UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-80542-Civ-ROSENBERG
MAGISTRATE JUDGE P.A. WHITE

ANTON E. TUOMI,

Petitioner,

v.

JULIE JONES,

Respondents.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

Anton E. Tuomi, a state prisoner, has filed this *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging the constitutionality of his conviction for aggravated battery entered following a jury verdict in **Palm Beach County Circuit Court, case no. 2009CF015311AMB.**

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

For its consideration of the petition (DE#1) with supporting memorandum (DE#4) and appendix (DE#13), the court has the state's response to this court's order to show cause with supporting appendix (DE#11), containing copies of relevant state court pleadings, including copies of the trial and sentencing

transcripts,[1] and the petitioner's traverse (DE#15).

II. Claims

Because the petitioner is *pro se*, he has been afforded liberal construction under Haines v. Kerner, 404 U.S. 419 (1972). As can best be discerned, the petitioner raises the following **twelve grounds** for relief:

1. The trial court did not have subject matter jurisdiction to grant the petitioner's second motion to withdraw guilty plea, filed through counsel, because the petitioner had filed a notice of appeal following the initial denial of his first *pro se* motion, thereby divesting the court of jurisdiction. (DE#1:6; DE#4:1).

2. He was denied the right to appointment of conflict free counsel to assist him in preparing and filing a proper motion to withdraw his guilty plea. (DE#1:8; DE#4:4).

3. His constitutional rights were violated when the trial court failed to conduct an adequate Faretta[2] hearing. (DE#1:10; DE#4:12).

4. The prosecution failed to provide the defense with the medical records of the victim diagnosing the severity or lack there of the victim's injuries, in violation of Brady v. Maryland, 373 U.S. 83 (1963). (DE#1:12; DE#4:15).

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[1]The letter "T" in this Report, followed by a page number, refers to the trial transcripts filed by the respondent. The transcripts are part of the Appendix, docketed on CM/ECF at **DE#11-2:Ex.25**.

[2]Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).

5. The trial court's comment to the jury that the petitioner chose not to testify on his own behalf violated petitioner's constitutional rights. (DE#1:13; DE#4:17).

6. The prosecution engaged in prosecutorial misconduct during closing argument by commenting on petitioner's failure to testify on his own behalf at trial. (DE#1:15; DE#4:19).

7. He was denied effective assistance of counsel, where his lawyer failed to assist the petitioner in preparing a motion for new trial. (DE#1:16; DE#4:20).

8. His due process rights were violated when the court denied petitioner's motion for new trial without a hearing or without providing petitioner the assistance of counsel. (DE#1:18; DE#4:22).

9. The trial court erred in denying defense counsel's motion to withdraw after it was previously established that a conflict pre-existed prior to Jenny Lancaster being appointed to represent the petitioner at sentencing. (DE#1:19; DE#4:24).

10. There was insufficient evidence to support petitioner's conviction for aggravated battery. (DE#1:20; DE#4:25).

11. He was denied effective assistance of appellate counsel, where his lawyer failed to assign as error on appeal the trial court's error in failing to appoint conflict free counsel to represent the petitioner at a critical stage of the proceeding. (DE#1:22; DE#4:28).

12. He was denied effective assistance of appellate counsel, where his lawyer failed to assign as error on appeal the trial court's error in permitting petitioner to proceed *pro se* without

> conducting an adequate Faretta inquiry prior to vacating petitioner's plea and setting the case for trial. (DE#1:23; DE#4:33).

III. Procedural History

Petitioner was charged by Amended Information with felony battery, in violation of Fla.Stat. §784.03(1) and (2) (Count 1), and criminal mischief, less than $200.00, in violation of Fla.Stat. §806.13(1)(a) and (b)1 (Count 2). (DE#11-2:Ex.2:6-7).[3] Petitioner then entered into a negotiated plea, agreeing to plead guilty as charged, in exchange for a maximum term of 24 months imprisonment, and restitution to the victim. (DE#11-2:Exs.4-5). A corrected judgment was entered on June 24, 2010, *nunc pro tunc* to June 1, 2010. (DE#11-2:Ex.5:13-14).

A motion to withdraw the guilty plea was filed by defense counsel on petitioner's behalf, on grounds that counsel was ineffective for advising petitioner to enter a plea that was predicated on an incorrect sentencing score sheet. (DE#11-2:Ex.6). While that motion was pending, petitioner, filed a *pro se* motion to withdraw his guilty plea on similar grounds. (DE#11-2:Ex.7). The *pro se* motion was denied by written order entered on July 9, 2010, finding in pertinent part, as follows:

> The Defendant was charged with Felony Battery. The allegations were that Mr. Tuomi beat Ms. Black with his closed fists causing lacerations to the eye and much bleeding. Her

[3]Despite this court's specific instructions regarding the preparation and filing of the appendix, the court has had to scour through the appendix to find certain state court pleadings. Herein, the citations to the pleadings are those reflected by the court's CM/ECF on-line docketing system, as imprinted on the upper-right hand corner of the filing.

> injuries were observed by a police officer. There was also a witness, Bonnie Andreozzi, who saw the beating. Mr. Tuomi had five prior convictions for Battery (most of them domestic) that resulted in this battery being charged as a felony. This Defendant understood he was facing five years in prison and chose to accept a two year sentence in lieu of risking the five years. He received the benefit of the bargain and should not be allowed to withdraw his plea. The score sheet is correct. (see attached). Wherefore, it is
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> ORDERED AND ADJUDGED that the Motion is denied.

(DE#11-2:Ex.8:24-25). Petitioner filed a *pro se* notice of appeal following the denial of his *pro se* motion to withdraw. (DE#11-2:Ex.9). On September 23, 2010, the appeal was dismissed for lack of prosecution. (DE#11-2:Ex.16).

In the interim, while the petitioner's *pro se* appeal was pending, a hearing was held on the petitioner's counseled motion to withdraw his guilty plea. (DE#11-2:Ex.14). At the conclusion of the hearing, the court set aside the judgment and sentence, granting the petitioner's request to withdraw his plea. (DE#11-2:Exx.14-15).

After the judgment was vacated, the prosecution filed an Second Amended Information charging petitioner with aggravated battery and criminal mischief. (DE#11-2:Ex.17). Petitioner proceeded to trial where he was found guilty of aggravated battery, as charged in the Second Amended Information, following a jury verdict. (DE#11-2:Ex.25:T.286-87). Petitioner's motions for new trial were denied without a hearing. (DE#11-2:Exs.27-31). Thereafter, the petitioner was adjudicated guilty and sentenced as a prison releasee reoffender to a 15-year minimum mandatory term of

imprisonment. (DE#11-2:Ex.32). The court also entered a judgment of acquittal as to the criminal mischief offense as charged in Count 2. (DE#11-3:Ex.32:9).

Petitioner prosecuted a direct appeal, raising one claim of fundamental error arising from the prosecution's and the trial court's comments during closing argument on petitioner's failure to testify, which is the essence of **claims 5 and 6** of this federal petition, as listed above. (DE#11-3:35). On **October 24, 2012**, the Fourth District Court of Appeal *per curiam* affirmed the conviction in a decision without written opinion. See Tuomi v. State, 101 So.3d 853 (Fla. 4 DCA 2012)(table); (DE#11-3:Ex.37). Rehearing was denied on **December 11, 2012**. (DE#11-3:Ex.39). The direct appeal concluded with the issuance of the mandate on December 28, 2012.[4]

It does not appear that petitioner sought discretionary review with the Florida Supreme Court. The time for doing so expired, at the latest, thirty days after denial of rehearing, or no later than **January 10, 2013**.[5] Since he did not seek discretionary review to the Florida Supreme Court, he is not entitled to an additional ninety days to file a petition for a writ of certiorari in the United States Supreme Court. Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 646 (2012).[6] Therefore, at the earliest, his judgment of

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[4]By separate order, a copy of the state appellate court dockets are being filed and made part of the record herein.

[5]Pursuant to Fla.R.App.P. 9.120(b), a motion to invoke discretionary review must be filed within 30 days of rendition of the order to be reviewed.

[6]In applying the Supreme Court's Gonzalez opinion to this case, the petitioner here is not entitled to the 90-day period for seeking certiorari review with the United States Supreme Court, because after his judgment was affirmed on direct appeal, petitioner did not attempt to obtain discretionary review by Florida's state court of last resort-the Florida Supreme Court, nor did he seek rehearing with the appellate court. See Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 653-54, 181 L.Ed.2d 619 (2012)(holding that conviction becomes final upon expiration of time for seeking direct review); Jimenez v. Quarterman,

conviction became final on **January 10, 2013.**

Nevertheless, assuming, without deciding, that petitioner was entitled to seek review to the U.S. Supreme Court, then alternatively, his conviction would have become final at the latest on **Monday,**[7] **March 11, 2013,**[8] when the 90-day period for seeking

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555 U.S. 113, 118-21, 129 S.Ct. 681, 685-86, 172 L.Ed.2d 475 (2009)(explaining the rules for calculating the one-year period under §2244(d)(1)(A)). See also Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003)(holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Chavers v. Secretary, Florida Dept. of Corrections, 468 F.3d 1273 (11th Cir. 2006)(holding that one-year statute of limitations established by AEDPA began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after mandate was issued by that court). In other words, where a state prisoner, who pursues a direct appeal, but does not pursue discretionary review in the state's highest court after the intermediate appellate court affirms his conviction, the conviction becomes final when time for seeking such discretionary review in the state's highest court expires. Gonzalez, __ U.S. ___, 132 S.Ct. 641 (2012).

[7]As applied here, under Fed.R.Civ.P. 6(a)(1), "in computing any time period specified in ... any statute that does not specify a method of computing time ... [the court must] exclude the day of the event that triggers the period[,] count every day, including intermediate Saturdays, Sundays, and legal holidays[, and] include the last day of the period," unless the last day is a Saturday, Sunday, or legal holiday. Where the dates fall on a weekend, the Undersigned has excluded that day from its computation.

[8]For purposes of 28 U.S.C. §2244(d)(1)(A), where a state prisoner does not seek discretionary review in the state's highest court of the decision of the intermediate appellate court, the judgment becomes "final" for purposes of §2244(d)(1)(A) on the date the time for seeking such review expires. Courts were initially split on when a judgment becomes final in the event the state prisoner did not seek discretionary review in the state's highest court of the intermediate state appellate court's decision. In Gonzalez v. Thaler, 132 S.Ct. 641 (2012), the U.S. Supreme Court resolved the split in circuits, explaining that scouring each state's laws and cases to determine how the state defined finality would contradict the uniform meaning of "conclusion of direct review" accepted by the Court in prior cases. The Court further rejected the argument that the limitations period does not commence running until the expiration of the 90-day period for filing a petition for writ of certiorari, where the petitioner does not seek review in the state's highest court. Id. The Supreme Court explained that it can only review judgments of a "state court of last resort" or of a lower state court if the "state court of last resort" has denied discretionary review. See Gonzalez v. Thaler, 132 S.Ct. 641 (2012)(citing Sup.Ct.R. 13.1 and 28 U.S.C. §1257(a)).

The Eleventh Circuit has yet to revisit the issue since Gonzalez. However, some courts to have discussed Gonzalez have found it to be distinguishable as

review expired following the conclusion of his direct appeal. See Hollinger v. Sec'y, Dep't of Corr's, 334 Fed. Appx. 302 (11th Cir. 2009) (conviction becomes "final" ninety days after rehearing is denied on direct appeal); Wainwright v. Sec'y, Dep't of Corr's, 537 F.3d 1282, 1283-84 (11th Cir. 2007) (one-year statute of limitations begins running the day after the ninety-day limit for seeking certiorari expires).

The limitations period ran unchecked for **45 days**, from the time his conviction became final on **March 11, 2013** until **April 25, 2013**,[9] when he returned to the state trial court, filing his first Rule 3.850 motion for post-conviction relief, raising multiple grounds for relief, including essentially **claims 2 through 10** of this federal petition, as listed above. (DE#11-3:Ex.43). Following the state's response thereto, by written order entered on September 17, 2014, the trial court summarily denied relief, adopting the

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applied to Florida cases, because the Supreme Court of Florida does not have jurisdiction to review a district court's *per curiam decision* without written opinion on direct appeal. See Jackson v. State, 926 So.2d 1262, 1266 (Fla. 2006)(Florida Supreme court holding that it does not have jurisdiction to review "unelaborated per curiam decisions issued by a district court of appeal."). These courts have determined that the filing of a petition for writ of discretionary review with the Supreme Court of Florida would have been futile. In other words, petitioner's who convictions are *per curiam* affirmed without opinion on direct appeal, need not seek discretionary review with the Florida Supreme Court, since the intermediate appellate court is the "state court of last resort." Further, those courts have also granted petitioner's an additional 90 days from the time the intermediate appellate court affirmed the judgment or denied rehearing, representing the time in which Petitioner could have filed a petition for writ of certiorari with the Supreme Court of the United States, but failed to do so. See e.g., Flynn v. Tucker, 2012 WL 4863051 (S.D.Fla. 2012)(stating that because the Florida Supreme Court lacked jurisdiction to review an appeal of the Third DCA's opinion and such an appeal would have been futile, Petitioner's only other avenue of review was to file a petition for writ of certiorari with the United States Supreme Court within ninety days after entry of judgment)(unpublished); Sierra v. Crews, 2014 WL 1202990 (N.D. Fla. 2014)(unpublished)(same); Gilding v. Sec'y, Dep't of Corr's, 2012 WL 1883745, *2 n.6 (M.D.Fla. 2012)(unpublished)(same).

[9]Where evidence shows the pleading was received by prison authorities for mailing, under the mailbox rule that date is utilized. In the event no prison stamp is noted on the filing, absent evidence to the contrary, the petition is deemed filed on the date executed by the petitioner.

state's response with attached exhibits, finding the claims raised by petitioner were conclusively refuted by the record. (DE#11-3:Ex.45). That denial was subsequent *per curiam* affirmed by the Florida Fourth District Court of Appeal in a decision without written opinion. Tuomi v. State, 166 So.3d 801 (Fla. 4 DCA 2015)(table); (DE#11-3:Ex.50). Rehearing was denied, and the proceeding concluded with the issuance of the mandate on **July 6, 2015**. (DE#11-3:Ex.54).

Before the above proceeding concluded, petitioner next filed a state petition for writ of habeas corpus with the Florida Fourth District Court of Appeal, raising multiple grounds for relief, including **claims 11 and 12** of this federal petition, as listed above. (DE#11-3:Ex.55). The petition was denied by order entered on March 17, 2015, prior to conclusion of the Rule 3.850 appeal. (DE#11-3:Ex.56).

