success at trial. Counsel noted "There are post-Miranda admissions written and oral. There were text messages, there were – the government had a very strong

case on this cyber stalking case – cyber guardian case." (App A, 6). Given the strong evidence of guilt and the extremely lenient sentence Cruz received pursuant to the plea, he cannot show that but for counsel's alleged error (failure to move to dismiss Count 4), he would not have pleaded guilty and would have insisted on going to trial.

Cruz cannot show that the state court's holding, that trial counsel was not ineffective in failing to move to dismiss the charge of attempted lewd or lascivious battery was either "contrary to, or involved an unreasonable application of" the clearly established law of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Harrington,* 131 S.Ct. at 786. Claim two should be denied.

Claim Three

Claim three alleges that Cruz's convictions in Counts I and III -- use of a computer device to solicit unlawful sexual activity with a minor, and traveling to meet a minor for unlawful sexual activity after solicitation -- violated double jeopardy. Respondent notes that in state court, Cruz also contended that trial counsel was ineffective for failing to move to dismiss the solicitation offense due

to double jeopardy. However, he has not raised that ineffectiveness claim in the instant petition, and Respondent therefore has not addressed that claim.

Respondent first notes that Cruz's negotiated guilty plea waived any double jeopardy claims regarding his convictions. *See Dermota v. United States*, 895 F.2d 1324 (11th Cir.), *cert. denied*, 498 U.S. 837, 111 S.Ct. 107, 112 L.Ed.2d 78 (1990) (where a defendant freely, voluntarily, and accompanied by his attorney enters into a plea agreement whereby he pleads guilty or the equivalent, he waives the right to challenge the offenses on the basis of a double jeopardy objection); *See also*, *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

Cruz claims that he entered an open plea rather than a negotiated plea, noting that his attorney stated "It's an open plea to the court." (App A, 4). However, the record shows that counsel made that statement when the trial court asked if there was a written plea form. The judge asked if there was "a written contract," and counsel replied, "No, your Honor. It's an open plea to the Court." (App A, 4). The representations made throughout the hearing, however, show that this was a negotiated plea. At the beginning of the hearing counsel noted that there was no written plea form because "This was a judge's conference and the Court offered the 90 days, three years, standard probation ...." (App A, 3). Counsel

stated that Cruz "has agreed to take the deal that the State of Florida – well, that the Court is going to offer." (App A, 5). He stated, "[we're here to change our pela today, enter a plea of guilty, receive 90 days in the Citrus County Jailhouse and three years standard probation." (App A, 10). Prior to Cruz entering the plea, the Court stated, "Now, this is 90 days. It is a condition of three years worth of standard probation." (App A, 15). Cruz entered the plea and the Court imposed that sentence. (App A, 16, 17). The record shows that this was a negotiated plea, pursuant to which Cruz received the benefit of a downward departure sentence in exchange for his plea. Cruz's negotiated plea waived any federal claim of a double jeopardy violation.

In any event, Respondent notes that according to the information, the solicitation offense involved a victim named Tiffany Wright, while the traveling offense involve a victim named "Jenny." (App A, 38). Likewise, the factual basis provided by the trial judge at the plea hearing stated that Count I (solicitation) involved victim Tiffany Wright, while County III (traveling) involved victim "Jenny." (App A, 11, 13). Although the Florida Supreme Court has recently held that "the statutory elements of solicitation are entirely subsumed by the statutory elements of traveling after solicitation," and that "the offenses are the same for

purposes of the *Blockburger* same-elements test," *State v. Shelley*, 176 So. 3d 914, 919 (Fla. 2015), *reh'g denied* (Oct. 9, 2015), such is not the case where the two offenses involve different victims. Thus, even if this claim was not waived by Cruz's negotiated plea, it would be without merit. Claim three should be denied.

CONCLUSION

WHEREFORE, based upon the above, respondents request that this Court dismiss the instant petition for writ of habeas corpus with prejudice or, in the alternative, deny the petition in all respects.

Respectfully submitted,

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I HEREBY CERTIFY that on April 13, 2017, I electronically filed the foregoing "Response to Petition" and Index to Appendix with the Clerk of the Court by using the CM/ECF system. I further certify that served a copy of the forgoing Response to Petition, Index to Appendix and notice of electronic filing by U.S. Mail to Michael Ufferman, Michael Ufferman Law Firm, P.A., 2022-1 Raymond Diehl Road, Tallahassee, Florida, 32308, and by email to ufferman@uffermanlaw.com.

s/ Lori N. Hagan
Lori N. Hagan
Of Counsel

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

EFRAIN CARARILL CRUZ,

Petitioner,

v. CASE NO. 5:16-cv-531-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

APPENDIX

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INDEX TO APPENDIX

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To whom it may concern:

By means of this communication I wish to present my professional opinion, based on the results of the Neuropsychological Evaluation I administered to Mr. Efrain Cruz that he was cognitively, intellectually, and psychiatrically incompetent to enter a plea (on his own), under stress/duress without adequate legal representation. More specifically, the following factors should be considered based on the findings obtained during the intellectual and cognitive evaluation:

1. The patient's level of intellectual functioning at the time of the evaluation placed him in the Extremely Low range of functioning; even taking into account that his intellectual performance was depressed to a certain extent by the effects of his psychiatric condition at the time the evaluation was conducted, his level of intellectual ability even prior to the onset of his legal problems was not considered to be much higher than just above the upper level of the Mild Mental Retardation range (i.e., in the lower end of the Borderline range of functioning).

2. The patient suffered a mild traumatic head injury during his childhood. Victims of mild head injuries are known to get easily overwhelmed both cognitively and emotionally speaking, often tending to make ill-advised, rash, impulsive decisions during highly (or even at times, mildly) stressful situations; when the patient recognizes the folly of his/her rash and impulsive actions (which this type of person often makes in order to quickly reduce or dissipate the high level of stress he/she is experiencing), it is, unfortunately, often too late to make amends or reverse the course of events. Mild head injuries almost invariably affect the frontal area of the brain due to shearing of the cortical neurons/axons supporting this area (i.e., since the frontal lobes of the brain are protected by protruding bony/spiky structures in the inner side of the skulls, they are particularly vulnerable to the effects of shearing as a result of acceleration/deceleration generalized traumatic closed head injuries); this frequently results in poor executive functioning (i.e., impaired problem-solving skills; poor reasoning skills; impaired use of commonsense; difficulty considering the potentially negative consequences of one's actions) such as that demonstrated by Mr. Cruz during the neuropsychological evaluation

Sincerely,

Dr. Herbert Ginart, Psy.D., P.A
Neuropsychologist
PY7503

RECEIVED, 5/5/2015 7:47 PM, Joanne P. Simmons, Fifth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

EFRAIN CAMARILL CRUZ,

Appellant,

v. CASE NO. 5D14-0833

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT IN AND
FOR CITRUS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee presents the following additional facts in support of the answer brief:

In the trial court's order summarily denying claims one and two, the court noted that the transcript of the plea hearing revealed that appellant answered questions revealing "that he had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, unde3rstood the rights he was giving up in his plea agreement, under that he would be subject to deportation, understood the sexual offender registration and monitoring requirements, was satisfied with the representation of his attorney." (*See* February 10, 2014 order, p. 4). The trial court found that "there was simply no indication of any mental incompetency," and noted that appellant's "immigration attorney was present at the plea hearing to ensure that the Defendant understood he would be deported." (February 10, 2014 order, p. 4).

In dening claim two, the trial court ntoed that this Court's opinion in *Pamblanco v. State*, 111 So.3d 249, 252 (Fla. 5th DCA 2013), makes clear that the holding does not apply to "attempted" lewd/lascivious charges" (*See* February 10, 2014 Order, p. 5).

The state's Resposne contended that appellant engaged in multiple text

messages, emails and phone calls to solicit the child on a single day. (State's Response, 2). Appellant's Reply contended that the traveling offense occurred on the same day, and the State's Response contended that it was impossible to determine whether the traveling offense occurred on the same day as the solicitation or on the following day. (State's Response, 2; Defendant's reply to State's Response, 2).

Following the State's Response and Appellant's Reply, the trial court denied claim three. (April 14, 2014 Order).

SUMMARY OF ARGUMENT

POINT ONE: Appellant has presented only conclusory allegations, and is not entitled to an evidentiary hearing regarding his claim that his plea was involuntary due to his alleged incompetency. Additionally, appellant's ineffective assistance of counsel claim is facially insufficient because appellant has not alleged that, in the absence of counsel's ineffectiveness, he would not have entered his plea. In any event, nothing in the record or the 3.850 motion show that trial counsel had reasonable grounds to have doubted appellant's competency to proceed. The trial court properly summarily denied this claim without an evidentiary hearing.

POINT TWO: This claim was facially insufficient as appellant did not allege that, but for counsel's ineffectiveness, he would not have entered his guilty plea. In any event the claim was properly denied on the merits. Appellant pled guilty to attempted lewd or lascivious battery of a minor rather than the completed offense; appellant cannot show that trial counsel was ineffective in failing to advise him that the state "was unable to satisfy the essential element of age."