It is also worth noting that before conclusion of his Rule 3.850 appeal, the petitioner next filed a state petition seeking to invoke the Florida Supreme Court's jurisdiction, assigned **case no. SC15-1708**. (DE#11-3:Ex.57). The Florida Supreme Court dismissed the petition for lack of jurisdiction by Order entered on **September 18, 2015**. (DE#11-3:Ex.58). He filed a second petition with the Florida Supreme Court, which was also dismissed for lack of jurisdiction by the Florida Supreme Court on **October 29, 2015**. (DE#11-3:Exs.59-60). More importantly, both petitions were dismissed for lack of jurisdiction, citing in pertinent part, Grate v. State, 750 So.2d 625 (Fla. 1999).

Thus, petitioner's attempt to seek review in the Florida Supreme Court does not serve to toll the federal limitations period because the Florida Supreme Court does not have jurisdiction over

per curiam affirmances from Florida's appellate courts. See e.g., Bismark v. Sec'y Dep't of Corr's, 171 Fed.Appx. 278, 280 (11th Cir. 2006) (holding that petitioner's unsuccessful attempt to invoke the discretionary jurisdiction of the Florida Supreme Court to review the appellate court's *per curiam* affirmance of the denial of post-conviction relief had no tolling effect on the federal limitations period, because such relief is not available under Florida law); see also, Fla. Const. Art. 5, §3; Jackson v. State, 926 So.2d 1262 (Fla. 2006); Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002); Grate v. State, 750 So.2 d 625 (Fla. 1999).

Consequently, the two Florida Supreme Court petitions had no tolling effect on the one-year federal limitations period because they were not "properly filed" within the meaning of §2244(d)(2). See Artuz v. Bennett, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000)(wherein the Supreme Court clarified the circumstances under which a motion is "properly filed" for purposes of §2244(d)(2)). In Artuz, the Supreme Court specifically noted that a motion is not "properly filed," when that motion is filed in a court that lacks jurisdiction to hear it. Id., 531 U.S. at 9.

Therefore, the federal limitations period ran untolled for **274** days, from conclusion of the petitioner's Rule 3.850 proceedings on **July 6, 2015**, until the petitioner then came to this court, filing the instant federal habeas corpus petition on **April 6, 2016**, after he signed and then handed it to prison authorities for mailing in accordance with the mailbox rule.[10] (DE#1:1). Given the foregoing

[10]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a

detailed procedural history, it appears that a total of **319 days** of the federal limitations period went unchecked from the time petitioner's conviction became final and the filing of the instant federal habeas proceeding.

IV. Governing Legal Principles

A. Standard of Review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")

This federal habeas petition is governed by 28 U.S.C. §2254(d), as amended by the AEDPA. Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless 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
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). This standard is both mandatory and difficult to meet. White v. Woodall, ___ U.S. ____, ___, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014); see also, Debruce v. Commissioner, Alabama Dept. of Corrections, 758 F.3d 1263, 1265-66 (11th Cir. 2014). The AEDPA imposes a highly deferential standard for

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prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

reviewing the state court rulings on the merits of constitutional claims raised by a petitioner. A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits which warrants deference. Ferguson v. Culliver, 527 F.3d 1144, 1146 (11th Cir. 2008).

"Clearly established federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the United States Supreme Court at the time the state court issues its decision. White v. Woodall, 134 S.Ct. at 1702; Carey v. Musladin, 549 U.S. 70, 74, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006)(citing Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010); Mitchell v. Esparza, 540 U.S. 12, 16, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, Brown v. Payton, 544 U.S. 133, 134, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005); Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000); or, "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Bottoson, 234 F.3d at 531 (quoting Williams, 529 U.S. at 406). The unreasonable application inquiry "requires the state court decision to be more than

incorrect or erroneous," rather, it must be "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citation omitted); Mitchell, 540 U.S. at 17-18; Ward, 592 F.3d at 1155. Petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." White, 134 S.Ct. at 1702 (quoting Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 786-787, 178 L.Ed.2d 624 (2011)).

It is also well settled that the state court is not required to cite, or even have an awareness of, governing Supreme Court precedent, "so long as neither the reasoning nor the result of [its] decision contradicts them." Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002); *cf*. Harrington, 562 U.S. at 98, 131 S.Ct. at 785 (reconfirming that "§2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'" and entitled to deference); Mitchell v. Esparza, 540 U.S. 12, 16 (2003)("[A] state court's decision is not 'contrary to ... clearly established Federal law' simply because the court did not cite [Supreme Court] opinions.... [A] state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'")(*quoting* Early v. Packer, 537 U.S. at 7-8).

Thus, state court decisions are afforded a strong presumption of deference even when the state court adjudicates a petitioner's claim summarily—without an accompanying statement of reasons. Harrington, 562 U.S. at 91-99, 131 S.Ct. at 780-84 (concluding that the summary nature of a state court's decision does not lessen the deference that it is due); Gill v. Mecusker, 633 F.3d 1272, 1288

(11th Cir. 2011)(acknowledging the well-settled principle that summary affirmances are presumed adjudicated on the merits and warrant deference, citing Harrington, 562 U.S. at 98-99, 131 S.Ct. at 784-85 and Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002)). See also Renico v. Lett, 559 U.S. 766, 773, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)("AEDPA ... imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt.")(citations and internal quotation marks omitted).

The Supreme Court has also stated that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" Miller—El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (*dictum*). When reviewing a claim under §2254(d), a federal court must bear in mind that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1); see, e.g., Burt v. Titlow, ____ U.S. ___, ___, 134 S.Ct. 10, 1516, 187 L.Ed.2d 348 (2013); Miller—El, 537 U.S. at 340 (explaining that a federal court can disagree with a state court's factual finding and, when guided by AEDPA, "conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence").

Further, the Supreme Court has recognized that the AEDPA imposes a highly deferential standard for evaluating state-court rulings and requires that state-court decisions be given the benefit of the doubt. Burt v. Titlow, ____ U.S. ____, __, 134

S.Ct. 10, 15 (2013)(stating, "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights."); Hardy v. Cross, 565 U.S. ___, ___, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011)(noting that the AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.")(quoting Felkner v. Jackson, 562 U.S. 594, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011)). Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 101-102, 131 S.Ct. 770, 786-87, 178 L.Ed.2d 624 (2011). See also Greene v. Fisher, 565 U.S. 34, 39, 132 S.Ct. 38, 43, 181 L.Ed.2d 336 (2011)(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.")(internal quotation marks omitted).

As pointed out by the Eleventh Circuit, "the standard of §2254(d) is 'difficult to meet .... because it was meant to be.'" Downs v. Sec'y, Fla. Dep't of Corr's, 748 F.3d 240 (11th Cir. 2013)(*quoting*, Titlow, 134 S.Ct. at 16). This "highly deferential standard" demands that "[t]he petitioner carries the burden of proof," Id., quoting, Cullen v. Pinholster, 563 U.S. 170, 180, 131 S.Ct. 1388, 1398, 1403, 179 L.Ed.2d 557 (2011)(internal quotation marks omitted) and "'that state-court decisions be given the benefit of the doubt,' Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002).'" Id.

Review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. 170, 180-90, 131 S.Ct. 1388, 1398-1400, 1403, 179 L.Ed.2d 557 (2011)(holding new evidence introduced in federal habeas court has no bearing on Section 2254(d)(1) review). And, a state court's factual determination is entitled to a presumption of correctness. 28 U.S.C. §2254(e)(1). Under 28 U.S.C. §2254(e)(1), this Court must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. See id. §2254(e)(1). As recently noted by the Eleventh Circuit in Debruce, 758 F.3d at 1266, although the Supreme Court has "not defined the precise relationship between §2254(d)(2) and §2254(e)(1)," Burt v. Titlow, ____ U.S. ____, ____, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013), the Supreme Court has emphasized "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Burt, Id. (*quoting* Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

B. Ineffective Assistance of Counsel Standard

Petitioner also claims that trial counsel provided constitutionally ineffective assistance. This Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In Strickland, the Supreme Court established a two-part test to determine whether a convicted person is entitled to habeas relief on the grounds that his or her counsel rendered ineffective assistance: (1) whether counsel's representation was deficient, i.e., "fell below an objective standard of reasonableness" "under prevailing professional norms," which requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) whether the deficient performance prejudiced the defendant, i.e., there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 688; see also Bobby Van Hook, 558 U.S. 4, 8, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009); Cullen v. Pinholster, 563 U.S. 170, 185, 131 S.Ct. 1388, 1403 179 L.Ed.2d 557 (2011).

"[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Bobby Van Hook, 558 U.S. at 9 (internal quotations and citations omitted). A court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Id. at 690-91. To uphold a lawyer's strategy, the Court need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. No lawyer can be expected to have considered all of the ways. Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)(*en banc*), cert.den'd, 531 U.S. 1204 (2001). If the petitioner

cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 697. See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

The Strickland test applies to claims involving ineffective assistance of counsel during the punishment phase of a non-capital case. See Glover v. United States, 531 U.S. 198 (2001)(holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established Strickland prejudice"). Prejudice is established if "there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). The standard is also the same for ineffective assistance of appellate counsel claims, requiring petitioner to demonstrate deficient performance and prejudice. Philmore v. McNeil, 575 F.3d 1251, 1264 (11th Cir. 2009)(citing Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991)); Smith v. Robbins, 528 U.S. 259, 285-86, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); Roe v. Flores-Ortega, 528 U.S. at 476-77.

If the Court finds there has been deficient performance, it must examine the merits of the claim omitted on appeal. If the omitted claim would have had a reasonable probability of success on appeal, then the deficient performance resulted in prejudice. Eagle, 279 F.3d at 943. See also Digsby v. McNeil, 627 F.3d 823, 831 (11th Cir. 2010)(holding that to determine whether the petitioner's appellate counsel rendered ineffective assistance, the court must assess the strength of the claim that the petitioner asserts his appellate counsel should have raised in his state direct appeal and only if failure to bring the claim both rendered counsel's performance deficient and resulted in prejudice to the

petitioner was there ineffective assistance); Joiner v. United States, 103 F.3d 961, 963 (11th Cir. 1997). Non-meritorious claims which are not raised on direct appeal do not constitute ineffective assistance of counsel. Diaz v. Sec'y for the Dep't of Corr's, 402 F.3d 1136, 1144-45 (11th Cir. 2005).

Further, the Supreme Court has held that the Sixth Amendment does not require appellate attorneys to press every non-frivolous issue that the client requests to be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. Jones v. Barnes, 463 U.S. 745 (1983). In considering the reasonableness of an attorney's decision not to raise a particular issue, this Court must consider "all the circumstances, applying a heavy measure of deference to counsel's judgments." Eagle v. Linahan, 279 F.3d 926, 940 (11th Cir. 2001), quoting, Strickland, 466 U.S. at 691.

Keeping these principles in mind, the Court must now determine whether counsel's performance was both deficient and prejudicial under Strickland. As indicated, Courts must be highly deferential in reviewing counsel's performance, and must apply the strong presumption that counsel's performance was reasonable. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. See also Chandler v. United States, 218 F.3d at 1314. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284, 297 (2010). See also Osborne v. Terry, 466 F.3d 1298, 1305 (11th Cir. 2006)(citing Chandler v. United States, 218 F.3d at 1313).

A habeas court's review of a claim under the Strickland

standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009), citing, Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)(per curiam). The relevant question "is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable-a substantially higher threshold." Knowles, 556 U.S. at 123, 129 S.Ct. at 1420. (citations omitted). Finally, "because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Id

Under AEDPA, a habeas petitioner must establish that the state court's application of Strickland was unreasonable under 28 U.S.C. §2254(d). "Where the highly deferential standards mandated by Strickland and AEDPA both apply, they combine to produce a doubly deferential form of review that asks only 'whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Gissendaner v. Seaboldt, 735 F.3d 1311, 1323 (11th Cir. 2013)(quoting Harrington, 562 U.S. at 103, 131 S.Ct. at 788).

V. Threshhold Issues

A. Statute of Limitations

The respondent properly concedes that the instant habeas petition is **not** time-barred. (DE#18:16). See 28 U.S.C. §2244(d)(1)-(2). The **petition (DE#1)** was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996). Consequently, post-AEDPA law governs this action. Abdul-Kabir v. Quarterman, 550 U.S. 233, 127 S.Ct. 1654, 1664, 167 L.Ed.2d 585

(2007); Penry v. Johnson, 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); Davis v. Jones, 506 F.3d 1325, 1331, n.9 (11 Cir. 2007). Given the foregoing procedural history, it appears that this federal petition was timely instituted.

As will be recalled, there was a total of **319 days** during which no state post-conviction proceedings were pending so as to toll the federal limitations period. Since less that one year went untolled from the time petitioner's conviction became final on **March 11, 2013** until he filed his federal habeas corpus petition on **April 6, 2016**, this proceeding is timely instituted. This is so because the one-year federal limitations period did not fully expire since there were state post-conviction proceedings pending which served to toll its expiration. See Artuz v. Bennett, 531 U.S. 4 (2000) (pendency of properly-filed state postconviction proceedings tolls the AEDPA limitations period).

B. Exhaustion and Procedural Bar

Next, it well-settled that an applicant's federal writ of habeas corpus will not be granted unless the applicant exhausted his state court remedies. 28 U.S.C. §2254(b),(c).[11] See Mauk v. Lanier,

[11]The terms of 28 U.S.C. §2254(b) and (c) provide in pertinent part as follows:

> (b)(1) An 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 unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . .

484 F.3d 1352, 1357 (11th Cir. 2007). It has long been required that, prior to filing a §2254 petition, a petitioner must have exhausted his available state court remedies, thereby giving the state the the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995)(quoting Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

To provide the state with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court thereby alerting that court to the federal nature of the claim. Baldwin v. Reese, 541 U.S. 27, 29-30 (2004); Duncan v. Henry, 513 U.S. 364, 365-366 (1995). See also O'Sullivan v. Boerckel, 526 U.S. 838 (1999). In other words, proper exhaustion of a claim must be "serious and meaningful," requiring the petitioner to "afford the State a full and fair opportunity to address and resolve the claim on the merits." Kelley v. Sec'y for Dep't of Corr's, 377 F.3d 1317, 1343-44 (11th Cir. 2004). Further, a claim must be presented to the highest court of the state to satisfy the exhaustion of state court remedies requirement. O'Sullivan v. Boerckel, 526 U.S. 838 (1999); Richardson v. Procunier, 762 F.2d 429, 430 (5th Cir. 1985); Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983). Exhaustion is not satisfied, however, if the petitioner (1) fails to raise a federal claim in the state court, *see, e.g.*, Bailey v. Nagle, 172 F.3d 1299, 1303 (11th Cir. 1999); or (2) fails to raise a claim in terms of federal law, *see, e.g.*, Gray v. Netherland, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 2081, 135 L.Ed.2d 457 (1996).

> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

In Florida, exhaustion is ordinarily accomplished on direct appeal. If not, it may be accomplished by the filing of a Rule 3.850 motion, and an appeal from its denial. Leonard v. Wainwright, 601 F.2d 807, 808 (5th Cir. 1979). In the case of a challenge to a sentence, exhaustion is accomplished by the filing of a Rule 3.800 motion, and an appeal from its denial. See Caraballo v. State, 805 So.2d 882 (Fla. 2d DCA 2001). Claims of ineffective assistance of trial counsel are generally not reviewable on direct appeal, but are properly raised in a Rule 3.850 motion for post-conviction relief. See Kelley v. State, 486 So.2d 578, 585 (Fla.), cert. den'd, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). Further, claims concerning representation received by appellate counsel are properly brought by way of a petition for habeas corpus relief to the appropriate district court of appeal. State v. District Court of Appeal, First District, 569 So.2d 439 (Fla. 1990). Exhaustion also requires that an ineffective assistance of trial counsel claim not only be raised in a Rule 3.850 motion, but the denial of the claim be presented on appeal. See Leonard v. Wainwright, 601 F.2d at 808.

"The teeth of the exhaustion requirement comes from its handmaiden, the procedural default doctrine. If the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief," unless one of two exceptions apply: cause and prejudice or fundamental miscarriage of justice. Smith v. Jones, 256 F.3d 1135, 1138 (11 Cir. 2001). "A claim is procedurally defaulted if it has not been exhausted in state court and would now be barred under state procedural rules." Mize v. Hall, 532 F.3d 1184, 1190 (11 Cir. 2008). See also Bailey v. Nagle, 172 F.3d 1299, 1305 (11 Cir. 1999).

For instance, when an issue was not presented to the state court, and where petitioner has already filed one Rule 3.850 motion,

the issue is considered procedurally defaulted or barred from federal review. See Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999); Kelley v. Secretary for Dept. of Corr., 377 F.3d 1317, 1351 (11th Cir. 2004)("[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, [the district court] can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief."(internal quotation marks omitted)); Canif v. Moore, 269 F.3d 1245, 1247 (11th Cir. 2001)("[C]laims that have been held to be procedurally defaulted under state law cannot be addressed by federal courts."); Chambers v. Thompson, 150 F.3d 1324, 1326-27 (11th Cir. 1998)(applicable state procedural bar should be enforced by federal courts even as to a claim which has never been presented to a state court).

Besides a failure to exhaust, a procedural default may also result from non-compliance with state procedural requirements. See Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 115 L.Ed.2d 640, *reh'g denied*, 501 U.S. 1277, 112 S.Ct. 27, 115 L.Ed.2d 1109 (1991). Thus, federal courts are barred from reaching the merits of a state prisoner's federal habeas claim where the petitioner has failed to comply with an independent and adequate state procedural rule. Wainwright v. Sykes, 433 U.S. 72, 85-86, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). See also Siebert v. Allen, 455 F.3d 1269, 1271 (11th Cir. 2006), *cert. denied*, 549 U.S. 1286, 127 S.Ct. 1823, 167 L.Ed.2d 331 (2007); Harmon v. Barton, 894 F.2d 1268, 1270 (11th Cir. 1990). To apply an express procedural bar, the state procedural rule must be regularly followed. See Baldwin v. Johnson, 152 F.3d 1304, 1317 (11th Cir. 1998)(finding that federal courts may not review a claim that a petitioner procedurally defaulted under state law if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and the

bar presents an independent and adequate state ground for denying relief), *cert. denied*, 526 U.S. 1047, 119 S.Ct. 1350, 143 L.Ed.2d 512 (1999). Application of a regularly established state procedural rule is appropriate where the appellate court silently affirms the lower court procedural bar since federal courts should not presume an appellate state court would ignore its own procedural rules in summarily denying applications for post-conviction relief. Tower v. Phillips, 7 F.3d 206, 211 (11th Cir. 1993).

The United States Supreme Court has recently discussed the doctrine of procedural default:

> Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule. *See, e.g., Coleman*,[12] *supra*, at 747–748, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640; *Sykes*,[13] *supra*, at 84–85, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594. A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. *See, e.g.*, Walker v. Martin, 562 U.S. ____, ____, 131 S.Ct. 1120, 1127–1128, 179 L.Ed.2d 62 (2011); Beard v. Kindler, 558 U.S.

[12]Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

[13]Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

> 53, [60-61], 130 S.Ct. 612, 617-618, 175 L.Ed.2d 417 (2009). The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. See Coleman, 501 U.S., at 750, 111 S.Ct. 2546, 115 L.Ed.2d 640.

Martinez v. Ryan, ___ U.S. ___, ___, 132 S.Ct. 1309, 1316, 182 L.Ed.2d 272 (2012).

Thus, even when a claim has been procedurally defaulted in the state courts, a federal court may still consider the claim if a state habeas petitioner can show either (1) cause for and actual prejudice from the default; or (2) a fundamental miscarriage of justice. Maples v. Thomas, ___ U.S. ___, ___, 132 S.Ct. 912, 922, 181 L.Ed.2d 807 (2012)(citations omitted); In Re Davis, 565 F.3d 810, 821 (11th Cir. 2009)(citation omitted).

Even when a claim has been procedurally defaulted in the state courts, a federal court may still consider the claim if a state habeas petitioner can show either (1) cause for and actual prejudice from the default; or (2) a fundamental miscarriage of justice. Maples v. Thomas, 565 U.S. 266, 276, 132 S.Ct. 912, 922, 181 L.Ed.2d 807 (2012)(citations omitted); In Re Davis, 565 F.3d 810, 821 (11th Cir. 2009)(citation omitted). See also Martinez v. Ryan, 566 U.S. 1, 9-10, 132 S.Ct. 1309, 1316, 182 L.Ed.2d 272 (2012).

For a petitioner to establish cause, the procedural default "must result from some objective factor external to the defense that prevented [him] from raising the claim and which cannot be fairly attributable to his own conduct." McCoy v. Newsome, 953 F.2d 1252, 1258 (11th Cir. 1992)(quoting Murray v. Carrier, 477 U.S. 478, 488,

106 S.Ct. 2639, 91 L.Ed.2d 397). In Martinez v. Ryan, the Supreme Court created a narrow exception to the rule that an attorney's errors in a postconviction proceeding do not qualify as cause for a procedural default. The Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 132 S.Ct. at 1320.

To establish prejudice, a petitioner must show that "the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness." Id. at 1261 (quoting Carrier, 477 U.S. at 494, 106 S.Ct. 2639, 91 L.Ed.2d 397).

In the absence of a showing of cause and prejudice, a petitioner may nevertheless receive consideration on the merits of a procedurally defaulted claim if he can establish a fundamental miscarriage of justice otherwise would result (i.e., the continued incarceration of one who is actually innocent). See Ward v. Hall, 592 F.3d 1144, 1155–57 (11th Cir. 2010), cert. den'd, ____ U.S. __, 131 S.Ct. 647, 178 L.Ed.2d 513 (2010). "To meet this standard, a petitioner must 'show that it is more likely than not that no reasonable juror would have convicted him' of the underlying offense." Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001)(*quoting* Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)), *cert. denied*, 535 U.S. 926, 122 S.Ct. 1295, 152 L.Ed.2d 208 (2002). Additionally, "'[t]o be credible,' a claim of

actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 538, 559, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)(*quoting* Schlup, 513 U.S. at 324). Such evidence is rare, relief on such a basis is extraordinary. Schlup, 513 U.S. at 327.

With these well-established principles in mind, it needs to be determined at the outset if any of petitioner's claims are unexhausted and/or subject to procedural bars. The respondent concedes correctly that **claims 2 through 6, 8 through 9, 11, and 12** of this federal petition have been properly exhausted in the state forum and are thus ripe for federal habeas corpus review. (DE#11:7-11). However, as to **claims 1, 7, and 10**, the state argues that they are unexhausted and procedurally barred federal habeas corpus review. (Id.).

Regarding **claim 1**, respondent argues that the claim was first raised by petitioner in a motion for rehearing following the denial of his Rule 3.850 appeal, and in two "all writs" petitions filed with the Florida Supreme Court which were dismissed for lack of jurisdiction. The respondent also argues that the claim was raised in terms of a violation of state law, and not federal constitutional principles. In his traverse (DE#15), petitioner concedes that **claim 1** was not presented properly in the state forum, but maintains that jurisdictional issues, like the one raised herein, can be raised at any time. (DE#15:3-4). That argument, however, is not entirely correct. The claim must first be presented to the state forum for it to be properly exhausted and subject to federal habeas corpus review. Petitioner did not do so here. Thus, the claim is procedurally defaulted from review.

Regarding **claim 7**, the respondent claims facts in support

thereof were not presented to the state court in the first instance, and therefore, claim 7 is unexhausted. In his traverse, petitioner agrees with the respondent that this claim is unexhausted because the facts in support thereof were different than the facts raised herein. (DE#15:36). Therefore, this claim is unexhausted and prospectively procedurally barred from review here.

As to **claim 10**, the respondent argues that petitioner raised the claim in his Rule 3.850 motion, but not in terms of a violation of federal constitutional principles, and its denial was not raised on appeal therefrom. Regardless of whether or not it was raised explicitly in terms of a violation of federal constitutional principles, the standard for review of the sufficiency of the evidence is similar under both federal and Florida law. See Jackson v. Virginia, 443 U.S. 307 (1979); Smith v. White, 815 F.2d 1401 (11 Cir. 1987); Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986)(citing Jackson v. Virginia, 443 U.S. 307 (1979)). In that regard, the respondent's argument fails.

However, the respondent's argument that claim 10 is unexhausted because its denial was not raised on direct appeal is well taken. In Florida, exhaustion of claims raised in a Rule 3.850 motion includes an appeal from the denial of the motion. See Leonard v. Wainwright, 601 F.2d 807, 808 (5th Cir. 1979). Florida law also establishes that claims for which an appellant does not present any argument-or presents only conclusory argument-are waived. See, e.g., Gamble v. State, 877 So.2d 706 (Fla. 2004).

Accordingly, a petitioner must present all claims-whether summarily denied or denied after an evidentiary hearing-in the initial brief to the appellate court, or else its denial is deemed waived. See Prince v. State, 40 So.3d 11 (Fla. 4th DCA 2010);

Hammond v. State, 34 So.3d 58 (Fla. 4 DCA 2010)(claim for which appellant did not present argument, or for which he provided only conclusory argument, was insufficiently presented for appellate review, regardless of whether claim was among those claims litigated at evidentiary hearing or among those claims summarily denied by trial court); N.W. v. Dep't of Children & Families, 865 So.2d 625, 625 (Fla. 4 DCA 2004). See also, Duest v. Dugger, 555 So.2d 849 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Williams v. State, 24 So.3d 1252 (Fla. 1st DCA 2009) (where appellant received evidentiary hearing on some of his post-conviction claims and others were summarily denied, appellate court would review only those summarily denied claims which movant argued in the appellate brief). See also Walton v. State, 58 So.3d 887, 888 (Fla. 2 DCA 2011)(where all of appellant's post-conviction claims were summarily denied, but appellant chose to file initial brief on appeal (even though not required to do so under Fla.R.App.P. 9.141(b)(2)), appellant abandoned any issues not addressed in initial brief); Ward v. State, 19 So.3d 1060, 1061 (Fla. 5 DCA 2009) (*en banc*)(same); Watson v. State, 975 So.2d 572 (Fla. 1 DCA 2008)(same); Austin v. State, 968 So.2d 1049 (Fla. 5 DCA 2007)(same).

Although petitioner prosecuted an appeal following the denial of his Rule 3.850 motion, he did not challenge the trial court's denial of **claim 10** of this federal petition in his initial brief on appeal. Therefore, petitioner waived appellate review of **claim 10**, and thus the claim was not properly exhausted in the state courts.

To the extent petitioner attempts to suggest he is ignorant of

the law, that does not excuse his failure to properly exhaust the claims raised herein in the state forum. Finally, any attempt to suggest in objections that his procedural default should be excused based upon the Supreme Court's decision in Martinez v. Ryan, supra, such an argument should not be entertained for the first time in objections. Moreover, it nonetheless warrants no relief.

In Martinez v. Ryan, 566 U.S. 1, 9, 132 S.Ct. 1309, 1318, 182 L.Ed.2d 272 (2012), the Supreme Court held that if "a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim ..." when (1) "the state courts did not appoint counsel in the initial-review collateral proceeding, where the claims should have been raised, was ineffective, pursuant to Strickland [v. Washington, 466 U.S. 668 (1984)]." Martinez v. Ryan, 566 U.S. at 9, 132 S.Ct. at 1318. In this regard, the petitioner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id.

In other words, in Martinez v. Ryan, 566 U.S. 1, 11, 132 S.Ct. 1309, 1320 (2012), the Supreme Court explained that "[W]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing **a substantial claim** of ineffective assistance at trial if, in the initial-review collateral proceeding, **there was no counsel or counsel in that proceeding was ineffective.**" Martinez v. Ryan, supra.(emphasis added). Therefore, relief is available if (1) state procedures make it virtually impossible to actually raise ineffective assistance of trial counsel claims on direct appeal; and

(2) the petitioner's state collateral counsel was ineffective for failing to raise ineffective assistance of trial counsel claims in the state proceedings. See Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1261 n.31 (11th Cir. 2014).

The claim of ineffective assistance must be a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Martinez, 132 S.Ct. at 1318. The Eleventh Circuit held in Trevino v. Thaler, 133 S.Ct. 1911 (11th Cir. 2013), that the exception recognized in Martinez applies when a State's procedural framework makes it highly unlikely that a defendant in a typical case will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.

In Hittson v. GDCP Warden, 759 F.3d 1210, 1262 (11th Cir. 2014), the Eleventh Circuit explained Martinez' "substantial claim" requirement, reiterating that:

> To overcome the default, a prisoner must ... demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)(describing standards for certificates of appealability to issue).

Martinez, ___ U.S. at _____, 132 S.Ct. at 1318-19. In Miller-El, the Supreme Court explained that "[a] petitioner satisfies this standard by demonstrating ... that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. at 327, 123 S.Ct. at 1034. Where the petitioner has to make a "substantial showing" without the benefit of a merits determination by an earlier court, he must demonstrate

that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1594, 1604, 146 L.Ed.2d 542 (2000). "[A] claim can be debatable even though every jurist of reason might agree, after the ... case has received full consideration, that petitioner will not prevail." Id.

The Eleventh Circuit in Hittson also observed that the foregoing standard is similar to the preliminary review standard set forth in Rule 4 of the Rules Governing §2254 Proceedings, which allows district courts to summarily dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." See Hittson, 759 F.3d at 1269-70 (footnotes omitted). Thus, the Eleventh Circuit instructs that the §2254 petition must be examined to determine whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right...." Hittson, supra.

As applied here, the respondent is correct, that **claims 1, 7, and 10** are unexhausted, but more importantly, they are also prospectively procedurally barred from review. Nevertheless, Martinez v. Ryan, supra., provides an exception to the procedural default rule, allowing review of such claims if petitioner can demonstrate that his claims of ineffective assistance of counsel are "substantial." In other words, petitioner must make a showing of a "substantial" claim of ineffective assistance of trial or appellate counsel which will be addressed in the Discussion section, *infra*.

Further, actual innocence may "serve as a gateway through which a petitioner may pass whether the impediment is a procedural bar... or ... expiration of the statute of limitations." McQuiggen v.

Perkins, 133 S.Ct. 1924, 1928 (2013); see Carrier, 477 U.S. at 496 ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). This exception requires the petitioner to persuade the district court that, in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Id.; Rozzelle v. Sec'y, Fla. Dep't of Corr's, 672 F.3d 1000, 1011 (11th Cir. 2012).

In making this assessment, the timing of the petition is a factor bearing on the reliability of the evidence purporting to show actual innocence. Schlup v. Delo, 513 U.S. 298, 327 (1995). To successfully plead actual innocence, a petitioner must show that his conviction resulted from a "constitutional violation." Id. at 327. "Actual innocence" means factual innocence, not mere legal insufficiency. Johnson v. Fla. Dep't of Corr's, 513 F.3d 1328, 1334 (11th Cir. 2008). This exception is exceedingly narrow in scope and requires proof of actual innocence, not just legal innocence. Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001); Spencer, 609 F.3d at 1180. No such showing is made here. Rather, he is raising a legal defense to his convictions. Regardless, even if he is attempting to assert a free-standing claim of factual innocence, petitioner cannot prevail on that basis.

It is noted that, even if the claims were not procedurally barred for the reasons stated immediately above, careful review of the record shows that petitioner would still not be entitled to review, let alone relief, on the ineffective assistance of counsel claims now raised. This is so, because the claims are meritless, as

asserted by the Respondent.[14] See Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, petitioner cannot show prejudice to overcome the procedural bar.

In the absence of a showing of cause and prejudice, a petitioner may nevertheless receive consideration on the merits of a procedurally defaulted claim if he can establish a fundamental miscarriage of justice otherwise would result (*i.e.*, the continued incarceration of one who is actually innocent). See Ward v. Hall, 592 F.3d 1144, 1155-57 (11th Cir. 2010), *cert. denied*, ____ U.S. ___, 131 S.Ct. 647, 178 L.Ed.2d 513 (2010). "To meet this standard, a petitioner must 'show that it is more likely than not that no reasonable juror would have convicted him' of the underlying offense." Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001)(quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)), *cert. denied*, 535 U.S. 926, 122 S.Ct. 1295, 152 L.Ed.2d 208 (2002). Additionally, "'[t]o be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 538, 559, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)(quoting Schlup, 513 U.S. at 324). Such evidence is rare, relief on such a basis is extraordinary. Schlup, 513 U.S. at 327. Petitioner has not alleged, let alone demonstrated, that he is entitled to review under the fundamental miscarriage of justice exception.[15] Schlup v. Delo, 513 U.S. at 321-322. Not having

[14]See Response to Order to Show Cause-DE#11.

[15]The petitioner must support an actual innocence claim "with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995)). The Supreme Court emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id. See also High v. Head, 209 F.3d 1257 (11th Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039 (8th Cir. 2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2d Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States,153 F.3d 1305 (11th Cir. 1998)(holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him).

shown that the fundamental miscarriage of justice exception applies, the claims are again procedurally barred from federal review.

Where applicable, any further exhaustion and procedural default arguments are addressed below, in relation to the claims. When judicial economy dictates, where the merits of the claims may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative.[16] See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best.").

VI. Facts Adduced at Trial

For an appreciation of this case and the multitude of claims raised herein, a full review of the facts adduced at trial is warranted. It is worth noting that petitioner represented himself at trial, during which he conceded that a battery occurred, but denied that he intentionally caused the victim, Susan Black ("Susan"), great bodily harm. Susan testified she first met the homeless petitioner in October 2008, when she and her husband, David, who were also homeless at the time, were living at Dubois

[16]Even if certain claims are technically unexhausted, the Court has exercised the discretion now afforded by Section 2254, as amended by the AEDPA, which permits a federal court to deny on the merits a habeas corpus application containing unexhausted claims. See Johnson v. Scully, 967 F.Supp. 113 (S.D.N.Y. 1996); Walker v. Miller, 959 F.Supp. 638 (S.D. N.Y. 1997; Duarte v. Miller, 947 F.Supp. 146 (D.N.J. 1996).

Park in the Jupiter Inlet. (DE#11-2:Ex.25:T.125). Later on, petitioner eventually met and began living with his girlfriend, Bonnie Jean Andreozzi ("Andreozzi") at her apartment. (T.126-127). Petitioner brought Andreozzi to the park and introduced her to Susan and David. (T.127). Because of bad weather, the Blacks were invited to stay a few days at Andreozzi's apartment. (T.125,127). Together, the four spent two or three days drinking, stopping only to sleep. (T.127,137,141-42).

For a while, everyone got along without incident. (T.137). However, on December 5th, 2009, Susan recalled they had started drinking at 12:00 o'clock, but after dinner, the petitioner went to bed, and David left, borrowing Andreozzi's car to visit a friend. (T.127-128). As a result, Andreozzi and Susan sat on the patio, and continued drinking and talking. (T.128-29,137).

Later, as the two women went to the freezer to get more ice for their drinks, the petitioner who had become irate, exited his bedroom and began yelling at Susan, that she and her husband had to leave because they were "freeloading." (T.129,139). Susan responded that David was not there, but that as soon as he returned, they would leave. (T.139). The three then walked to the living room, where Andreozzi stood between the petitioner and Susan, trying to calm him down. (T.129). The petitioner, however, reached over her and hit Susan in the right side of her jaw, knocking her to the ground. (T.129). Petitioner continued beating Susan in the face and head, while she curled into a fetal position, trying to protect herself. (T.129-30,140). When she was able to get up, she went to the screened-in patio, in an effort to back away from the petitioner. (T.129-30). Meanwhile, Andreozzi was yelling and screaming, as she tried pulling the petitioner off Susan. (T.132). During cross-examination, Susan testified that she believed

petitioner had every intention of hurting her even more if it had not been for Andreozzi yelling and the neighbors coming out. (T.144). In fact, Susan believed the petitioner would have kept hitting her until he killed her. (T.144). Susan had to be taken to the hospital, where she received ten stitches to repair the laceration to her left eye. (T.134).

Officer Sean Pope ("Officer Pope") with the Jupiter Police Department, assigned to road patrol, testified he responded to Andreozzi's residence on December 5, 2009. (T.149-150). When he got there, he found Susan in the parking lot, visibly upset, wearing a blood-soaked shirt, with blood on her arms, and a laceration above her eye that was bleeding heavily. (Id.). Andreozzi informed Officer Pope regarding the beating and that, after she told petitioner she was going to call 9-1-1, the petitioner fled the area on foot. (T.159-160).

Officer Pope then spoke with a neighbor who indicated that a suspicious person had gone towards the other side of the building. (T.150). As a result, Pope walked around the apartment building and found petitioner in close proximity to his apartment, but by the front door of another person's unit, laying curled up in a fetal position, with blood on his hands,. (T.150-52,155-56). Petitioner could not explain to Officer Pope where the blood on his hands came from. (T.153-54). Officer Pope found this significant, because the petitioner had no visible fresh injuries on his hand to explain where the fresh blood came from. (T.154). After he advised the petitioner that he was investigating the incident involving Susan, petitioner denied being involved in any type of an altercation. (T.154). Petitioner was then taken to the Jupiter Police Department for processing, and after explaining what the charges were, petitioner responded that the victim could not prosecute, because

"she was a homeless bitch." (T.154).

VII. Discussion[17]

A. First Rule 3.850 Claims

In **claim 1**, petitioner asserts that the trial court did not have subject matter jurisdiction to have granted the motion to withdraw petitioner's guilty plea, filed by counsel, because the petitioner had filed a notice of appeal, following the denial of his *pro se* motion to withdraw his guilty plea, thereby divesting the court of jurisdiction. (DE#1:6; DE#4:1).

First, it will be recalled that this claim is unexhausted and procedurally defaulted from review in this habeas corpus proceeding. Next, as a preliminary matter, petitioner's claim that the state court did not have jurisdiction to vacate petitioner's judgment and sentence, involves a matter of state law. Federal habeas relief is only available upon a showing that a petitioner is in custody in violation of federal law. 28 U.S.C. §2254(a). Therefore, questions of state law are not cognizable in a federal habeas petition, even if a petitioner characterizes such a claim as presenting a federal question. See Branan v. Booth, 861 F.2d 1507, 1508 (11th Cir. 1988)("It is our opinion that the petition raises issues of state law only and, thus, must be dismissed. Although Petitioner alleges violations of federal law, it is clear that this petition is based exclusively on state law issues which are merely 'couched in terms of equal protection and due process.'")(citation omitted).

[17]The court is reminded that petitioner's initial filing has been stricken and the operative petitioner, is the amended petition (DE#10). Consequently, any arguments or allegations not raised within the amended petition (DE#10) are deemed abandoned or otherwise waived and are not considered by the court herein.

Thus, a state court's interpretation of state law cannot provide federal habeas relief since no question of a constitutional nature is involved. See Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983). See also Jones v. Sec'y, Dep't of Corr's, 2014 WL 505093 at *6 (N.D.Fla. Feb.7, 2014) ("A state court's jurisdiction to convict and sentence a defendant are quintessential state law matters this Court cannot review in a federal collateral proceeding.").

In Carbajal v. State, 75 So.3d 258 (Fla. 2011), the Florida Supreme Court addressed the issue of subject matter jurisdiction in criminal prosecutions, stating as follows:

> "Subject matter jurisdiction is the '[p]ower of a particular court to hear the type of case that is then before it" or "jurisdiction over the nature of the cause of action and relief sought." Fla. Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988)(quoting Black's Law Dictionary 767 (5th Ed. 1979)). Pursuant to section 26.012(2)(d), Florida Statutes (2001), at the time Carbajal was charged, the circuit courts had-as they continue to have-subject matter jurisdiction over "all felonies." See also McLean v. State, 23 Fla. 281, 2 So. 5, 5 (1887)("In criminal cases the jurisdiction is determined by the charge made.").

Carbajal, 75 So.3d at 262.

However, under Florida law, subject matter jurisdiction—the "power of the trial court to deal with a class of cases to which a particular case belongs"—is conferred upon a court by constitution or by statute. Cunningham v. Standard Guar. Ins. Co., 630 So.2d 179, 181 (Fla. 1994); Jesse v. State, Dep't of Revenue ex rel. Robinson, 711 So.2d 1179 (Fla. 2d DCA 1998). It cannot be conferred by waiver,

acquiescence, or agreement of the parties. Ruble v. Ruble, 884 So.2d 150 (Fla. 2d DCA 2004). Thus, under Florida law, a trial court's lack of subject matter jurisdiction makes its judgment void, and a void judgment can be attacked at any time, even collaterally. Fla.R.Civ.P. 1.140(h); Gonzalez v. Gonzalez, 654 So.2d 257 (Fla. 3d DCA 1995).

In this case, petitioner pleaded guilty and sentenced on June 1, 2010. (DE11-2:Ex.4-5). In accordance with the mailbox rule, petitioner returned to the trial court filing a *pro se* motion to withdraw his plea on June 17, 2010, which was not file stamped received by the Clerk until July 9, 2010. (DE#11-2:Ex.7). While the above *pro se* motion was pending, on June 30, 2010, petitioner's counsel filed a second motion to withdraw petitioner's guilty plea. (DE#11-2:Ex.6). Both motions argued in relevant part that counsel had misadvised petitioner to enter a plea that utilized an incorrect sentencing score sheet. (DE#11-2:Exs.6-7). On July 9, 2010, the court entered an order denying petitioner's *pro se* motion. (DE#11-2:Ex.8). Before a ruling was had on the counseled motion, however, on July 20, 2010, petitioner filed a *pro se* notice of appeal of the trial court's denial of his *pro se* motion, which was assigned appellate court, **case no. 4D10-3228.** (DE#11-2:Ex.9).

In the interim, on August 27, 2010 a status hearing was held, at which time defense counsel reminded the court that it had previously entered an order summarily denying petitioner's *pro se* motion to withdraw his guilty plea, without fully considering all of the grounds mentioned therein. (DE#11-2:Ex.14:49). Counsel then explained that, while the petitioner had initially been charged with a level 6 felony battery, on the first day of trial, he accepted a plea to a level 1 felony battery based on priors. (Id.). However, when the paperwork was filed, an incorrect sentencing scoresheet was

filed based on a level 6, instead of a level 1 offense. (Id.:50). Counsel further explained that even under a level 1 offense, the prosecution had indicated the injury points would be moderate, not slight, which would result in a total of over 22 points. (Id.:51). According to counsel, petitioner was aware of these facts, and was advised that only if he scored under 22 points, the term of imprisonment would be no more than a year imprisonment. (Id.). Counsel next advised the court that petitioner has also made allegations in his motion that he was coerced by his attorney into accepting the plea, stating that counsel had "threatened him." (Id.). Counsel concluded that if the court were inclined to grant withdrawal of the plea, that it should then appoint conflict free counsel to represent the petitioner. (Id.:52).

The court acknowledged that petitioner wanted to address the court directly, at which time petitioner indicated that counsel advised him not to ask any questions at the change of plea proceeding or else the court would not accept the plea and he would be sentenced to five years imprisonment. (Id.:53). Petitioner also stated he was "definitely coerced," and "under duress" at the time. (Id.). In response, the court inquired whether or not the petitioner wanted to have a trial now, to which the petitioner responded, "I would love to have another trial, Your Honor." (Id.:53-54).

Thereafter, the prosecution addressed the court, indicatiing that if the judgment were going to be set aside, an Amended Information would be filed charging petitioner with aggravated battery given his status as a prison releasee reoffender, which would result in a 15-year minimum mandatory term of imprisonment if convicted. (Id.:54). Petitioner responded, addressing the court, explaining again that when he accepted the plea, it was based upon a scoresheet that listed the primary offense as a level 6 felony

battery, which gave him over 44 points. (Id.:55-56). However, the prosecution countered that the plea offer had nothing to do with the scoresheet. (Id.:57). The prosecutor was adamant that, given petitioner's violent history, from the outset petitioner was facing prison time, "no matter what." (Id.:57). The prosecutor noted, however, that if the scoresheet had been properly prepared, petitioner would have score out to a total of 14 months, rather than 24-months. (Id.:58).