POINT THREE: This claim was facially insufficient as appellant did not allege that, but for counsel's ineffectiveness, he would not have entered his guilty plea. In any event the claim was properly denied on the merits. The convictions for use of a computer device to solicit

unlawful sexual activity with a minor, and traveling to meet the minor for unlawful sexual activity, did not violate double jeopardy because appellant solicited the minor through multiple uses of a computer device. Counsel was therefore not ineffective in failing to advise appellant that the convictions violated double jeopardy.

ARGUMENT

POINT ONE

APPELLANT HAS PRESENTED ONLY CONCLUSORY ALLEGATIONS AND IS NOT ENTITLED TO AN EVIDENTIARY HEARING; THE TRIAL COURT PROPERLY SUMMARILY DENIED THIS CLAIM WITHOUT AN EVIDENTIARY HEARING.

Appellant alleges that his plea was involuntary because he was not competent to enter the plea. (Initial brief, 7). Alternatively, he argues that counsel was ineffective in failing to properly evaluate him and request competency hearing. (Initial brief, 8).

Appellant has presented only conclusory allegations, however, and is not entitled to an evidentiary hearing regarding his claim that his plea was involuntary due to his alleged incompetency. Additionally, appellant's ineffective assistance of counsel claim is facially insufficient because he has not alleged that, in the absence of counsel's ineffectiveness, he would not have entered his plea. In any event, nothing in the record or the 3.850 motion show that trial counsel had reasonable grounds to have doubted appellant's competency to proceed. The trial court properly summarily denied this claim without an evidentiary hearing.

Appellant alleged below that he suffered a traumatic head injury as a child and that his mental capacity is at "the lower end of borderline range of

functioning." (Initial Brief, 6). He alleged that he has recently been examined by Dr. Herbert Ginart, a neuropsychologist, who has concluded that he was incompetent to enter his plea. (Initial Brief, 6). Appellate counsel alleges that appellant is entitled to an evidentiary hearing on his claim of incompetency hearing, given his allegations of mental illness and a recent mental health evaluation finding that he was incompetent at the time of the plea. Appellant has not provided a copy of the alleged mental health report.

"To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief." *Everett v. State,* 54 So.3d 464, 485 (Fla.2010). "A defendant is normally entitled to an evidentiary hearing on a postconviction motion 'unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient.' " *Valentine v. State,* 98 So.3d 44, 54 (Fla.2012) (quoting *Franqui v. State,* 59 So.3d 82, 95 (Fla.2011)). However, merely conclusory allegations are not sufficient—the defendant bears the burden of "establishing a 'prima facie case based on a legally valid claim.' " Barnes v. State 124 So.3d 904, 911 (Fla.,2013)(quoting *Franqui,* 59 So.3d at 96).

Appellant alleges that his claim should not have been summarily denied, and that he was entitled to an evidentiary hearing, based on the Second District Court of Appeal's decision in *Storey v. State,* 32 So. 3d 105, 106-107 (Fla. 2d

DCA 2009). Apelles notes that the defendant in *Storey* claimed that he would not have entered his plea if he had not been incompetent. In the present case appellant makes no such allegation; rather he requests an evidentiary hearing on his incompetency claim. (Initial Brief, 11). Additionally, the defendant in *Storey* exhibited "odd behavior immediately preceding and subsequent to the plea hearing" and gave "inappropriate answers to questions during the plea colloquy", and the district court noted a "lack of any other evidence to indicate he understood the consequences of his plea." . *See Storey v. State,* 139 So.3d 448, 450 (Fla. 2d DCA 2014). In the present case, by contrast, as will be noted below, the plea transcript shows that appellant gave appropriate and rational responses during the plea hearing.

Appellant's claim that his plea was involuntary due to his alleged incompetency is, in essence, a substantive incompetency claim. A substantive incompetency claim that a defendant was permitted to enter a plea while incompetent is generally procedurally barred where the defendant failed to raise it on direct appeal. *Barnes,* 124 So. 3d at 913 (citing *Nelson,* 43 So.3d at 33; *Carroll,* 815 So.2d at 610);) Francis v. State 121 So.3d 67, 69 (Fla. 32d DCA 2013)(citing *Bundy v. State,* 538 So.2d 445, 447 (Fla.1989), for proposition that "competency-based postconviction relief was procedurally barred because the defendant failed to raise the issue on direct appeal").

However, such a claim "has been allowed in postconviction under limited

circumstances where the facts are compelling that the defendant was tried and convicted while incompetent." *See, e.g., Jones v. State,* 478 So.2d 346, 347 (Fla.1985) (postconviction claim allowed and hearing granted where affidavits and expert opinions supported claim that Jones suffered from organic brain damage and was incompetent). A petitioner is entitled to an evidentiary hearing on a substantive incompetency claim if he or she "presents clear and convincing evidence to create a real, substantial and legitimate doubt"' as to his competency. or her competency." *Barnes,* 124 So.3d at 915 -918 (quoting *Fallada v. Dugger,* 819 F.2d 1564, 1568 n. 1 (11th Cir.1987)).

In the present case, appellant is not entitled to an evidentiary hearing because has not "presented clear and convincing evidence to create a real, substantial and legitimate doubt"' as to his competency. *Barnes,* 124 So.3d at 915 -918. Appellant has not presented affidavits, or the neuropsychologist's alleged report, supporting his claim that he was incompetent at the time of the plea. Moreover, as noted by the trial court, the transcript of the plea hearing reveals that appellant appropriately answered questions revealing "that he had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, unde3rstood the rights he was giving up in his plea agreement, under that he would be subject to deportation , understood the sexual offender registration and monitoring

requirements, was satisfied with the representation of his attorney." (*See* February 10, 2014 order, p. 4). The transcript of the plea hearing supports these findings. (*See* attachment to February 10, 2014 order, pp. 4-24).). As noted by the trial court, "there was simply no indication of any mental incompetency." In fact, the transcript points out that the Defendant's immigration attorney was present at the plea hearing to ensure that the Defendant understood he would be deported." (February 10, 2014 order, p. 4). The record does not show that appellant did not "have the present ability to consult with his attorney with a reasonable degree of rational understanding," or that he had "no rational as well as factual understanding of the proceedings against him." See §916.12(1), Florida Statutes (2012) (defining incompetency). Given the lack of clear and convincing evidence of incompetency, appellant was not entitled to an evidentiary hearing on this claim. *Barnes,* 124 So.3d 904, 915 -918 (noting that defendant consulted with counsel, that "No counsel, prosecutor, or judge had any doubt the Defendant was not competent and that "there were no indications of Defendant's incompetence."

Appellant's related ineffective assistance of counsel claim is facially insufficient because appellant has not alleged that, in the absence of counsel's ineffectiveness, he would not have entered his plea. *See, e.g., Delice v. State*, 103 So.3d 262, 263 (Fla. 5th DCA 2012)(To sufficiently allege prejudice, defendant was required to allege that he would not have entered his plea but for attorney's

ineffectiveness). Moreover, he cannot show that trial counsel was ineffective in failing to request a competency hearing or in failing to argue that appellant was incompetent to enter the plea.

The Florida Rules of Criminal Procedure require counsel to seek a competency determination only if he or she has "a reasonable ground to believe that the defendant is not mentally competent to proceed." *See* Fla. R.Crim. P. 3.210(b). In the present case, nothing in the record or the 3.850 motion show that trial counsel had a reasonable ground to have doubted appellant's competency to proceed. *See Barnes,* ("nothing in the record or the motion submitted by Barnes presents a reasonable ground for standby counsel to doubt Barnes' competency to proceed. Thus, summary denial of this claim was proper."). Given appellant's appropriate and rational responses at the plea hearing, and the allegations that an expert has only recently found that he was incompetent, the record does not show that trial counsel was ineffective for failing to request a competency hearing or for failing to argue that appellant was incompetent to enter the plea. The trial court properly summarily denied this claim without an evidentiary hearing.

POINT TWO

THIS CLAIM WAS FACIALLY INSUFFICIENT AND, IN ANY EVENT, WAS PROEPRLY DENIED ON THE MERITS.

Appellant argues that trial counsel was ineffective for failing to move to dismiss the charge of attempted lewd or lascivious battery because the state was "unable to satisfy the essential element of age in this case." Appellant notes that he engaged in communication with an adult law enforcement officer, and not a child "12 years of age or older but less than 16 years of age." (Initial Brief, 12).

Appellee first notes that this claim was facially insufficient and would have been properly denied on that basis. A claim that counsel was ineffective for failing to move to dismiss a charge, based on lack of a factual basis or lack of evidence of an element of the crime, must include an allegation that, but for counsel's ineffectiveness, the defendant would not have entered his guilty plea. Smalls v. State 973 So.2d 630, 631 -632 (Fla. 1st DCA 2008); *See also Delice v. State*, 103 So.3d 262, 263 (Fla. 5th DCA 2012)(To sufficiently allege prejudice, defendant was required to allege that he would not have entered his plea but for attorney's ineffectiveness); *Davis v. State,* 15 So.3d 770, 772 (Fla. 2d DCA 2009) (defendant's claim that he would not have entered into a plea but for counsel's misadvice ... stated a "facially sufficient claim" for postconviction relief). Appellant has made no such allegation in the present case.

In any event, the trial court properly held that the claim was without merit.

Appellant alleges that the age of the victim of the lewd or lascivious battery is an element of the offense, and that the state was "unable to satisfy the essential element of age in this case." He notes that in *Pamblanco v. State*, 111 So.3d 249, 252 (Fla. 5th DCA 2013), this Court vacated a conviction for soliciting a minor to commit a lewd and lascivious act, because the defendant was (unknowingly) soliciting an undercover police officer rather than a minor. This court held that the age of the person solicited was an element of the offense, and that the evidence was "totally insufficient as a matter of law" to establish the commission of the offense. *Id.*

In the present case, in contrast to *Pamblanco,* the charge involved an *attempt* to commit an offense against a minor. As noted by the trial court below, *Pamblanco* addressed a completed offense and "makes clear that the holding does not apply to "attempted" lewd/lascivious charges" (*See* February 10, 2014 Order, p. 5). This Court's opinion in *Pamblanco* specifically noted that "The parties have not briefed the issue of attempted solicitation and whether a conviction could be obtained for attempted solicitation under the facts of this case." Pamblanco, 111 So.3d at 252 n. 3. Moreover, the court noted that "it is only a person who actually commits (versus attempts to commit) lewd or lascivious conduct who commits a felony." *Id.* at 252. The trial court properly held that the this claim was without merit and that the offense would not have been subject to dismissal on this basis.

POINT THREE

THIS CLAIM WAS FACIALLY INSUFFICIENT; MOREOVER, THE CLAIM WAS PROPERLY DENIED ON THE MERITS AS APPELLANT'S CONVICTIONS DID NOT VIOLATE DOUBLE JEOPARDY.

Appellant claims that his convictions for the use of a computer device to solicit unlawful sexual activity with a minor, and traveling to meet the minor for unlawful sexual activity, violated double jeopardy. Appellant's motion for postconviction relief also alleged, alternatively, that trial counsel was ineffective for failing to move to dismiss the solicitation offense.

Appellee first notes that appellant's negotiated plea waived this double jeopardy claim. *See Wolkerson v. State,* 128 So.3d 189, 189–90 (Fla. 5th DCA 2013). However, a defendant may seek review in a rule 3.850 proceeding through an ineffective assistance of counsel claim "which is based on the contention that defense counsel failed to advise him, before he entered his plea, that there were potential double jeopardy issues." *Id.* Thus, to the extent that appellant has alleged that trial counsel was ineffective in failing to advise him that the offenses violated double jeopardy, such a claim is cognizable in a Rule 3.850 motion.

However, appellant's ineffective assistance of counsel claim was facially insufficient as appellant did not allege below (nor has he alleged on appeal) that would not have entered the plea if counsel had advised him of the double

jeopardy violation. *See, e.g.,* Rogers v. State 113 So.3d 960, 961 (Fla. 2d DCA 2013). The claim would have been properly denied on that basis.

In event, even if the claim had been facially sufficient it was properly denied on the merits. The convictions did not violate double jeopardy, and trial counsel was therefore not ineffective, because appellant solicited the minor through multiple uses of a computer device.

Appellant alleges that his convictions of Count I and Count III violated double jeopardy. In *Pinder v. State,,* 128 So.3d 141, 143 (Fla. 5th DCA 2013), this Court held that a defendant's convictions for traveling and solicitation of a minor under §847.0135(3)(b) and 4(b) did not violate double jeopardy because the defendant was alleged to have violated subsection (3)(b) on multiple occasions over an eight-day period, and "the evidence established multiple offenses." *Pinder,* 128 So. 3d at 143-144. On the day of the last communication, the defendant traveled to meet the alleged minor. This Court noted that "Section 847.0135(3) expressly provides that "[e]ach separate use of a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission wherein an offense described in this section is committed may be charged as a separate offense." Therefore, under the facts of this case, Pinder's convictions under subsections (3)(b) and (4)(b) were for separate offenses and no double jeopardy violation occurred." This Court further noted that "if a defendant solicited

unlawful sexual activity with a minor through a single use of a computer device prior to traveling to meet the minor for unlawful sexual activity, double jeopardy principles would preclude convictions under both subsections." *Pinder*, 128 So.3d at 143 -144.

In the present case the state contended, and the defendant did not dispute, that appellant engaged in multiple text messages, emails and phone calls to solicit the child on a single day. (State's Response, 2; Defendant's reply to State's Response, 2). Appellant contended that the traveling offense occurred on the same day, although the State contended that it was impossible to determine whether the traveling offense occurred on the same day as the solicitation or on the following day. (State's Response, 2). The information is not included in the limited record available in this appeal. However, under either view, since the defendant solicited unlawful activity with a minor through more than "a single use" of a computer device prior to traveling to meet the minor, the convictions under subsections 3(a) and 4(a) were for separate offenses and did not violate double jeopardy. The trial court properly held that appellant committed separate offenses and that the convictions did not violate double jeopardy. (April 14, 2014 Order, pp. 3-4).

Appellant states that he is entitled to relief under the Second DCA's decision in *Shelley v. State,* 134 so. 3d 1138 (Fla. 2d DCA 2014). In *Shelley,* "the State only charged one use of a computer devises to solicit, and that charge was

based on a solicitation occurring on the same date as the traveling date." *Id.* at 1141-1142.

The opinion in *Shelley* focused on the fact that the solicitation offense "occurred on the same date as the traveling offense." *Id.* However, this Court's opinion in *Pinder* does not require that the offenses occurred on different dates in order to withstand a double jeopardy challenge. Rather, *Pinder* holds that that "if a defendant solicited unlawful sexual activity with a minor through a *single use* of a computer device prior to traveling to meet the minor for unlawful sexual activity, double jeopardy principles would preclude convictions under both subsections." Pinder, 128 So.3d at 143 -144 (emphasis added). Additionally, in a case subsequent to *Pinder,* this Court held that convictions for traveling and solicitation violate double jeopardy if the offenses are "based on the same act of "soliciting" or "luring."" *Rodriguez v. State*, 2015 WL 1851546, 1 (Fla. 5th DCA April 24, 2015).

In the present case, although the solicitation charge and the traveling charge were arguably based on conduct occurring on the same date, the solicitation charge was based on multiple solicitations/multiple uses of a computer device prior to the traveling offense. The two offenses were not based on "the same act of soliciting or luring" and thus do not violate double jeopardy. *Rodriguez, supra.* Trial counsel was not ineffective in failing to advise appellant that the convictions violated double jeopardy.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays that this honorable Court affirm the trial court's summary denial of appellant's Rule 3.850 motion for postconviction relief.

Respectfully submitted,
Pamela Jo Bondi
Attorney General

/s/ Lori N. Hagan
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Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by email to Michael Ufferman, Esq., 2022-1 Raymond Diehl Road, Tallahassee, Florida, 32308, at ufferman@uffermanlaw.com, on this 5th day of May, 2015.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, in this proceeding: crimappdab@myfloridalegal.com (primary) and lori.hagan@myfloridalegal.com (secondary).

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lori N. Hagan
Lori N. Hagan
Of Counsel

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

APR 16'14 14:29

STATE OF FLORIDA

v. **CASE NO.: 2012-CF-696**

EFRAIN CAMARILL CRUZ,
Defendant.
_____/

FINAL ORDER AFTER STATE'S RESPONSE
to the
MOTION FOR POST CONVICTION RELIEF
and
MOTION FOR COMPETENCY DETERMINATION

THIS COURT having considered Defendant's Motion for Post Conviction Relief and Motion for Competency Determination, having reviewed the record of this case and all documents pertinent to Defendant's motions, the State's Response and being otherwise fully advised in the premises finds as follows:

1. On August 19, 2013, the Defendant plead guilty in open court to (I) Use of Internet or Device to Lure Child; (II) Use of Internet or Device to Lure Parent/Guardian; (III) Traveling to Meet Minor for Illegal Sexual Conduct; and (IV) Attempted Lewd/Lascivious Battery on a Child 12 YOA but less than 16 YOA. He was adjudicated guilty, a pre-sentence investigation was waived, and he was sentenced to 90 days in the Citrus County Jail with CTS as a condition of three years of Standard Probation. Costs were assessed at $398, $20 for the CSTF, $151 CAM, $100 CPOR, $100 COI to the CCSO, $50 outstanding PD application fee, and $50 per day cost of incarceration, all on the Clerk's Payment Plan. Additionally, DNA testing was ordered, he was designated as a Sexual Offender, and he is subject to the requirements of the

CERTIFIED TO BE A TRUE COPY
ANGELA VICK
CLERK OF THE CIRCUIT COURT
AND COMPTROLLER
BY _____ D.C.
THIS 23 DAY OF Jun 2014

Jimmy Ryce Act and the Lunsford Act. The Defendant filed a Notice of Appeal on September 5, 2013, which the Fifth DCA acknowledged in an Order dated September 6, 2013. The Defendant subsequently voluntarily dismissed his appeal.