The court then asked the prosecution whether they wanted to have a full evidentiary hearing or just proceed to trial. (Id.:57-58). The prosecutor responded that a trial would be "just fine." (Id.:58). Thus, after considering petitioner's statements and the prosecution's recommendation, the court granted the petitioner's counseled motion to withdraw guilty plea, vacated the judgment and resulting sentence, and set the case for trial. (Id.).

In its order, the court specifically found as follows:

> ...judgment and sentence is set aside at the request of defendant. Upon reflection, he would prefer to go to trial. He believes the sentencing scoresheet used at the time of his sentence was incorrect. In this regard he is correct. He has also asserted his attorney forced him to enter the plea. As a result the court appoints new counsel and sets this matter for trial.

(DE#11-2:Ex.15).

As will be recalled, petitioner proceeded to trial *pro se* and was convicted as charged in the Second Amended Information, following a jury verdict, was adjudicated guilty and sentenced to a 15-year minimum mandatory term of imprisonment as a prison

releasee reoffender.

Now, with the benefit of hindsight, petitioner seeks a do over claiming the trial court had no jurisdiction to grant vacatur of his guilty plea, even if that is what he had requested, since the court did not have jurisdiction over his case because of the pendency of his *pro se* appeal. Under Florida Rule of Appellate Procedure 9.020(h)(3), the court does not lose jurisdiction over a pending motion to withdraw plea after sentencing where a notice of appeal is filed or otherwise instituted after the motion was filed and remained pending. In those cases, the notice of appeal is to be treated as prematurely filed and the appeal held in abeyance until the filing of a signed, written order disposing of the pending motion. See Fla.R.App.P. 9.020(h)(3); Sharp v. State, 884 So.2d 510 (Fla. 2 DCA 2004)(finding trial court had jurisdiction to dispose of motion to withdraw guilty plea filed before notice of appeal); see also, Luckett v. State, 56 So. 3d 914, 914-15 (Fla. 2d DCA 2011); Clemons v. State, 3 So.3d 364, 365-66 (Fla. 2d DCA 2009) ("A timely motion to withdraw plea delays rendition of a defendant's judgment and sentence until the trial court files a signed, written order disposing of the motion."); Gray v. State, 198 So.3d 780 (Fla. 4 DCA 2016)(where three motions to withdraw plea were filed, but only one ruled upon, the judgment and sentence had not been rendered under Rule 9.020(i) because the other two motions remained pending).

As applied here, contrary to petitioner's argument, the trial court had jurisdiction to rule on the motion to withdraw guilty plea which was filed before petitioner's *pro se* notice of appeal. See Kegler v. State, 46 So.3d 1061, 1062 (Fla. 2d DCA 2010); Applegate v. State, 23 So.3d 211, 212 (Fla. 2d DCA 2009). And despite being represented by counsel at the time petitioner filed his motion, his *pro se* pleading could not be stricken as a nullity because he was

also arguing therein that there existed an actual conflict of interest with counsel which resulted in the plea not being knowing and voluntary. See Sheppard v. State, 17 So.3d 275, 277 (Fla. 2009). Moreover, it is evident from the record that, the *pro se* notice of appeal filed did not signify that petitioner was waiving or otherwise abandoning the counseled motion to withdraw plea. See Thompson v. State, 50 So.3d 1208, 1211 (Fla. 4th DCA 2010). In any event, petitioner ultimately allowed his *pro se* appeal to be dismissed for failure to pay the filing fee. (See DE#11-2:Ex.16).

Accordingly, the petitioner's argument here, even though it is procedurally defaulted, it is also devoid of merit. The petitioner has not demonstrated that the claim is either meritorious or substantial sufficient to overcome the procedural default. Thus, under either a *de novo* review here or applying the procedural default, this claim warrants no federal habeas corpus relief.

In related **claim 2**, petitioner asserts that he was denied the right to appointment of conflict free counsel to assist him in preparing, filing, and then arguing a proper motion to withdraw his guilty plea. (DE#1:8; DE#4:4). Petitioner relies upon the August 27, 2010 status hearing transcript summarized previously in this Report in relation to claim 1 above. He misquotes the record, believing that proceeding to have been an "evidentiary hearing," when in fact, it was merely a status hearing, where argument was entertained regarding the petitioner's counseled motion. Petitioner's representation in this habeas proceeding that he was never afforded an opportunity to decide whether or not to proceed to trial or withdraw his motion borders on the perjurious and is belied by the record. The petitioner was, in fact, afforded an opportunity to determine whether he wanted to proceed to trial or not, and the petitioner insisted he wanted to go to trial. (DE#11-2:Ex.14:53-

54). Petitioner suggests that he was not afforded an opportunity to "reflect" and/or otherwise "decide" whether to seek correction of his sentence or withdrawal of his plea. Regardless, petitioner at no time, even after the prosecution advised the court that it would be amended the charging instrument, indicated or otherwise advised the court that he would rather not go forward with a trial, and would be withdrawing his motion to withdraw his guilty plea, much less that he wanted to pursue the filing of a Rule 3.800 motion to correct illegal sentence.

When the identical claim was raised in the Rule 3.850 proceeding, it was rejected by the trial court, based on the prosecution's response thereto, which argued after citing to applicable Florida law, as follows:

> ...Defendant's claim fails because he was well aware that, upon the State's amendment of the information to charge aggravated battery, he faced a maximum fifteen year sentence as a Prison Releasee Reoffender. Defendant cannot show that the outcome of the proceeding would have been different....
>
> In this case, the Court did not hold an evidentiary hearing to determine whether to grant or deny Defendant's motion to withdraw his plea. Thus, the appointment of conflict free counsel was not necessary.
>
> Defendant requested that his plea be withdrawn so that he could have the chance of an acquittal at trial....The Court granted Defendant's request for a jury trial without holding an evidentiary hearing or ruling upon the allegations of coercion on the part of defense counsel....
>
> More importantly, Defendant was advised during the hearing on the motion to withdraw his plea that if he was permitted to withdraw

> his plea, he could face anywhere from *five to fifteen years' imprisonment*....Defendant was well aware that by withdrawal of his plea and the accompanying two year sentence, he would subject himself to a more serious aggravated battery charge....
>
> Accordingly, Defendant was well aware of the possible fifteen year sentence if Defendant was given leave to withdraw his plea....Defendant was clearly aware of the potential sentence and sought instead to gamble at a trial where he faced an increased aggravated battery charge and imprisonment for fifteen years if he lost.

(DE#11-3:Exs.44:101-103).

The denial of the claim was subsequently affirmed on appeal in a decision without written opinion. Tuomi v. State, 166 So.3d 801 (Fla. 4 DCA 2015); (DE#11-3:Ex.50).

Independent review of the record confirms that the state's response, as narrated above, and as adopted by the trial court, and then affirmed on appeal, was not error. The court did not hold an evidentiary hearing on the petitioner's counseled motion. Once petitioner indicated he wanted to proceed to trial, and after the prosecution agreed it would be amenable to vacatur of the plea and proceeding to trial, the court granted petitioner's motion. Now, in hindsight, petitioner suggests that had he had a conflict free counsel appointed prior to that hearing, he would not have sought withdrawal of his guilty plea, and newly appointed counsel would have been able to renegotiate an even better plea offer and sentence through the filing of a proper Rule 3.800 motion to correct illegal sentence. (DE#15:19). The first part of petitioner's claim is patently frivolous. As borne out by the record, petitioner had previously filed his own *pro se* motion to withdraw his guilty plea.

He has not demonstrated here that but for the court failing to appoint new counsel for the status hearing, the petitioner would not have withdrawn his plea of guilty. His after-the-fact representation are incredulous and rejected as disingenuous.

In Florida, to prove an ineffectiveness claim premised on an alleged conflict of interest, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Herring v. State, 730 So.2d 1264 (Fla.1998). A lawyer suffers from an actual conflict only when he or she actively represents conflicting interests. Id. To demonstrate an actual conflict, a defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of a lawyer or another party. Id. No such showing has been made here.

While it is true that at the August 2010 status hearing, defense counsel indicated that the petitioner had accused the defense of coercing him into accepting a plea, it is also evident if the court intended to proceed with an evidentiary hearing, counsel was going to call a third party who was present during the plea discussions to demonstrate the absence of any undue influence or coercion. Petitioner maintained that the conflict arose because the defense had permitted him to plead guilty based on an incorrect scoresheet. (DE#11-2:Ex.14). In response, both the prosecution and defense counsel admitted to the court that the scoresheet was incorrect, but ultimately this was of no consequence because the prosecution's offer required petitioner to serve a 24-month sentence, regardless of the scoresheet determination. (Id.). Moreover, at the time, the petitioner was aware that he faced a 5-year term of imprisonment on the charged offense. (Id.).

Federal law also holds that a conflict of interest cannot be established through hypothesis or speculation, United States v. Novaton, 271 F.3d 968, 1010-1011 (11th Cir. 2001), citing Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), United States v. Medel, 592 F.2d 1305 (5 Cir. 1979), but rather requires a showing that counsel actively represented conflicting interests. United States v. Ard, 731 F.2d 718 (11 Cir. 1984); United States v. Panasuk, 693 F.2d 1078 (11 Cir. 1982); accord, United States v. Ettinger, 344 F.3d 1149, 1161 (11th Cir. 2003); Mickens v. Taylor, 535 U.S. 162 (2002); accord, United States v. Ettinger, 344 F.3d 1149, 1161 (11th Cir. 2003); Hunter v. Secretary, Dept of Corrections, 395 F.3d 1196 (11th Cir. 2005). A defendant who fails to show both an actual conflict and an adverse affect is not entitled to relief. United States v. Novaton, 271 F.3d 968, 1010 (11 Cir. 2001); Burden v. Zant, 24 F.3d 1298, 1305 (11 Cir. 1994).

The Eleventh Circuit has adopted a test to distinguish actual from potential conflicts, which requires the petitioner to "point to specific instances in the record to suggest an actual conflict or impairment of their interests, make a factual showing of inconsistent interests, and demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical." Barham v. United States, 724 F.2d 1529, 1532 (11th Cir.), cert. den'd, 467 U.S. 1230 (1984); see also, Porter v. Wainwright, 805 F.2d 930, 939-40 (11th Cir. 1986); see e.g., Turnquest v. Wainwright, 651 F.2d 331, 333 (5th Cir. 1981); Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir. 1999), quoting, Smith v. White, 815 F.2d 1401, 1405 (11th Cir. 1987). No such showing has been made here.

It is true that a movant need not show that the result of the proceeding would have been different without the conflict of interest, only that the conflict had some adverse effect on counsel's performance. Strickland, 466 U.S. at 694. To prove an adverse effect, a defendant must: 1) "point to some plausible alternative defense strategy or tactic" that might have been pursued, 2) "demonstrate that the alternative strategy or tactic was reasonable"[18] under the facts in his case, and 3) "show some link between the actual conflict and the decision to forgo the alternative strategy of defense."[19] Novaton, supra at 1011, citing Freund v. Butterworth, 165 F.3d 839, 860 (11 Cir. 1999) (en banc). In the absence of a showing of an "adverse effect," prejudice is not presumed to flow from a conflict of interest. Id.

Here, petitioner has not demonstrated that an actual conflict exists, much less that he was adversely affected thereby. His allegations that counsel was operating under an actual conflict of interest at the status hearing is too speculative and insufficient to warrant relief on this claim. Regardless, since the petitioner's motion was granted and trial scheduled, counsel was discharged from the case, and new counsel appointed. Under the totality of the circumstances present here, petitioner has not demonstrated that his constitutional rights were violated nor that the state court erred in rejecting this claim. Therefore, it should not be disturbed here. Williams v. Taylor, supra.

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[18]Because prejudice is presumed under Strickland, 466 U.S. at 692, the movant "'need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used,' rather he only need prove that the alternative 'possessed sufficient substance to be a viable alternative.'" Freund, 165 F.2d at 960, citing, United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985).

[19]In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. Novaton, supra at 1011, citing, Freund, 165 F.3d at 860.

In **claim 3**, petitioner asserts that his constitutional rights were violated when the trial court failed to conduct an adequate Faretta hearing to ensure that movant's waiver of his right to counsel was knowing and voluntary. (DE#1:10; DE#4:12).

In Florida, when a defendant requests his appointed counsel be removed for incompetence, "the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether ... there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." Nelson v. State, 274 So.2d 256, 258-59 (Fla. 1973). While the counseled motion was anything but clear, it is undisputed from review of the August 2010 transcript that a conflict arose between counsel and the petitioner concerning the voluntariness of petitioner's plea and the advice provided by counsel in support thereof.

During the status hearing on the motion, defense counsel indicated that if the court were inclined to have an evidentiary hearing on whether to grant the motion, that it should appoint new counsel because petitioner had raised the allegation that defense had coerced or otherwise forced him to accept the prosecution's plea offer which was predicated on an incorrect sentencing scoresheet. At that time, counsel did not raise the issue of discharging counsel, nor did the court conduct an evidentiary hearing on the motion. As previously noted in this Report, after hearing from the petitioner directly and the prosecution, the court simply allowed counsel to withdraw, granted the petitioner's motion, and then set the case for trial. Thus, in that instance, petitioner has not demonstrated that the court erred in failing to ensure counsel was discharged prior to the status conference commencing. It is also well settled that an indigent defendant is constitutionally entitled

to appointed counsel, not the appointed counsel of his choice. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Here, there was no basis to support the discharge of counsel at the status conference stage.

The petitioner claims here, as he did in his Rule 3.850 motion in the state forum, that the court failed to conduct an adequate Faretta inquiry at the time it held a hearing on his counseled motion to withdraw. The Sixth Amendment provides that all criminal defendants are entitled to the assistance of counsel. U.S. Const. Amend. VI. A defendant can waive the fundamental right to counsel if he does so "knowingly and intelligently." Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938); see Faretta v. California, 422 U.S. 806, 833 (1975); Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Although a defendant need not have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Faretta, 422 U.S. at 835.

The Eleventh Circuit has interpreted Faretta to mean a trial court should hold a hearing to advise a criminal defendant on the dangers of proceeding *pro se* and make an explicit finding that he has chosen to represent himself with adequate knowledge of the possible consequences. See Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986); see also Fla.R.Cr.P. 3.111(d). The failure to hold a Faretta hearing is not error, however, if the record shows the defendant knowingly and voluntarily elected to represent himself. See Nelson v. Alabama, 292 F.3d 1291 (11th Cir. 2002); see also Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992). Waiver presents a mixed question of law and fact. Brewer v. Williams, 430

U.S. 387, 403 (1977).

As will be recalled, the petitioner filed a *pro se* waiver of representation by counsel, pursuant to Fla.R.Cr.P. 3.160(e), indicating he was currently not represented by counsel, waived his right to counsel, and informed the court that he intended to represent himself at trial. (DE#11-2:Ex.22:82). He then filed a *pro se* amendment thereto, advising the court that he does not suffer from any severe mental illness and is competent to conduct the trial proceedings himself. (Id.:83).