2. As noted in a previous Court Order, this is the Defendant's second time to submit these two motions. The Court denied the previous Motion for Post Conviction Relief for lack of jurisdiction during the pendency of appeal. The companion Motion for Competency Determination was dismissed because the Defendant's current posture was not a "material stage of a criminal proceeding" pursuant to Rule 3.210.

Through his Counsel, the Defendant re-submitted the Motion for Post Conviction Relief, (with added claims of ineffective assistance of counsel), because the appeal is no longer pending. In the Motion for Post Conviction Relief, the Defendant alleged three claims for relief as follows:

a. In light of the Defendant's mental illness, the Defendant was not able to fully comprehend his guilty plea and therefore the plea was involuntary. In relief, the Defendant requests to withdraw his plea. Alternatively, the Defendant alleges that his defense Counsel was ineffective by failing to properly evaluate and argue that the Defendant was incompetent to enter a guilty plea and failing to request a hearing pursuant to Rule 3.210.

b. Counsel was ineffective for failing to move to dismiss the attempted lewd or lascivious battery charge, because the Defendant was communicating with an adult law enforcement officer, not someone "12 years of age or older but less than 16 years of age."

c. Convictions for both § 847. 0135(3)(a) and subsection (4)(a) violate double jeopardy. Alternatively, Counsel was ineffective by failing to move to dismiss the § 847. 0135(3)(a) violation.

In addition, the Defendant re-filed a Motion for Determination of Competency.

3. In a previous Court Order dated February 10, 2014, (before a response was requested from the State), this Court took the following actions:

a. Denied the Defendant's request to withdraw plea more than 30 days after rendition of the sentence as untimely;

b. Dismissed the Companion Motion for Competency Determination because the Defendant's current posture is not a "material stage of a criminal proceeding";

c. Denied the Defendant's first claim of ineffective assistance of Counsel (for failing to properly evaluate and argue that the Defendant was incompetent to enter a guilty plea and failing to request a hearing pursuant to Rule 3.210) as conclusively refuted by the record;

d. Denied the Defendant's claim of ineffective assistance of Counsel (for failing to move for dismissal of attempted lewd or lascivious battery charge (Count IV)) because Pamblanco v. State , cited by the Defendant, is clear that the holding does not apply to "attempted" lewd/ lascivious charges. 111 So.3d 249, n3 (Fla. 5th DCA 2013); and,

e. Denied the Defendant's claim of ineffective assistance of Counsel (for failing to move for dismissal of Count I as violative of double jeopardy as suggested by Pinder v. State, 2013 WL 5950995 (Fla. 5th DCA, Nov. 8, 2013)) because the Defendant's trial Counsel did not have the benefit of Pinder during the change of plea hearing in August 2013.

4. However, in a separate Order, this Court ordered the State to Respond to the issue of whether the sentence on Count I was illegal as violative of double jeopardy principles as suggested by Pinder v. State, 2013 WL 5950995 (Fla. 5th DCA, Nov. 8, 2013) (stating that soliciting unlawful sexual activity with a minor through a single use of a computer device would preclude conviction under both § 847. 0135(3)(b) and subsection (4)(b)). By analogy, the Defendant argued his convictions for both § 847. 0135(3)(a) (Count I) and subsection (4)(a) violate double jeopardy.

5. The State filed a response on March 6, 2014, and pointed out that the Defendant exchanged 117 text message, 16 phone calls, and numerous emails with the undercover law enforcement officer he believed was the mother of a 13 year old minor being offered for unlawful sexual activity. As stated in Pinder, "each separate use of a . . . device capable of data storage or transmission wherein an offense described in [§847.0135(3)] is committed may be charged as a separate offense." Id. at 144. Therefore, as in Pinder, under the facts of this case,

convictions under subsection (3)(a) and (3)(b) were for separate offenses; thus, no double jeopardy violations occurred. Defendant was provided an opportunity to file a reply to the State's response however failed to file a reply within the time limit required. Accordingly, the Defendants sentence as to Count I is not illegal. Based upon the foregoing, it is thereupon:

ORDERED AND ADJUDGED: That the Defendant's Motion to Correct Illegal Sentence is **DENIED.** Defendant has the right to file a notice of appeal in writing within 30 days of the date of this Order. The Clerk of Courts shall promptly serve a copy of this Order upon Defendant including an appropriate certificate of service.

DONE AND ORDERED in Chambers, at Inverness, Citrus County, Florida, this 14th day of April, 2014.

RICHARD A. HOWARD
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following by U.S. Mail/courthouse mailbox delivery this 15th day of April, 2014.

[ ] Micahel Ufferman, Esq., 2022-1 Raymond Diehl Road, Tallahassee, FL 32308 at ufferman@uffermanlaw.com

[ ] Office of the State Attorney, via courthouse mail.

Judicial Assistant/~~Deputy Clerk~~

State v. Cruz
2012-CF-696
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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

FEB 12'14 11:05

STATE OF FLORIDA

v. **CASE NO.: 2012-CF-696**

EFRAIN CAMARILL CRUZ,
Defendant.
_____/

ORDER ON MOTION FOR POST CONVICTION RELIEF
and
ORDER ON MOTION FOR COMPETENCY DETERMINATION

THIS COURT having considered Defendant's Motion for Post Conviction Relief and Motion for Competency Determination, having reviewed the record of this case and all documents pertinent to Defendant's motions, and being otherwise fully advised in the premises finds as follows:

1. On August 19, 2013, the Defendant plead guilty in open court to (I) Use of Internet or Device to Lure Child; (II) Use of Internet or Device to Lure Parent/Guardian; (III) Traveling to Meet Minor for Illegal Sexual Conduct; and (IV) Attempted Lewd/Lascivious Battery on a Child 12 YOA but less than 16 YOA. He was adjudicated guilty, a pre-sentence investigation was waived, and he was sentenced to 90 days in the Citrus County Jail with CTS as a condition of three years of Standard Probation. Costs were assessed at $398, $20 for the CSTF, $151 CAM, $100 CPOR, $100 COI to the CCSO, $50 outstanding PD application fee, and $50 per day cost of incarceration, all on the Clerk's Payment Plan. Additionally, DNA testing was ordered, he was designated as a Sexual Offender, and he is subject to the requirements of the Jimmy Ryce Act and the Lunsford Act. The Defendant filed a Notice of Appeal on September 5,

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ANGELA VICK
CLERK OF THE CIRCUIT COURT
AND COMPTROLLER
BY Pauline D.C.
THIS 12 DAY OF MAR 2014

2013, which the Fifth DCA acknowledged in an Order dated September 6, 2013. The appeal is currently pending.

2. This is the Defendant's second time to submit these two motions. The Court denied the previous Motion for Post Conviction Relief for lack of jurisdiction during the pendency of appeal. The companion Motion for Competency Determination was dismissed because the Defendant's current posture was not a "material stage of a criminal proceeding" pursuant to Rule 3.210.

Through his Counsel, the Defendant re-submits the Motion for Post Conviction Relief, with added claims of ineffective assistance of counsel, because the appeal is no longer pending. In the Motion for Post Conviction Relief, the Defendant alleges three claims for relief as follows:

a. In light of the Defendant's mental illness, the Defendant was not able to fully comprehend his guilty plea and therefore the plea was involuntary. In relief, the Defendant requests to withdraw his plea. Alternatively, the Defendant alleges that his defense Counsel was ineffective by failing to properly evaluate and argue that the Defendant was incompetent to enter a guilty plea and failing to request a hearing pursuant to Rule 3.210.

b. Counsel was ineffective for failing to move to dismiss the attempted lewd or lascivious battery charge, because the Defendant was communicating with an adult law enforcement officer, not someone "12 years of age or older but less than 16 years of age."

c. Convictions for both § 847. 0135(3)(a) and subsection (4)(a) violate double jeopardy. Alternatively, Counsel was ineffective by failing to move to dismiss the § 847. 0135(3)(a) violation.

In addition, the Defendant re-filed a Motion for Determination of Competency.

3. To begin, any request or motion to withdraw plea more than 30 days after rendition of the sentence is not permitted; the Motion is untimely. Fla. R. Crim. P. 3.170(*l*); see

also Gafford v. State, 783 So.2d 1191, 1192 (Fla. 1st Dist. 2001) (the 30 day limit under 3.170(*l*) is jurisdictional).

4. As before, the Companion Motion for Competency Determination is inappropriate because the Defendant's current posture is not a "material stage of a criminal proceeding" pursuant to Rule 3.210. Except under certain circumstances for capital defendants, post-conviction motions (such as Rule 3.850 motions) are civil in nature and are therefore not a material stage of a criminal proceeding. Jackson v. State, 452 So.2d 533, 537 (Fla. 1984) (stating the designation of a 3.850 motion as a criminal procedure rule is a misnomer because the proceeding is civil in nature, rather than criminal); see also Carter v. State, 706 So.2d 873, 875 (Fla. 1997) (a judicial determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue). Thus, the Motion for Competency Determination remains dismissed.

5. Regarding post-conviction relief, the Supreme Court of Florida has repeatedly held that under Rule 3.850, a movant is entitled to an evidentiary hearing unless the motion, files, and records conclusively show that the movant is not entitled to relief. Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993) (citing Fla. R. Crim. P. 3.850(d)). The Supreme Court of Florida has reiterated the standard to be applied to claims of ineffective assistance of counsel:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to

> have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (citing Strickland v. Washington, 466 U.S. 668 (1984); Downs v. State, 453 So.2d 1102, 1108-09 (Fla. 1984)).

6. In regard to the Defendant's first claim that trial Counsel was ineffective by failing to properly evaluate and argue that the Defendant was incompetent to enter a guilty plea and failing to request a hearing pursuant to Rule 3.210; this claim is conclusively refuted by the record. Attached is a copy of the plea transcript where it was revealed that the Defendant had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, understood the rights he was giving up in his plea agreement, understood that he would be subject to deportation, understood the sexual offender registration and monitoring requirements, was satisfied with the representation of his attorney, and that there was simply no indication of any mental incompetency. In fact, the transcript points out that the Defendant's immigration attorney was present at the plea hearing to ensure that the Defendant understood he would be deported. Thus, the claim that trial Counsel was ineffective for failing to evaluate the Defendant as incompetent or request a hearing pursuant to Rule 3.210, is without merit.

7. In the final two claims, the Defendant argues that Counsel was ineffective for failing to move for dismissal of attempted lewd or lascivious battery charge (Count IV) and that convictions for both § 847. 0135(3)(a) (Count I) and subsection (4)(a) violate double jeopardy. In a separate Order, the State will be ordered to respond to the issue of whether the Defendant's

sentence was illegal as to Count I. Whether Counsel was ineffective for failing to move to dismiss Counts I and IV is another matter. First, trial Counsel did not have the benefit of Pinder v. State, 2013 WL 5950995 (Fla. 5th DCA, Nov. 8, 2013) until after the change of plea hearing in August 2013. Pinder v. State is the case that the Defendant cites for the proposition that convictions for both § 847. 0135(3)(a) and subsection (4)(a) violate double jeopardy. Although Pinder suggests that convictions of subsection (3)(b) and (4)(b) violate double jeopardy principles, by the same logic, convictions of subsections (3)(a) and (3)(b) may violate double jeopardy principles. In any case, trial Counsel cannot be ineffective for failing to argue case law that did not exist in August of 2013.

The Defendant also cites Pamblanco v. State for the proposition that for the completed offense of solicitation of a child under the age of sixteen to commit lewd or lascivious conduct, the request must be made to someone under sixteen. 111 So.3d 249, 252 (Fla. 5th DCA 2013). It is not enough for a defendant to believe the victim is under sixteen. Id. The Defendant argues that because the actual victim in this case was an adult law enforcement officer, a conviction of lewd and lascivious battery on a child 12 yoa but less than 16 yoa cannot stand. However, in this case, Count IV is for "attempted" lewd and lascivious battery on a child 12 yoa but less than 16 yoa, pursuant to sections 800.04(4)(a) and 777.04(1). Pamblanco makes clear that the holding does not apply to "attempted" lewd/ lascivious charges. Id. at fn3. Accordingly, this Court finds that attempted lewd and lascivious battery on a child 12 yoa but less than 16 yoa, when the actual victim is an adult law enforcement officer, is not subject to dismissal. Even if the sentence as to Count I is eventually vacated as illegal, there is no showing that confidence in

the outcome, based on the remaining charges, is undermined. In sum, this Court does not find that trial Counsel's performance was ineffective. Based upon the foregoing, it is thereupon:

ORDERED AND ADJUDGED:

1. That the Defendant's Motion to Withdraw the Plea is **DENIED.**

2. That the Defendant's Motion for Competency Determination is **DISMISSED.**

3. That the Defendant's Motion for Post Conviction Relief is **DENIED**.

4. Defendant has the right to file a notice of appeal in writing within 30 days of the date of this Order. The Clerk of Courts shall promptly serve a copy of this Order upon Defendant including an appropriate certificate of service.

DONE AND ORDERED in Chambers, at Inverness, Citrus County, Florida, this 10th day of February, 2014.

RICHARD A. HOWARD
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following by U.S. Mail/courthouse mailbox delivery this 11th day of Feb., 2014.

[ ] Micahel Ufferman, Esq., 2022-1 Raymond Diehl Road, Tallahassee, FL 32308 at ufferman@uffermanlaw.com

[ ] Office of the State Attorney, via courthouse mail.

Judicial Assistant/Deputy Clerk

State v. Cruz
2012-CF-696
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EFRAIN CAMARILL CRUZ vs. STATE OF FLORIDA
LT. CASE NO: 2012 CF 000696
HT. CASE NO: 5D13-3161

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA,
IN AND FOR CITRUS COUNTY IN THE YEAR OF OUR LORD, TWO THOUSAND-TWELVE.

THE STATE OF FLORIDA CASE NO. 2012-CF-000696-A

vs **INFORMATION**

EFRAIN CAMARILL CRUZ

JUL 17'12 11:35AM

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

BRAD KING, State Attorney of the Fifth Judicial Circuit of the State of Florida, in and for Citrus County prosecuting for the State of Florida, by and through the undersigned Assistant State Attorney, in the said County, under oath, information makes that: EFRAIN CAMARILL CRUZ (R/G: W/M, DOB: 01/16/1980) in the County of Citrus, and the State of Florida, on or about the 22nd day of June in the year of Our Lord, twenty-twelve:

COUNT I
USE OF INTERNET OR DEVICE TO LURE A CHILD (F3)
847.0135(3)

did knowingly utilize a computer on-line service, Internet service, local bulletin board service, or other device capable of electronic data storage or transmission, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure or entice Tiffany Wright, a person believed by EFRAIN CAMARILL CRUZ to be a child, to commit an illegal act described in chapter 794 relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, to-wit: by conversing and/or chatting and or sending emails or messages to a person believed to be a child over the internet or telephone discussing engaging the child in sexual activity, in violation of Florida Statute 847.0135(3)(a);

COUNT II
USE OF INTERNET OR DEVICE TO LURE PARENT/GUARDIANA CHILD (F3)
847.0135(3)

and the Assistant State Attorney upon his oath aforesaid, further information makes that EFRAIN CAMARILL CRUZ (R/G: W/M, DOB: 01/16/1980) in the County of Citrus, and the State of Florida, on or about the 22nd day of June in the year of Our Lord, twenty-twelve, in the County and State aforesaid did knowingly utilize a computer on-line service, Internet service, local bulletin board service, or other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure or entice Dodi Pruitt, a person believed by EFRAIN CAMARILL CRUZ to be a parent, legal guardian or custodian of a child to consent to the participation of that child in an illegal act described in chapter 794 relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, or to otherwise engage in sexual conduct, to-wit: by conversing and/or chatting and or sending emails or messages to a person believed to be the parent, legal guardian or custodian of a child over the internet or telephone discussing engaging the child in sexual activity, in violation of Florida Statute 847.0135(3)(b);

COUNT III
TRAVELING TO MEET MINOR FOR ILLEGAL SEXUAL CONDUCT(F2)
847.0135(4)(a)

and the Assistant State Attorney upon his oath aforesaid, further information makes that EFRAIN CAMARILL CRUZ (R/G: W/M, DOB: 01/16/1980) in the County of Citrus, and the State of Florida, on or about the 22nd day of June in the year of Our Lord, twenty-twelve, in the County and State aforesaid did knowingly travel any distance, by any means, or attempted to do so, for the purpose of engaging in any illegal act described in chapter 794 (sexual battery), chapter 800 (Lewd or Lascivious Acts), or chapter 827 (Sexual Performance by a Child), or to otherwise engage in other unlawful sexual conduct with a child, to-wit: "Jenny", after using a computer on-line service, Internet service, local bulletin board service, or any other device capable of electronic data storage, or transmission, to seduce, solicit, lure, or entice or attempt

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JUL 17'12 11:35AM

to seduce, solicit, lure or entice a child or another person believed to be a child, to engage in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child, in violation of Florida Statute 847.0135(4)(a);

COUNT IV
ATTEMPTED LEWD/LASC BATTERY CHILD 12 YOA BUT LESS 16 YOA (F3)
800.04(4)(a) AND 777.04(1)

and the Assistant State Attorney upon his oath aforesaid, further information makes that EFRAIN CAMARILL CRUZ (R/G: W/M, DOB: 01/16/1980) in the County of Citrus, and the State of Florida, on or about the 22nd day of June in the year of Our Lord, twenty-twelve, in the County and State aforesaid did attempt to engage in sexual activity with "Jenny", a child twelve years of age or older but less than sixteen years of age, by attempting to cause his mouth to have union with the vagina and/or by attempting to cause his penis to penetrate of have union with the vagina of "Jenny" a child under the age of sixteen, in violation of Florida Statute 800.04(4)(a) and 777.04(1);

contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Florida.