In the interim, following the August 2010 status conference, Samuel T. Marshall, II, Esquire, filed a motion to withdraw as counsel, stating that he received an order in October 2010 granting a motion to withdraw and appointing him to represent the petitioner. However, counsel indicated that he is not on the court-appointed list of attorneys available to represent indigent defendants where the Office of Regional Conflict Counsel is unable to represent defendants. Therefore, he declined the appointment and requested that the court enter an order withdrawing him from representation in the case. (DE#11-2:Ex.23). On November 17, 2010, Attorney Marshall's motion was granted, and the court noted that the petitioner will represent himself, as requested. (DE#11-2:Ex.24). The Order also set the case for trial commencing on December 13, 2010 at 8:30 a.m. (Id.).

Review of the December 14, 2010 transcript reveals that the court did, in fact, conducted a limited Faretta inquiry prior jury selection. (DE#11-2:Ex.25:T.92-93). At that time, the court again reminded the petitioner that it needed to remind him about his choice and the ramifications of proceeding without a lawyer. (T.92). The following colloquy was conducted on the record:

COURT: Right. Yeah, so a lawyer, as you know, has the experience and knowledge of the entire process, and the lawyer's job would be to argue for your side and present your best legal argument. Jury -- what we're about to start is the jury qualification procedure, and they usually have -- the lawyers usually have a desire or a thought about -- the good ones, anyway, they have what type of person they think would be best for your case, so you -- that's what you should think about, and we're going to ask these jurors questions about what they do for a living and what -- you know, that sort of thing, personal information about them and go over some legal principles with them. So when I'm questioning them and when the other lawyer is questioning them, you should be looking at them and deciding, "is this a juror that I think would be sympathetic to my situation or not," and -- you know, so you will have the ability to -- for six people, have the ability to say, "I don't want this person, that person," six of them, you get six peremptory challenges, we call them. Do you understand?

DEF.: Okay.

COURT: In other words, you can bump six of them. Do you have a list there of their names?

DEF.: Yes.

COURT: Okay. You can write little information about them, whether you like them -- you know, "This is a plus person for me or a minus," on that sheet. A lawyer would know how to do that; a lawyer can also, of course, get witnesses here and question the witnesses and question other people and give you some advice about whether they think you should testify or not. They know when -- they have the rules of evidence, and so they know when to object and that's sort of thing.

DEF.: Right.

COURT: So that's the -- you know, we lawyers -- I'm a lawyer too, obviously -- we always think it's

> a bad idea not to have a lawyer, but you have convinced me previously that you know about the system somewhat and that you are sincere in your desire to do it yourself, so -- and we fired your lawyer, I guess, at your request, but -- so I just want to make sure you're ready to continue.
>
> DEF.: Yes.
>
> COURT: Okay, you are?
>
> DEF.: I would just like to know exactly what I'm charged with today....

(DE#11-2:Ex.25:91-94:T.16-19).

Given the colloquy above, it is clear that the petitioner eloquently conveyed his sincere desire for self representation, and as a result, was granted the request, but not before the court again ensured that the petitioner was ready and able to continue *pro se*. (Id.:94:T.19). Further, as previously narrated in this Report, after claiming that the Office of Regional Counsel coerced him into changing his plea, and the court allowed that counsel to withdraw, it then appointed Samuel Marshall, Esquire to represent the petitioner. (DE#11-2:Ex.19:71). However, petitioner then filed a *pro se* letter/motion seeking to discharge that attorney on the basis that counsel was not competent or experienced enough to defend him. (DE#11-2:Exs.20-22). Thereafter, petitioner filed a handwritten, *pro se* waiver of representation of counsel, indicating that he had diligently investigated his case, does not have currently counsel appointed to represent him, and waives the right to counsel. (DE#11-2:Ex.21). He further advised the court that he is or will be prepared for trial in December 2010, and will represent himself. (Id.). Petitioner then amended the waiver only to add that he does not suffer from a severe mental illness and is competent to conduct

his trial. (DE#11-2:Ex.22). Attorney Marshall also filed a motion to withdraw, and by court order entered on November 17, 2010,[20] the motion was granted and petitioner was permitted to proceed *pro se*, as requested. (Id.).

Petitioner's waiver of counsel was unwavering, knowing and intelligent. Petitioner sought discharge of counsel and then voluntarily filed the waiver of his right to counsel. He was cautioned against proceeding *pro se*. He was aware that he was entitled to conflict free counsel, but not counsel of choice. Here, petitioner has not shown a due process violation arising from the court's failure to renew or otherwise conduct a more exhaustive Faretta inquiry. To the contrary, the fact that he proceeded *pro se* was of his own doing, and not that of the court.

To the extent petitioner suggests here, as he did in the Rule 3.850 proceeding, that the trial court should have determined his competence to proceed, this claim likewise fails. Failure to comply with Florida's procedural rules regarding competency hearings implicates state law and is not cognizable on habeas review. See Fla. R. Crim. P. 3.210, 3.211; Tejada v. Dugger, 941 F.2d 1551 (11th Cir. 1991) (quoting Carrizales v. Wainwright, 699 F.2d 1053 (11th Cir. 1983)(questions of state law and procedure "rarely raise issues of federal constitutional significance. [A] state's interpretation of its own laws provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved."). Petitioner here has not implicated any federal constitutional right.

[20]The state court docket in Palm Beach County, Circuit Court, case no. 2009CF015311AMB, reveals that on that day, a court event was held at 8:30 a.m. on counsel's motion to withdraw. Although the respondent indicates no transcript of the hearing was ever transcribed, and need not be provided here, it is clear given the entire history of this case, that the petitioner was well aware of his constitutional right to have an attorney assist in his defense. However, the petitioner knowingly and voluntarily waived that right.

Regardless, the Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants. James v. Singletary, 957 F.2d 1562, 1569-70 (11th Cir. 1992) (citing Pate v. Robinson, 383 U.S. 375, 384-86, 86 S.Ct. 836, 841-42, 15 L.Ed.2d 815 (1966); Dusky v. U.S., 362 U.S. 402 (1960)). The test for determining competence to stand trial is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402.

Although petitioner attempts to suggest here that he had competency issues that should have first been addressed and evaluated, there was never any question that petitioner was anything other than fully competent. He never requested a competency hearing. He always engaged the court appropriately, albeit, if at times argumentative, and was aware of the nature of the proceedings, so that none of the judges before whom he appeared would have had any cause to examine his competence *sua sponte*. See, e.g., Tiller v. Esposito, 911 F.2d 575, 576 (11th Cir. 1990) (a court has a duty to hold a competency hearing *sua sponte* "if there is reasonable cause to believe that a defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."). Accordingly, any suggestion that the Florida courts should have examined petitioner's competency to proceed is meritless and should be rejected.

On the record before this court, where it is clear the petitioner was quite competent to proceed, and freely and knowingly waived the right to counsel, the dictates of Faretta are satisfied,

the inquiry is over, and the defendant may proceed unrepresented. See Muehlman v. State, 3 So.3d 1149, 1150 (Fla. 2009)(quoting State v. Bowen, 698 So.2d 248, 251 (Fla. 1997)). When that occurs, "[t]he court may not inquire further into whether the defendant 'could provide himself with a substantively qualitative defense,' for it is within the defendant's right, if he or she so chooses, to sit mute and mount no defense at all." Id. (citation omitted)(quoting Bowen, 698 So.2d at 251). Moreover, "[w]here a competent defendant 'knowingly and intelligently' waives the right to counsel and proceeds unrepresented 'with and intelligently' waives the right to counsel and proceeds unrepresented 'with eyes open,' he or she *ipso facto* receives a 'fair trial' for right to counsel purposes." Id. (quoting Potts v. State, 718 So.2d 757, 759-60 (Fla. 1998)).

The record further confirms that the petitioner in the state forum appeared lucid, articulate, and had a clear understanding of what he was facing. The court advised him of the penalties he faced if convicted and the petitioner rejected and insisted that a 2-year plea offer be vacated simply because his scoresheet contained an error, despite being cautioned that he faced, without the PRRA enhancement, a 5-year statutory maximum if convicted at trial. Nothing of record in the state forum or this habeas proceeding suggests that petitioner was suffering from a mental illness to the point where he was not competent to conduct trial proceedings himself. See Muehleman v. State, 3 So.3d 1149, 1160 (Fla. 200); see also, Potts v. State, 718 So.2d 757 (Fla. 1998)(rejecting claim petitioner was not informed of the dangers and disadvantages of self-representation). To the contrary, it is evidence from the record that he was able to select a jury of his choosing, and then attempt to sway the jury's sympathy.

Under the totality of the circumstances present here, the

rejection of this claim on direct appeal was not an unreasonable application of controlling federal constitutional principles. The state court decision rejecting the claim is entitled to deference and should not be disturbed here. Williams v. Taylor, supra.

In **claim 4**, petitioner asserts that the prosecution failed to disclose favorable exculpatory evidence to the defense by withholding the medical records of the victim documenting the severity or lack thereof of the victim's injuries, in violation of Brady v. Maryland, 373 U.S. 83 (1963). (DE#1:12; DE#4:15). Petitioner suggests that the prosecution withheld this evidence, and merely represented that the victim's injuries were "moderate," in order to support the amended charges. (DE#4:16). Petitioner, however, claims that this evidence would have negated the aggravating factor of the amended charge and rebutted the prosecution's representations regarding the nature and extent of the victim's injuries. (Id.).

"In Brady, the Supreme Court placed an affirmative duty on the prosecution to reveal any 'evidence [that] is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" Haliburton v. Sec'y, Fla. Dep't of Corr's, 342 F.3d 1233, 1238 (11 Cir. 2003)(quoting Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. 1194). The affirmative duty includes "[i]mpeachment evidence ... as well as exculpatory evidence." United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The prosecution, however, is not required under Brady to "deliver [its] entire file to defense counsel, but only [that it] disclose" material evidence. Id. at 675, 105 S.Ct. 3375 (footnote omitted). Under Brady, the evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682,

105 S.Ct. 3375.

In the state forum, the petitioner raised the claim by way of prosecutorial misconduct for withholding exculpatory Brady materials. (DE#11-2:Ex.43:79). There, petitioner argued that the medical records were required by the defense to ascertain the nature and extent of the victim's purported injuries, but the state failed and/or otherwise refused to produce them, thereby preventing the defense from utilizing them at trial. (DE#11-3:Ex.43:79).

The trial court denied relief based on the state's response thereto, which argued in relevant part, that the claim was procedurally barred, and even if not barred, failed on the merits, because the petitioner had also not demonstrated how such information would have altered the outcome of the trial. (DE#11-3:Ex.44:105-106; DE#11-3:Ex.45). Alternatively, the respondent argued no Brady violation occurred. (Id.). According to the respondent, by petitioner's own admissions, as reflected in his *pro se* filings seeking to proceed *pro se*, he represented to the court that he had diligently investigated and prepared his case for trial, and that he is or otherwise would be ready for trial by December 2010. (Id.). The respondent further argued that no Brady violation occurred where the petitioner, aware of the existence of the medical records from the victim's deposition, could have issued a subpoena requesting copies of them prior to trial, but chose not do so. (Id.). The foregoing rejection of the claim was summarily affirmed on appeal in a decision without written opinion. Tuomi v. State, 166 So.3d 801 (Fla. 4 DCA 2015)(table).

First, it is worth noting that petitioner has not demonstrated either in the state forum or this habeas proceeding that the subject medical/hospital records were exculpatory in nature or otherwise

rebutted the state's argument that the victim's injuries were moderate. To the contrary, the victim testified she was severely beaten by the petitioner; and, as a result, received knots to her head and a laceration to her face, requiring ten stitches. Petitioner has not shown here or in the state forum that the laceration or injuries she sustained were not caused by or as a result of the petitioner's beating. Thus, even if the prosecution withheld the medical records documenting the nature and extent of the victim's injuries, the suppression did not result in any prejudice to the defense.

The petitioner, who represented himself at trial, cross-examined the victim, Susan, regarding the events that evening. In fact, during cross-examination, petitioner conceded that he did, in fact, strike her, and apologized for doing so. (DE#11-2:Ex.25:T.141). Petitioner conceded that the victim had received a "cut," and then asked if she had been in much pain, to which the victim indicated that she had. (Id.:T.141-42). Petitioner was aware that the victim had been taken to the hospital for injuries because he asked her during cross-examination how long she had been in the hospital the night of the incident. (Id.:T.142). Susan responded that it was approximately three to four hours. (Id.). He then asked the victim to confirm whether or not she required ten stitches for a laceration to her left eye, to which the victim responded that she did. (T.142).

After the victim indicated there were tests done at the hospital, petitioner then testified that he did not have a copy of the medical records, to which the prosecution objected, indicating that the petitioner was "testifying." (Id.:T.143). The court overruled the objection, but did advise the petitioner to "just ask the question, if you have one." (Id.). After asking the victim what

the final diagnosis on discharge was, she said it was ten stitches above her eye. (Id.). Petitioner attempted to establish through cross-examination that he was apologetic for the incident, and that he never planned or otherwise intended to harm or otherwise cause that injury to Susan. (Id.:T.143-144). After the victim responded that she believed he had every intention of killing her, petitioner responded, "Well, I really -- I don't think that would have happened, ma'am, but again it's a blur to me, most of it. I'm hanging on right now by a thread trying to remember, you know; I learned what I know from--." (T.144-45). The court then interjected, asking the petitioner whether he had any more questions of the witness, to which the petitioner responded that he did. (T.145).

Even if as suggested by the petitioner here, the prosecution failed to provide him with the victim's medical/hospital records, and further assuming, without deciding, that those documents could have been utilized by the defense during cross-examination of the victim, the petitioner has not demonstrated here nor in the state forum that such evidence would have been favorable to the defense. To the contrary, it may have been more detrimental, reinforcing the victim's testimony regarding the nature and extent of the injury she received as a result of the petitioner's beating. Consequently, petitioner has not demonstrated a due process violation resulting from the prosecution's purported failure to turn over exculpatory evidence. Thus, the rejection of this claim in the state forum should not be disturbed here. Williams v. Taylor, supra.

In **claim 5**, petitioner asserts that the trial court's comment to the jury that the petitioner chose not to testify violated petitioner's constitutional rights. (DE#1:13; DE#4:17). In related **claim 6**, petitioner asserts that the prosecution engaged in prosecutorial misconduct during closing argument by commenting on

petitioner's failure to testify on his own behalf at trial. (DE#1:15; DE#4:19). In support thereof, petitioner explains that during his closing argument, the prosecution objected, stating that the petitioner was arguing facts not in evidence, because the petitioner was explaining to the jury that he became homeless because his stepfather was always picking fights with petitioner. (DE#4:17). After the court advised the jury to disregard the foregoing, petitioner claims the prosecution erroneously indicated that the explanation the petitioner gave during closing regarding how the victim received the laceration to her eye was not evidence because the petitioner had chosen not to testify on his own behalf and he could not do so during closing. (Id.:18).