STATE OF FLORIDA, COUNTY OF CITRUS

Personally appeared before me, BRAD KING, State Attorney for the Fifth Judicial Circuit, State of Florida, in and for Citrus County, State of Florida, or his duly designated Assistant State Attorney, who first being sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense therein charged. Prosecution instituted in good faith and subscribed under oath, certifying he has received testimony under oath from the material witness or witnesses of the offense.

Richard Buxman, Assistant to BRAD KING State Attorney,
Fifth Judicial Circuit of Florida
Florida Bar No. 0155357

Sworn to and subscribed before me this 17th day of July, 2012.

Affiant Personally Known to Notary Public

CYNTHIA STARNER
MY COMMISSION # DD 905953 EXPIRES:
August 18, 2013
BONDED THRU TROY FAIN INSURANCE, INC.

Presented and filed in the CIRCUIT Court this 17th day of July, 2012.

Betty Strifler
CLERK OF CIRCUIT COURT
BY: _____ D.C.

SEAL

C-2012-29620

Incident Report 12-55433 Supplement No ORIG

ORANGE COUNTY SHERIFF'S OFFICE

During this time the male kept attempting to call and I even had Deputy Tiffany Wright, from the Citrus County Sheriff's Office, call him posing as the daughter, "Jenny".

During the call the male originally believed he was speaking to the mother, "Karen". He stated, "It get you horny if I'll teach your daughter? Will you be there watching?"

She then told him she was the daughter and not the mother. She also told him this was only about her and that the mother would not be involved. The male eventually stated, "So she wants you to have first time sex?" She told him this was not her first time and he stated, "Only she wants you to have, to have it safe, to be safe right?"

He then said, "I like to oral, I like to do it." She then asked him, "And you wanted to do that with me?" He answered by stating, "Yes, if that is ok with you?" and "Anything that, you know I like to do anything that is pleasing you. You know, that is what I like to do pleasing. If you can come more than five times, I'm pleasing. Yeah that is me. For me coming, like any other guys they feel pleasure, for me is I feel pleasure when the girl comes a lot."

He then stated, "So form anything you want me to do or you let me allowed to do, you can tell me what I can do what I am not allowed to do."

She then asked him what his favorite thing to do with her would be. He stated, "Well one thing if you could dress really sexy." And, "Like a little skirt or short, short shorts with a little top." He stated he wanted to look really sexy and cute.

He further stated, "I am not gonna put anything inside of you until you are really begging to do it, that's what I like."

He then described how he was going to take his time in undressing her kissing her back, belly button, go down to her legs and kiss her "butt". He also said he wanted to "eat" her when she was "really wet". He also stated he wanted to "eat" her when she is "coming". He then asked, "Is your mom ok with that?"

He asked her if her mother would be home with her, and she told him she would be in the other room. He then described how he had been with another couple and had sex with the wife while the husband watched. He described to her how he liked to be watched because it turned him on.

He then said he wanted to do "it" in not only her room, but also in the kitchen, the living room; as long as it was ok with her mother. He continued to describe in detail how he would perform sex with her including, "doggie style".

He then asked to talk with her "mother". Deputy Wright told him she would tell her "mother" to call him back since she was in the bathroom. A short time later Detective Dodi Pruitt, who is also with the Citrus County Sheriff's Office called him back posing as the mother, "Karen".

During the conversation the male was asking for directions to meet the daughter. He also asked her if the daughter has had sex before and Detective Pruitt told him she has one other time. He said he was not allowed to do it when he was young, but he knew it was better since she (the mother) wanted her (the daughter) to do it and be safe. She then asked him if he was ok with wearing a condom, and he said he would "definitely" wear a condom, "If you do not mind?"

He then described how the daughter would have pleasure and he wanted to please her. He also told her how he gets pleasure from pleasing the other partner. He also said he likes to do oral and asked if that would be ok with "you guys". He also asked her, "Do you just want me to do it and leave, or you know because it is a couple of hours driving?" He also told the mother he was willing to have sex with the daughter in the kitchen and living room.

They then spoke about directions to the mother and daughters location and how long it would take to get there.

I then communicated with the male via text message again and provided him with the address to the residence being used for the operation and also basic directions. I also later stated, "so ur cool with her right n u know this is not a fantasy game or some role play right". The male replied by stating, "Yes I'm ok with her".

Eventually after more text messages and phone conversations with Detective Pruitt and Deputy Wright for directions to the residence he arrived at approximately 0000 hours on June 23, 2012.

Upon his arrival to the front door the male was arrested by the Citrus County Sheriff's Office, searched and placed into an interview room in the residence. Detective Christopher Cornell and I then began an interview with the

Incident Report 12-55433 Supplement No ORIG

ORANGE COUNTY SHERIFF'S OFFICE

male, who was identified as Mr. Efrain Cruz. I read Mr. Cruz his Miranda Rights, and he invoked them. He then began to make statements about how he was sorry for what he did and it was just a mistake. He also mentioned how he was interested in the mother. I advised him a few more times he told us he did not want to talk and he continue to say he did not want to speak, but also continued to apologize and make similar statements. We eventually obtained his basic information and ended the interview. The interview and arrest was video and audio recorded by the Citrus County Sheriff's Office.

The Citrus County Sheriff's Office case number is 2012-111431.

EFRAIN CAMARILL CRUZ vs. STATE OF FLORIDA
LT. CASE NO: 2012 CF 000696
HT. CASE NO: 5D13-3161

ORIGINAL

JUN 25'12 14:18

ARREST AFFIDAVIT / FIRST APPEARANCE FORM

CITRUS COUNTY SHERIFF'S DEPARTMENT 1701

OBTS NO: 09010710600	AGENCY: Citrus County Sheriff's Office — ORI: FL0090000
COURT CASE NO: 2012CF10960	AGENCY CASE NO: 2012-00111431

ARREST TYPE: Felony

DEFENDANT: CRUZ, EFRAIN CAMARILL	DOB: 01/16/1980 — SEX: M — RACE: W — HGT: 5ft 5in — WGT: 160.0 — HAIR: BLK — EYES: BRO
ADDRESS: 2309 N TOOMBS ST VALDOSTA, GA 31602	ALIAS:
MAILING ADDRESS: ,	SCARS-MARKS: SCAR SC L A-Surgical Scar
PHONE: (229)444-1326 — RESIDENCY: Full-time	PLACE OF BIRTH: MEXICO
PLACE OF EMPLOYMENT: ,	OCCUPATION: Laborer — PHONE:
DRIVER LICENSE:	SOCIAL SECURITY NO:
VEHICLE TOWED BY:	☐ Vehicle Hold — HOLD AGENCY: — TOW CO. PHONE:
DATE OF ARREST: 06/22/2012 23:55 — ARREST SUFFIX:	LOCATION OF ARREST: WESTSIDE,
ALCOHOL INFLUENCE: No — DRUG INFLUENCE: No	JUVENILE DISPOSITION:
WEAPON SEIZED: N — TYPE:	

ACTIVITY: F. Forgery, O. Counterfeit, A. Fraud, X. Stolen Property, T. Traffic, P. Possess, S. Sell, B. Buy, R. Smuggle, D. Deliver, U. Use, M. Manufacture/Produce/Cultivate, Z. Other, K. Dispense/Distribute, N. N/A

TYPE: A. Amphetamine, B. Barbituate, C. Cocaine, R. Heroin, H. Hallucinogen, M. Marijuana, O. Opium/Derivative, S. Synthetic, Z. Other, P. Paraphernalia/Equipment, U. Unknown, N. N/A

CHARGES

DESCRIPTION	COUNT	ACTIVITY	TYPE	NCIC	CIS	STATUTE	BOND	TO SCHED
TRAVEL TO SEDUCE/SOLICIT CHILD IN SEX ACT	1					847.0135(4)(A)	$25,000	error: - 31627
USE COMPUTER - SOLICIT PARENT/GUARDIAN TO ENGAGE IN SEX ACT	1					847.0135(3)(B)	$25,000	error: - 31627

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EFRAIN CAMARILL CRUZ vs. STATE OF FLORIDA
LT. CASE NO: 2012 CF 000696
HT. CASE NO: 5D13-3161

ORIGINAL

JUN 25'12 14:16

☐ Complaint ☒ Arrest Affidavit Continuation	COURT CASE NO. 2012CF696	AGENCY CASE NO. 2012-00111431
DEFENDANT NAME CRUZ, EFRAIN CAMARILL		DATE OF BIRTH 01/16/1980
JAIL LOG (to be completed by Booking Officer)		JAIL INMATE NUMBER 12-2474

DATE BOOKED	TIME BOOKED AM PM	BOOKING OFFICER	FINGERPRINTED BY	PHOTOGRAPHED BY	BIN NUMBER

ADVISED OF RIGHTS BY	CHECK FOR WARRANT NCIC [ ] FCIC [ ] LOCAL [ ]	HOLDS YES [ ] NO [ ]	AGENCY OF HOLD
ATTORNEY (if known)	RELIGION J [ ] PR [ ] C [ ] OTHER [ ]	MARITAL S [ ] M [ ] D [ ] SEP [ ]	TELEPHONE CALL LOGGED TIME AM PM #

NEXT OF KIN / PARENTS OF JUVENILE (for emergency)	RELATION ADDRESS	PHONE: (352) PHONE:

BOND DATE	RETURNABLE COURT DATE	RETURNABLE COURT TIME	RELEASE DATE	RELEASE TIME AM PM	RELEASING OFFICER

BOND CHARGE A	BOND CHARGE B	BOND CHARGE C	BOND CHARGE D	BOND CHARGE E

NAME AND ADDRESS OF BONDSMAN	BOND TYPE: ROR[ ] SURETY [ ] CASH [ ] BAIL BOND[ ] CERT [ ] OTHER [ ]
APPROVING OFFICER SIGNATURE	

PROBABLE CAUSE AFFIDAVIT: (specify probable cause for each charge)

Before Me, the undersigned authority personally appeared Det Chris Cornell who being duly sworn, alleges, on information and belief, that on the 22 day of June, 2012 in Citrus County, Florida the defendant did:

SUBMITTED BY: CORNELL, CHRISTOPHER 0283 (AR1701)
THE DEFENDANT, MR EFRAIN CAMARILL CRUZ, DID KNOWINGLY USE HIS EMAIL ACCOUNT TO SEDUCE, SOLICIT, LURE OR ENTICE OR ATTEMPT TO SEDUCE, SOLICIT, LURE OR ENTICE A PARENT OF A CHILD TO COMMIT ANY ILLEGAL SEX ACT, TO WIT: PERFORM ORAL SEX ACTS AND SEXUAL INTERCOURSE, IN VIOLATION OF FLORIDA STATE STATUTE 847.0135(3)(B).
THE DEFENDANT, MR EFRAIN CAMARILL CRUZ, DID KNOWINGLY TRAVEL FOR THE PURPOSE OF ENGAGING IN UNLAWFUL SEXUAL CONDUCT WITH A CHILD OR WITH ANOTHER PERSON BELIEVED BY THE PERSON TO BE A CHILD AFTER USING A COMPUTER ONLINE SERVICE, INTERNET SERVICE, OR ANY OTHER DEVICE CAPABLE OF ELECTRONIC DATA STORAGE TO WIT: PERFORM ORAL SEX ACTS AND SEXUAL INTERCOURSE, IN VIOLATION OF FLORIDA STATE STATUTE 847.0135(4)(A).
ON 062012, THE CITRUS COUNTY SHERIFF'S OFFICE CONDUCTED AN ONLINE UNDERCOVER OPERATION TARGETING SUSPECTS THAT USE THE INTERNET TO SEXUALLY EXPLOIT CHILDREN WITH THE INTENTION TO MEET THEM FOR THE PURPOSES OF SEXUAL CONDUCT.

ON 062212 DEPUTY PHIL GRAVES, A SWORN OFFICER WITH THE ORANGE COUNTY SHERIFF'S OFFICE WAS ASSISTING IN THE UNDERCOVER OPERATION AND POSTED AN ONLINE ADVERTISEMENT ON THE INTERNET WHICH WAS TITLED "READY FOR TRAINING – W4M".

ON 062212 AT APPROXIMATELY 1344 HOURS THE DEFENDANT UTILIZED AN ONLINE EMAIL SERVICE TO RESPOND TO THE ADVERTISEMENT. THE DEFENDANT PROVIDED HIS CELL PHONE NUMBER AND IDENTIFIED HIMSELF AS A 28 YEAR OLD MALE FROM VALDOSTA GEORGIA. DEPUTY GRAVES, POSING AS AN ADULT SINGLE MOTHER, IMMEDIATELY RESPONDED BACK, AND IDENTIFIED THE DAUGHTER AS BEING 13 YEARS OF AGE.

THE CONVERSATIONS BETWEEN THE DEFENDANT AND DEPUTY GRAVES CONTINUED THROUGH TEXT MESSAGES USING THEIR CELLULAR PHONES. THE DEFENDANT SUGGESTED MEETING ON THIS DATE AND SEVERAL PICTURES WERE EXCHANGED THROUGH EMAIL. THE DEFENDANT HAD SENT A PICTURE OF HIMSELF AND DEPUTY GRAVES SENT HIM A PICTURE OF AN ADULT FEMALE WHO WAS AN ORANGE COUNTY DETECTIVE AS THE MOTHER. HE ALSO SENT AN AGE REGRESSED IMAGE OF A SHERIFF'S OFFICE EMPLOYEE, DESCRIBED AS THE 13 YEAR OLD CHILD.
SEVERAL PHONE CONVERSATIONS WERE MADE WITH THE DEFENDANT, ONE TIME SPEAKING WITH WHO

EFRAIN CAMARILL CRUZ vs. STATE OF FLORIDA
LT. CASE NO: 2012 CF 000696
HT. CASE NO: 5D13-3161

☐ Complaint ☒ Arrest Affidavit Continuation	COURT CASE NO. 2012 CF 696	AGENCY CASE NO 2012-00111431
DEFENDANT NAME CRUZ, EFRAIN CAMARILL		DATE OF BIRTH 01/16/1980

ORIGINAL

JUN 25 '12 14:18

HE THOUGHT WAS THE CHILD AND THE OTHER TIMES THINKING HE WAS SPEAKING WITH THE ADULT MOTHER. DURING THE PHONE CONVERSATIONS WITH THE CHILD, THE DEFENDANT TOLD HER THAT HE WANTED TO PLEASE HER, SAID SHE WAS BEAUTIFUL, AND WANTED HER TO DRESS IN A SHORT SKIRT WHEN HE ARRIVED. THE DEFENDANT DESCRIBED HIMSELF AS HAVING A NICE BODY AND SAID HE KNEW THE CHILD WAS YOUNG. THE DEFENDANT SAID HE WOULD PERFORM SEXUAL INTERCOURSE WITH THE CHILD AND WOULD USE A CONDOM. THE DEFENDANT ALSO STATED THAT HE WANTS TO PERFORM ORAL SEX ON THE CHILD AND DISCUSSED ON THE PHONE WHERE IN THE RESIDENCE THIS WOULD HAPPEN. WHILE SPEAKING WITH WHO HE THOUGHT WAS THE MOTHER, THE DEFENDANT ASKED IF HE COULD STAY THE NIGHT AT THE RESIDENCE SINCE IT WOULD BE A LONG RIDE.
THE DEFENDANT WAS THEN PROVIDED AN ADDRESS IN CITRUS COUNTY WHICH WAS A PREDETERMINED UNDERCOVER LOCATION SELECTED FOR THIS OPERATION.
AFTER THE DEFENDANT DROVE TO THE UNDERCOVER LOCATION HE WAS TAKEN INTO CUSTODY BY CITRUS COUNTY SHERIFF'S OFFICE PERSONNEL. THE DEFENDANT WAS INTERVIEWED AND POST MIRANDA, STATED HE MADE A MISTAKE TONIGHT, BUT DID NOT WANT TO DISCUSS THE INCIDENT ANY FURTHER.
THE DEFENDANT WAS ARRESTED AND CHARGED WITH ONE COUNT OF USING THE INTERNET TO SEDUCE, SOLICIT, LURE OR ENTICE A PARENT OR GUARDIAN OF A CHILD ONLINE FOR SEXUAL ACTIVITY, AND ONE COUNT OF TRAVELING TO MEET A MINOR FOR SEXUAL ACTIVITY. THE DEFENDANT WAS THEN TRANSPORTED TO THE CITRUS COUNTY DETENTION FACILITY WITHOUT INCIDENT.

THE DEFENDANT'S BOND WAS SET AT $50,000.00.

PRE-TRIAL RELEASE CONDITIONS
THE HONORABLE JUDGE THOMAS HAS ORDERED THE FOLLOWING CONDITIONS OF PRE-TRIAL RELEASE:
1. DEFENDANT MUST POST BOND OF $25,000 PER COUNT UNDER 847.0135 AND/OR 847.0138. ANY OTHER CHARGES WILL HAVE THE STANDARD BOND SET ACCORDING TO THE ADMINISTRATIVE ORDER DICTATING THE BOND SCHEDULE FOR THE FIFTH CIRCUIT. AS A CONDITION OF PRE-TRIAL RELEASE, THE COURT SHALL ORDER THE FOLLOWING SPECIAL CONDITIONS:
DEFENDANT MAY NOT HAVE CONTACT WITH ANY CHILD UNDER THE AGE OF 18 YEARS.
DEFENDANT MAY NOT POSSESS OR UTILIZE ANY COMPUTERS OR ELECTRONIC DEVICES CAPABLE OF CONNECTING TO THE INTERNET.

2. NO JUDGE CONDUCTING FIRST APPEARANCE IS AUTHORIZED TO REDUCE BONDS IMPOSED UNDER 847.0135 AND/OR 847.0138 FOR THE PURPOSE OF THIS OPERATION BETWEEN JUNE 19-25, 2012.

"If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator at the Office of the Trial Court Administrator, Citrus County Courthouse, 110 North Apopka Avenue, Inverness, Florida 34450, Telephone (352) 341-6700, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711."