In the Rule 3.850 proceeding, where the subject claim was raised, petitioner claimed that the prosecution, during closing argument, deliberately commented on the petitioner's failure to testify, and the court compounded the error by providing an erroneous instruction that again commented on the petitioner's silence, without giving a subsequent curative instruction. (DE#11-3:Ex.43:79,88-89). Petitioner conceded in his post-conviction motion that he did not preserve the error for review, having failed to object to the court's erroneous instruction. (Id.).

The trial court denied relief on these interrelated claims, based on the state's response thereto, which argued in relevant part, that the claim was barred from review in the Rule 3.850 proceeding because the petitioner had not preserved the issue for review below, and because the issue had been raised and rejected on direct appeal. (DE#11-3:Ex.44:106-110; DE#11-3:Ex.45). That denial was subsequently *per curiam* affirmed on appeal in a decision without written opinion. Tuomi v. State, 166 So.3d 801 (Fla. 4 DCA 2015)(table).

Careful review of the trial court record reveals that during closing argument, the petitioner first explained to the jury the elements necessary to support the charged offense of aggravated battery. (DE#11-2:Ex.25:T.183-189). Petitioner first conceded that he intentionally touched or struck the victim against her will. (Id.:T.183). Regarding the next element, that petitioner intentionally and knowingly caused the victim great bodily harm, permanent disfigurement, or permanent disability, the petitioner argued there was no permanent disability, nor was there any permanent disfigurement because the purported cut above the victim's eye was not even visible. (Id.:183-84). Petitioner suggested that the only issue remaining was whether he caused the victim great bodily harm. (Id.:184). In that regard, petitioner provided the jury with what he believed that term meant, which included a "serious physical impairment of the human bodily, especially bodily injury that creates a substantial risk of death..." (Id.:185). The petitioner provided the jury with a definition of "bodily injury," which included a "cut" or "abrasion." (T.188). Immediately thereafter, petitioner attempted to show the jury a criminal punishment code scoresheet, to which the prosecution objected, arguing facts not in evidence. (T.188-189). The court advised petitioner that the scoresheet "has nothing to do with this case." (T.189). Petitioner responded, "Okay, All right...." (T.189).

Petitioner then continued with his closing, honing in on the fact that the victim's laceration was not moderate, but could be "slight," and suggested:

> It's a cut; there was broken glass at the scene. Nobody knew-I don't even know -- it looked like a large cut to me. I couldn't say for sure that she did or didn't fall down when I hit her, but she did admit that she feel down when I hit here, and there was broken glass

> everywhere on the scene. Now, I can't say that I didn't cause that injury by hitting her with my closed fist, but still it's not an injury that constitutes great bodily harm, all right, I believe. And we are talking about a very serious charge here of aggravated battery that the state is accusing me of, and it is punishable by a lot of time. So, you know, I met these people; I was homeless on the beach doing the best I could. I had stayed at Dubois Beach in Jupiter because I feel that that's a safe place for, you know, for me as a homeless person; my family lived close by although I couldn't stay at home because my stepfather was always picking fights with me--...

(T.190-191).

Again, the prosecution objected to the foregoing on the basis that petitioner was arguing facts not in evidence. (T.191). The court responded:

> Okay, sustained. Disregard these last comments about where he stayed and his family and all that. If he wanted to be a witness, he could have been a witness; he's decided--...not to be a witness, so we have to--...we have to decide the case based on the evidence that's presented here.

(T.191-192).

Petitioner responded, explaining to the court that he had lived on the beach as a homeless person when he met the victim. (T.192). However, the court again indicated that it was sustaining the prosecution's objection, and reminded the petitioner "not to talk about that." (T.192).

During rebuttal closing, the prosecution explained to the jury that the court would be instructing them that, to prove as petitioner suggested during closing the offense of simple battery, as a lesser included offense of felony battery, they would have to find that petitioner intentionally touched or struck or caused bodily harm to the victim. (T.194). In other words, respondent explained that if the petitioner walked up to the victim and touched her against her will that's technically a battery because proof of harm is not required. (T.194). The prosecution then countered that a simple shoulder touch was not what occurred in this case. (T.194). The prosecution directed the jury to later examine the evidence, including the photos of the victims showing the laceration that required ten stitches. (T.194-95). After further narrating the evidence adduced at trial, the prosecution also advised the jury that the judge would be instructing them not to base their verdict on "bias, prejudice, or sympathy for anybody, including the defendant," but rather to examine the facts of the case itself. (T.196).

Next, the prosecution argued the legal difference between felony battery and aggravated battery, suggesting that evidence contradicts petitioner's speculative suggestion that the victim received the eye laceration because there was glass strewn about the floor. (T.196-197). He reminded the jury that evidence established that once the victim fell to the ground, the petitioner continued pummeling her. (Id.). Thereafter, in pertinent part, the prosecution reminded the jury:

> Nothing Mr. Tuomi [petitioner] said today was evidence. He had the opportunity to get up there and be a witness; instead he came in the opening statement and the closing argument and said all of these tings, but the bottom line is it's not evidence. The only evidence that you

> can consider is what came from that stand, and there is no evidence that she accidentally got cut on a piece of glass after he broke the table; there is only evidence that he was on top of her, punching her in the head so many times she couldn't count, and he -- and she thought he was going to kill her, and he didn't think that it was going to get this far because she's a homeless bitch, but you know what? She came in here and she told her story and she stayed strong, and for that you should find him guilty of aggravated battery. Thank you.

(T.196-97). Thereafter, the court instructed the jury in relevant part on the law they were to follow, including the fact that they were to consider only the evidence introduced at trial in determining whether the state had proven the charged offense beyond a reasonable doubt. (T.200-01). The court further instructed the jury that the defendant exercised his fundamental right by choosing not to be a witness in this case, and that they "must not view this as an admission of guilt or be influenced in any way by his decision." (T.201). The court further stated that "[N]o juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case." (T.201). The court also instructed the jury that its verdict must be decided based only on the evidence it has heard from the testimony of the witnesses and have seen in the form of exhibits in evidence, and considered together with the instructions provided by the court. (T.201-202). They were further reminded that "the lawyers are not on trial, and your feelings about them should not influence your decision. (T.202-03). More importantly, the court also instructed the jury that it was exclusively their job to decide the verdict, and that the court could not "participate in that decision in any way, so please disregard anything I may have said that made you think I preferred one verdict over another. It's up to you to decide what evidence is reliable..." (T.203).

It is axiomatic that a defendant has the constitutional right to decline to testify against himself in a criminal proceeding. See U.S. Const. Amend. V ("No person...shall be compelled in any criminal case to be a witness against himself."); Fla. Const. art. I, §9 ("No person shall be ...compelled in any criminal matter to be a witness against oneself."); see also, State v. Kinchen, 490 So.2d 2, 22 (Fla. 1985)("The right to stand mute at trial is protected by both our state and federal constitutions.").

"[A] comment on the right to remain silent strikes at the heart of our criminal justice system." Ventura v. State, 29 So.3d 1086, 1088 (Fla. 2010). Thus, any statement that focuses on the defendant's failure to testify is "serious error" because it can result in a "substantial likelihood that meaningful comments will vitiate the right to a fair trial." State v. DiGuilio, 491 So.2d 1129, 1136 (Fla. 1986). In Griffin v. California, 380 U.S. 609 (1965), the United States Supreme Court made clear that:

> the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Griffin v. California, 380 U.S. at 615. When determining whether an impermissible comment on a defendant's right to remain silent has occurred, federal courts must consider the totality of the circumstances and evaluate whether the remark is "manifestly intended" by the prosecutor or "was of such a character" that it "would naturally and necessarily be understood by the jury" as a comment on the defendant's silence. Matire v. Wainwright, 811 F.2d 1430 (11 Cir. 1987), citing United States v. Vera, 701 F.2d 1349 (11

Cir. 1983), also citing United States v. Forrest, 620 F.2d 446, 455-56 (5 Cir. 1980); See also Baxter v. Thomas 45 F.3d 1501 (11 Cir. 1995); United States v. Beale, 921 F.2d 1412 (11 Cir. 1991).

In Lakeside v. Oregon, 435 U.S. 333 (1978), the United States Supreme Court further made clear that the purpose of the "judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of his privilege not to testify...is to remove from the jury's deliberations any influence of unspoken adverse inferences." Lakeside v. Oregon, 435 U.S. 333, 339, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978). "Without the cautionary instruction, the jurors were free to infer or speculate that a defendant who does not testify must surely be guilty, otherwise he would take the stand on his own behalf." Andrews v. State, 443 So.2d 78, 84-85 (Fla. 1983)(concluding that court's comment on defendant's right not to testify, which was not requested by the defendant and did not include a cautionary instruction, was reversible error).

If some other explanation for the remark is equally plausible, the Court cannot find that counsel 'manifestly intended' to comment on the defendant's failure to testify. United States v. Swindall, 971 F.2d 1531 (11th Cir.1992)(citing, Samuels v. United States, 398 F.2d 964, 968 (5 Cir. 1968)(Court declined to reverse when finding it "very possible" that the prosecutor's statement was "merely inadvertent")); United States v. Ward, 552 F.2d 1080, 1083 (5 Cir. 1977)(approving a prosecutor's remarks when they were "more likely" intended to "properly refer to the defendants' failure to produce evidence of any kind to rebut the inference of knowledge that naturally follows from the possession of recently stolen property" than to comment on the defendants' failure to take the stand).

Here, careful review of the record reveals that the comments

under attack were not of such a character that it would naturally and necessarily be understood by the jury as a comment on the defendant's silence. In fact, the now challenged prosecutor's comments during closing argument, while inartful, summarized the facts adduced at trial, and were in direct response to the representations of facts not in evidence that petitioner made during closing. Moreover, it is evident that the fundamental fairness of the movant's trial was not affected, given the more than sufficient evidence implicating the petitioner in the offense. See Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974); Hall v. Wainwright, 733 F.2d 766, 733 (11 Cir. 1984); Hance v. Zant, 696 F.2d 940 (11 Cir.), cert. denied, 463 U.S. 1210 (1983); Williams v. Weldon, 826 F.2d 1018, 1023 (11 Cir.), cert. denied, 485 U.S. 964 (1988).

The petitioner's challenge to the cautionary instruction provided by the court regarding petitioner's constitutional right not to testify was proper. Further, petitioner also has not demonstrated that the prosecution's comments had a substantial and injurious effect on the jury. See Gay v. Sec'y, Fla. Dep't of Corr's, 523 Fed.Appx. 560, 563 (11th Cir. 2013). At the conclusion of argument by the parties, the court instructed the jury that it could not view petitioner's failure to testify on his own behalf as an admission of guilt nor that it should in any way influence their verdict. Thus, even if the prosecution's comments were error, the court's curative instruction was proper and cured any such error. It is worth noting that during his closing, petitioner attempted to put facts before the jury that were not brought out by the state during its case-in-chief, nor during petitioner's cross-examination of the state witnesses. Thus, the prosecution properly argued that petitioner was attempting to argue facts that were not in evidence. It does not appear, as suggested by petitioner, that the comments were directly made to sway the jury adversely against the

petitioner. Consequently, the rejection of the claims in the state forum, especially on the alternative basis that the evidence was more than sufficient to support the charged offense of conviction, was neither contrary to nor an unreasonable application of federal law, and it should thus not be disturbed here. 28 U.S.C. §2254(d)(1); Williams v. Taylor, 529 U.S. 362 (2000). Relief is therefore not warranted on **claims 5 and 6**.

In **claim 7**, petitioner asserts that he was denied effective assistance of counsel, where his lawyer failed to assist the petitioner in preparing a motion for new trial. (DE#1:16; DE#4:20). Here, he maintains counsel should have prepared a "more legally sophisticated motion" establishing that the prosecution had not met its burden of demonstrating that the victim sustained "great bodily injury," as opposed to, "slight" or "moderate" injury. (DE#4:21). In related **claim 8**, petitioner asserts that his due process rights were violated when the court denied petitioner's motion for new trial without a hearing or without providing petitioner the assistance of counsel. (DE#1:18; DE#4:22).

Careful review of the record reveals that immediately following the jury's verdict, finding petitioner guilty of aggravated battery, as charged in the Second Amended Information, the court advised petitioner that he believed petitioner should have an attorney assist him with this next phase of his case, and reminded petitioner that his prior counsel, whom petitioner had discharged, Attorney Pagan, was "very good." (DE#11-2:Ex.25:T.214-15). Petitioner responded, stating "[I]'m regretful now for what I've done because I've done opened up a can of worms I can't close now." (Id.:T.215). Petitioner then indicated he wanted counsel appointed, but not from the public defender's office, and as a result, the court appointed Attorney Elizabeth Gardner, to represent the petitioner post-trial.

(T.215-218). The petitioner turned to the prosecution and stated that he gave it the best he could because he did not and still does not believe he is guilty of aggravated battery. (T.218).

Approximately a week later, although he was aware that he was currently represented by Attorney Gardner, petitioner filed his own *pro se* motion for new trial, arguing that the verdict was contrary to the weight of the evidence, and raised numerous other claims of trial court error. (DE#11-2:Ex.27). Before a ruling was had on that motion, petitioner then filed a motion requesting the discharge of Attorney Gardner, on the basis that she was refusing to handle his motion for new trial. (DE#11-2:Ex.28). On March 14, 2011, the court conducted a Nelson[21] hearing, at which time petitioner renewed his request, explaining that counsel refused to assist, adopt or otherwise file a motion for new trial, so he had been forced to file a bar complaint against her. (DE#11-2:Ex.29:346,349,352-53). Petitioner then advised the court that he wanted counsel discharged and wanted the Public Defender to be appointed to represent him. (T.352-53). The court then granted Attorney Gardner's *ore tenus* motion to withdraw, and an order was then entered appointing the Public Defender. (T.354; DE#11-3:Ex.30).

When the claim was raised in the Rule 3.850 proceeding, it was denied by the trial court, based on the state's response thereto, which argued, in pertinent part, that petitioner was complaining Attorney Gardner and the Public Defender were both ineffective for failing to assist him in the preparation and litigation of a post trial motion for new trial. (DE#11-3:Ex.44:110-111). After citing to the appropriate federal Strickland standard, the prosecution argued that the petitioner failed to assert a facially valid claim

[21]Nelson v. State, 274 So.2d 256 (Fla. 4 DCA 1973).

because it did not discuss how counsel performed deficiently, nor how he was prejudiced. (Id.). In other words, petitioner had not shown that the result of his post trial motions would have been different, but for counsel's ineffectiveness. (Id.). That denial was subsequently *per curiam* affirmed in a decision without written opinion. Tuomi v. State, 166 So.3d 801 (Fla. 4 DCA 2015)(table).