SWORN to and SUBSCRIBED before me
this 23 day of June, 2012

Dpty [signature]
~~Notary Public~~ - Certified Officer

Det Chris Cameron D-283
AFFIANT

Citrus County Sheriff's Department
ARRESTING AGENCY

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EFRAIN CAMARILL CRUZ vs. STATE OF FLORIDA
LT. CASE NO: 2012 CF 000696
HT. CASE NO: 5D13-3161

12CF696

AUG 9'13 3:43PM

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY

AFFIDAVIT FOR A SEARCH WARRANT

STATE OF FLORIDA
COUNTY OF CITRUS

Before me, Carol A. Falvey, the undersigned Circuit Judge of Citrus County, Florida, personally appeared Jason Strickland, Detective for the Criminal Investigations Division of the Citrus County Sheriff's Office, who after having been sworn, deposes and says:

That the laws of the State of Florida, to wit: use of the internet to seduce, solicit, lure or entice a parent or guardian of a child to consent to unlawful sexual activity with the child in violation of F.S.S. 847.0135(3)(B), and traveling to meet a minor to engage in unlawful sexual activity with the child in violation of F.S.S. 847.0135(4)(A), have been violated and the item(s) containing evidence of the crime are two cellular phones and thumb drive device currently located in the evidence department at the Citrus County Sheriff's Office.

To arrive at 1 Dr Martin Luther King Jr Avenue, Inverness, Citrus County, Florida, begin at the intersection of North Lecanto Highway (County Road 491) and West Gulf to Lake Highway (State Road 44). Travel east on West Gulf to Lake Highway (State Road 44) approximately 9.4 miles to US 41/West Main Street. Continue straight approximately 0.7 miles to Dr Martin Luther King Jr Avenue. Turn north (left) onto Dr Martin Luther King Jr Avenue and turn east (right) less than approximately .1 miles into the parking lot of the Citrus County Sheriff's Office. This is the Citrus County Sheriff's Office located at 1 Dr Martin Luther King Jr Avenue, Inverness, and Citrus County, Florida.

The Citrus County Sheriff's Office located at 1 Dr Martin Luther King Jr Avenue, Inverness, Citrus County, Florida 34453 is an operational office building. The structure faces west and is located on the east side of Dr Martin Luther King Jr Avenue. The Sheriff's office building can be identified by a cement wall standing approximately 5 feet tall located on the

northwest part of the property by the first parking lot exit. This wall displays the title Citrus County Sheriff's Office. The Sheriff's office building is two stories high, off-white in color with tinted windows. Furthermore, there are steps and a handicap ramp leading to the main two front doors of the building. The front doors are glass with metal frames. Through the main doors is the lobby area occupied by a receptionist and desk deputy during normal business hours. The door leading to the evidence room is located on the south west end of the lobby. Through the door leading to the west section of the building is a hallway leading to the evidence room that is secured after normal business hours. This describes the structure located at 1 Dr Martin Luther King Jr Avenue, Inverness, Citrus County, Florida 34450.

The Search is to include the contents of a Verizon PALM cell phone, and an Apple Iphone, and an 8G thumb drive (usb digital storage device) originally turned into the Citrus County Sheriff's Office evidence locker under case number 2012-000111431, and located at the premises of 1 Dr Martin Luther King Jr Avenue, Inverness, Citrus County Florida 34450, by reason of the following facts:

Your Affiant, Jason Strickland, is an active sworn law enforcement officer with the Citrus County Sheriff's Office. Your Affiant has been a sworn law enforcement officer for over six years. Your Affiant served for over six years with the Citrus County Sheriff's Office and is currently assigned to the Criminal Investigations Division. Prior to being employed with the Citrus County Sheriff's Office , your Affiant served in the United States Army as a military policeman, where he gained the rank of sergeant. Your Affiant has attended classes during his law enforcement career which provided him with training regarding the investigation of crimes against children. Your Affiant's primary responsibility is to investigate sexual crimes involving children and adults, and also criminal child abuse and child neglect cases.

Your Affiant has knowledge that Efrain Cruz, Defendant in the above-styled cause, was using the internet to seduce, solicit, lure or entice a parent or guardian of a child to consent to unlawful sexual activity with the child and arrested for said charges on June 22, 2012.

On 062012, the Citrus County Sheriff's Office conducted an online undercover operation targeting suspects that use the internet to sexually exploit children with the intention to meet them for the purposes of sexual conduct.

On 062212, Deputy Phil Graves with the Orange County Sheriff's Office, while assisting in this undercover operation, posted an online advertisement on the internet web site, "Craigslist.com". The online ad was titled, "Ready For Training- W4M".

On 062212 at approximately 1344 hours, the suspect using the email address of "milan8189@yahoo.com" responded to the ad and identified himself as a "twenty eight year old male from Valdosta GA,229 444 1326 ,let me know when and time the u guys playing and text me so we can talk and text pic thank you" . Deputy Graves, using and undercover email account of "ashleycholton@gmail.com" and posing as an adult single mother, immediately responded back, and identified the daughter as being 13 years of age.

As the conversation continued between Deputy Graves and the suspect, the suspect asked, "ok so when u wanA talk u can text or call me". As the conversations between the defendant and Deputy Graves continued through text messages using their cellular phones, the defendant suggested meeting on this date and several pictures were exchanged through email. The defendant had sent a picture of himself and Deputy Graves sent him a picture of an adult female, who was an Orange County Detective, as the mother. He also sent an age regressed image of a Sheriff's Office employee, described as the 13 year old child.

Several phone conversations were made with the defendant, one time speaking with who he thought was the child, and the other times thinking he was speaking with the adult mother. During the phone conversations with the child, the defendant told her that he wanted to please her, said she was beautiful, and wanted her to dress in a short skirt when he arrived. The defendant described himself as having a nice body and said he knew the child was young. The defendant said he would perform sexual intercourse with the child and would use a condom. The defendant also stated that he wants to perform oral sex on the child and discussed on the phone where in the residence this would happen. While speaking with who he thought was the mother, the defendant asked if he could stay the night at the residence since it would be a long ride. The defendant was then provided an address in Citrus County which was a predetermined undercover location selected for this operation. When the suspect arrived he was taken into custody by other Sheriff's Office Members and identified as Efrain Cruz.

Detective Cornell with the Citrus County Sheriff's Office and Deputy Philip Graves with the Orange County Sheriff's Office conducted a post miranda interview with Efrain Cruz at which time he stated he made a mistake, but did not want to discuss the incident any further.

Based on your Affiant's training and experience, cell phones are frequently used in the commission of crimes that target children as a primary means of communication. Persons who engage in the online exploitation of minors to include sending pornographic material to minors, utilize cellular telephones to communicate via voice and text to arrange meeting locations as well as send and receive pictures and videos also known as mms or multimedia messages.

Cell phones also contain pertinent information such as contact numbers, names of potential associates, and possibly other unknown victims. At the time of the arrest, defendant Efrain Cruz was using the cell phone and also had in his possession a 8g thumb drive (usb digital storage device) it was taken into custody by Law Enforcement. During a search of the defendant's vehicle, a Verizon PALM cellular telephone was also located in his vehicle. Some cellular telephones can record images and even video's. Also they can record a call log show when and who the defendant called. A usb digital storage device can also contain photographs, video's and other media files.

Given the aforementioned facts and circumstances, your Affiant has probable cause to believe and does believe that the cell phones and usb digital storage device previously collected by the Citrus County Sheriff's Office on or about October 18, 2010 will contain pertinent information relating to the crimes described in this warrant. Your Affiant requests a search be ordered of the cell phone and usb digital storage device contents, and to seize all pertinent information stored in the cellular telephones memory or the phone's digital storage media.

Your Affiant is aware that the recovery of data by a computer forensic analyst takes significant time, and much the way recovery of narcotics must later be forensically evaluated in a lab, digital evidence will also undergo a similar process. For this reason, the "return" inventory will contain a list of only the tangible items examined. Unless otherwise ordered by the Court, the return will not include the digital files or evidence later examined by a forensic analyst.

Whereas, it is prayed that a search warrant be issued for the above-described evidence pertaining to case number 2012-00111431 to extract all cell phone records including but not limited to contact information, incoming and outgoing calls and sms logged, owner information,

images or videos, sms/mms text or multimedia messages, any and all communications between the screen names or email address of "milan8189" or milan8189@yahoo.com and "ashleycholton" or "ashleycholton@gmail.com", internet or web history, and any stored file that would provide evidence of the online sexual exploitation of minors on one Verizon PALM cell phone or the Apple I-phone. relating to the online enticement of a parent or guardian of a child to consent to unlawful sexual activity with a child and arranging to travel and meet that child.

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AFFIANT DET. JASON STRICKLAND

Sworn to and subscribed before me in my presence this 31st day of ~~August~~ July, 2011.

CIRCUIT JUDGE FIFTH JUDICIAL
CIRCUIT COURT OF FLORIDA

Having considered the above facts, I find that probable cause exists and a Search Warrant is hereby allowed and issued.

CIRCUIT JUDGE FIFTH JUDICIAL
CIRCUIT COURT OF FLORIDA