Here, as in the state forum, petitioner has failed to meet his burden of proof. He has not demonstrated that had counsel filed and/or otherwise assisted in amending the motion for new trial to raise the arguments set forth herein, that such a motion would have been granted, especially given the evidence adduced at trial. As will be recalled, the trial court judge who presided over the trial also considered petitioner's motion for new trial and amendment thereto, when it entered its order denying the motion. (DE#11-3:Ex.31). Consequently, the petitioner cannot satisfy either the deficient performance or prejudice prong under Strickland. Therefore, the state court rejection of the claim, as noted above, was not contrary to federal constitutional principles, and should not be disturbed here. Williams v. Taylor, supra.

To the extent the petitioner argues in **claim 8** that the court erred in failing to hold an evidentiary hearing on his motion for new trial, that claim warrants no federal habeas corpus relief because a state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief since no question of a constitutional nature is involved. The federal courts must defer to a state court's interpretation of its own rules of evidence and procedure. Machin v Wainwright, 758 F.2d 1431 1433 (11 Cir. 1985); Jones v. Goodwin, 982 F.2d 464, 471 (11th Cir. 1993); see also Krasnow v. Navarro, 909 F.2d 451, 452 (11th Cir. 1990); Carrizales v. Wainwright, 699 F.2d 1053 (11th Cir. 1983).

The federal habeas corpus court will be bound by the Florida court's interpretation of its own laws unless that interpretation breaches a federal constitutional mandate. McCoy v. Newsome, 953 F.2d 1252, 1264 (11th Cir.), cert. den'd, 504 U.S. 944 (1992). State courts are the ultimate expositors of their own state's laws, and federal courts entertaining petitions for writs of habeas corpus are bound by the construction placed on a state's criminal statutes by the courts of the state except in extreme cases. Mendiola v. Estelle, 635 F.2d 487, 489 (5th Cir. Unit A 1981). Thus, the petitioner's claim that the state court erred when it denied his motion to amend his Rule 3.850 post-conviction motion is based on state law issues which is not cognizable here.

To the extent Petitioner argues the state court's denial of his motion for new trial deprived him of due process of law, such a claim also does not present an issue that is cognizable on federal habeas review. Likewise, petitioner has not demonstrated that his due process rights were violated because the court failed to hold a hearing on these or any of the claims raised herein. In the Eleventh Circuit, a §2254 court is not an appropriate forum for a prisoner to challenge the process afforded him in state collateral proceedings because such a claim represents an attack on post-conviction proceedings. See e.g., Quince v. Crosby, 360 F.3d 1259, 1261-62 (11th Cir. 2004)(affirming district court's denial of habeas relief based on state court judge's refusal to recuse himself from the Rule 3.850 hearing, explaining "while habeas relief is available to address defects in a criminal defendant's conviction and sentence, an alleged defect in a collateral proceeding does not state a basis for habeas relief."); Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987)(per curiam) (concluding §2254 claim that petitioner's due process rights were violated when state post-conviction court held no evidentiary hearing and failed to

attach appropriate portions of record to its opinion "goes to issues unrelated to the cause of petitioner's detention [and] does not state a basis for habeas relief").

In **claim 9**, petitioner asserts that the trial court erred in denying defense counsel's motion to withdraw after it was previously established that a conflict pre-existed prior to Jenny Lancaster being appointed to represent the petitioner at sentencing. (DE#1:19; DE#4:24). According to petitioner, at a March 2011 hearing post trial, and then again in June 2011, the court failed to ascertain whether the Public Defender's Office still had a conflict, or whether alternate counsel should be appointed. (DE#4:25). It appears from the state court docket that, in fact, a court event was held on June 15, 2011 at 8:30 a.m. on a motion to withdraw. The respondent argues in correctly here that the claim herein refers only to Attorney Gardner and not Attorney Lancaster. That argument, however, is not well taken.

To the contrary, as is evident from the above, the petitioner was clearly arguing his claim in relation to Attorney Lancaster in his federal habeas corpus proceeding, as well as, in the state forum. In fact, in his Rule 3.850 motion, petitioner argued in ground eight that the court erred in denying Attorney Lancaster's motion to withdraw and for the appointment of conflict free counsel, despite there being a clear conflict. (DE#11-3:Ex.43:80). The trial court denied relief, based on the state's response thereto, which argued in pertinent part, as follows:

> ...Initially, the State notes that Defendant is attacking the Court's failure to remove APD Lancaster, Defendant is procedurally barred from raising this claim because he could have appealed the Court's denial of the motion to withdraw, but did not....

> At the hearing on Defendant's motion to withdraw his guilty plea, Defendant alleged that he only pled because SPD Pagan advised him that if he did not, he could face a harsher sentence. [Tr. at 7] There was no conflict that "actually affected" Defendant's representation. This was sage advice. At that same hearing, the State placed Defendant on notice that withdrawal of his guilty plea exposed him to a fifteen year sentence as a Prison Releasee Reoffender under a forthcoming amended information charging aggravated battery. [Tr. at 8].
>
> ...Granting or denying AFPD Lancaster's motion had no effect on Defendant's sentence. Defendant has not "show[n] that a conflict of interest actually affected the adequacy of representation." Cuyler, 446 U.S. at 349. As forewarned, this case played out exactly as all the parties, the APD, the Court, and the State advised that it would. Defendant knowingly chose to disregard the warnings. This claim is subject to summary denial.

(DE#11-3:Ex.44:111-112). That denial was subsequently *per curiam* affirmed in a decision without written opinion. Tuomi v. State, 166 So.3d 801 (Fla. 4 DCA 2015)(table).

Review of the record reveals that at the March 2011 hearing, when the court allowed Attorney Gardner to withdraw as counsel, the petitioner therein agreed to have the Public Defender re-appointed to represent him moving forward with post-conviction matters on his case. (DE#11-2:Ex.29:T.352-54). On June 14, 2011, Assistant Public Defender Jenny Lancaster filed a motion to withdraw and for appointment of conflict free counsel, explaining that the Office of the Public Defender had previously been granted leave to withdraw in this case because the petitioner maintained that a conflict had arisen on the basis that the assistant public defender at the time had misadvised him to enter into a plea based on an incorrect

sentencing scoresheet. (DE#11-3:Ex.33). The current assistant public defender explained that the court had re-appointed her office because petitioner had stated, following the discharge of yet another lawyer, Attorney Gardner, that he had no problems with the Office of the Public Defender, nor with its appointment to represent him moving forward. (Id.). According to petitioner, the motion was denied. The respondent, despite this court's show cause order, has failed to provide this court with all documents relevant to the issues before this court, as instructed, including the state trial docket, and as pertinent here, the event form, as noted thereon, which would confirm whether the petitioner's representation in this regard.

"Where a constitutional right to counsel exists, [the Supreme Court's] Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." See United States v. Mounier, 307 Fed. Appx. 379, 380 (11th Cir. 2009)(quoting Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)).

Further, the Supreme Court has also held that, "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980)). While "a defendant who shows that a conflict of interest actually affected his representation need not demonstrate prejudice in order to obtain relief," he is not entitled to relief unless he shows both: (1) an actual conflict; and (2) an adverse affect. Id. (quoting United States v. Novaton, 271 F.3d 968, 1010 (11th Cir. 2001)). "An 'actual conflict' of interest occurs when a lawyer has 'inconsistent interests,'" however, "a speculative or

merely hypothetical conflict of interest does not yield a Sixth Amendment violation." Id. (quoting United States v. Novaton, 271 F.3d at 1010-11 (quotations omitted). To prove an adverse effect, the defendant must show that: (1) the defense attorney could have pursued a plausible alternative strategy; (2) this alternative strategy was reasonable; and (3) the alternative strategy was not followed because it conflicted with the attorney's external loyalties. Id.

Here, as will be recalled, the petitioner raised no objection to having the Public Defender's Office appointed to represent him post-trial. The fact that Attorney Lancaster filed the motion anyway, based on a prior purported conflict, does not mean that an actual conflict existed, much less that the petitioner was adversely affected therefrom. Given the detailed history of this case, together with the petitioner's own admissions in the state forum, it is clear that prior Assistant Public Defender Pagan, who represented petitioner during the change of plea proceeding was not ineffective. While the prosecution and Pagan both admittedly advised the court that at the time the parties were negotiating the petitioner's plea, immediately before jury selection, which resulted in the imposition of a 2-year sentence, when petitioner faced a 5-year term of imprisonment, neither realized that the scoresheet used at the time contained incorrect information. However, the prosecution assured the court that the scoresheet did not factor into the negotiations because the petitioner was going to receive prison time, due to the nature of the injuries to the victim.

Petitioner latched onto the concession regarding the error in the scoresheet to argue that his plea was not knowing and voluntary. The petitioner would have preferred for the state to have vacated the sentence and imposed a term of imprisonment less than the 24

months received. However, the prosecution clearly indicated at the time if the petitioner persisted in challenging the lawfulness of the plea, they would be amending the information, given the petitioner's reoffender status, which would require a 15-year minimum term of imprisonment if convicted at trial. Despite being advised of the foregoing in detail, the petitioner insisted that he wanted to proceed to trial. Therefore, the court granted his request. The advice provided during those proceedings by counsel was not deficient. Petitioner, however insisted on taking his case to trial.

It will be recalled that following his conviction, petitioner agreed to the re-appointment of the Officer of the Public Defender, after his request to discharge a private appointed counsel was again granted. He has not shown here that an actual conflict existed arising from counsel's representation post-conviction nor that even if such a conflict did exist, that he was adversely affected. Thus, petitioner cannot prevail on this claim. The court's denial of counsel's motion to withdraw in the state forum should not be disturbed here. Relief is therefore not warranted on this basis.

In **claim 10**, petitioner asserts that there was insufficient evidence to support petitioner's conviction for aggravated battery. (DE#1:20; DE#4:25). Petitioner maintains there was no evidence adduced at trial that he intentionally caused the victim great bodily harm. (DE#4:25). As cause for failing to properly raise the claim, petitioner relies on Martinez v. Ryan, supra. for the proposition that his claim is "substantial" so it should be addressed on the merits here. DE#4:28).

In Florida, the courts do not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury

may lawfully take of it favorable to the opposite party can be sustained under the law. See Holloman v. State, ___ So.3d ___, 2017 WL 626656 (Fla. 4 DCA Feb. 15, 2017)(quoting Pagan v. State, 830 So.2d 792, 803 (Fla. 2002)); see also, Starks v. State, So.3d , 2017 WL 1067815 (Fla. 3 DCA Mar. 22, 2017)(quoting Lynch v. State, 293 So.2d 44, 45 (Fla. 1974)(stating that "[w]here there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge.")). A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence admitted at trial, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. See Lynch v. State, 293 So.2d at 45.

When the issue was raised in the Rule 3.850 proceeding, it was denied by the trial court, based on the state's response thereto, which argued that the claim was procedurally barred because petitioner did not move for a judgment of acquittal at the close of the evidence at trial, thereby waiving the issue. (DE#11-3:Ex.44:112-113). The state also argued that petitioner did not appeal the denial of his motion for new trial, and therefore, the claim remained procedurally defaulted. (Id.). Alternatively, the state argued the conviction was amply supported by the evidence. (Id.:113-114). The foregoing findings and rejection of the claim was summarily affirmed on appeal in a decision without written opinion. Tuomi v. State, 166 So.3d 801 (Fla. 4 DCA 2015)(table).

Independent review of the record reveals that the victim

testified the petitioner repeatedly beat her in and about the face and head, approximately "20 times maybe, if not more." (DE#11-2:Ex.25:T.132). The attack left knots on the victim's head and a visible laceration requiring ten stitches above one of the victim's eyes. (Id.:T.132,134,143,147). As a result, the victim, covered in blood, was transported to the hospital for emergency medical treatment, and incurred more than $6,000 in medical bills as a result of the petitioner's beating. (Id.:T.134,142). When the state rested, the court advised petitioner that "it's customary for the defense to make a motion at this time for a directed verdict, in other words to ask the judge to enter a verdict in their favor because they don't think the evidence is sufficient to find them guilty, or sometimes they have other reasons." (Id.:T.162). When the court asked petitioner whether he wanted to make such a motion, the *pro se* petitioner responded, "Not at this time, Your Honor." (Id.:T.162). Consequently, the respondent is correct that the petitioner failed to preserve the issue below. Even if, as suggested by petitioner, he had been appointed counsel to represent him in the Rule 3.850 proceeding, he would still not prevail on the claim as he did not preserve it at trial.

Regardless, on the merits, the petitioner still is not entitled to the relief requested. In order to determine whether the state court's rejection of the claim was proper, review of the sufficiency of the evidence is warranted. On a petition for federal habeas corpus relief, the standard for review of the sufficiency of the evidence is whether the evidence presented, viewed in a light most favorable to the state, would have permitted a rational trier of fact to find the petitioner guilty of the crimes charged beyond a

reasonable doubt.[22] Jackson v. Virginia, 443 U.S. 307 (1979); Simmons v. State, 934 So.2d 1100, 111 (Fla. 2006)(quoting Bradley v. State, 787 So.2d 732, 738 (Fla. 2001)). This familiar standard gives full play to the responsibility of the jury to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See Wilcox v. Ford, 813 F.2d 1140, 1143 (11 Cir. 1987)(citing Jackson v. Virginia, 443 U.S. at 326).

The Jackson standard for the sufficiency of the evidence is equally applicable to direct or circumstantial evidence. Jackson v. Virginia, 443 U.S. at 320; United States v. Peddle, 821 F.2d 1521, 1525 (11 Cir. 1987). The simple fact that the evidence gives some support to the defendant's theory of innocence does not warrant the grant of habeas relief. Wilcox v. Ford, 813 F.2d at 1143 (citing Martin v. State of Alabama, 730 F.2d 721, 724 (11 Cir. 1984)). It is not necessary that the evidence exclude every reasonable hypothesis except that of guilt. Holland v. United States, 348 U.S.

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[22]Similarly, in Florida, the test for sufficiency of the evidence is whether a "rational trier of fact could have found proof of guilt beyond a reasonable doubt." Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986)(citing Jackson v. Virginia, 443 U.S. 307 (1979)). The courts do not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974)(stating that "[w]here there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge."). A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence admitted at trial, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Gant v. State, 640 So.2d 1180, 1181 (Fla. 4 DCA 1994). It is for the jury to decide what inferences are to be drawn from the facts. Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). In cases consisting solely of circumstantial evidence, a motion for judgment of acquittal will be granted if the state failed to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt. State v. Law, 559 So.2d 187, 188 (Fla. 1989).

121, 140 (1954). Under Jackson, federal courts must look to state law for the substantive elements of the criminal offense, but to federal law for the determination of whether the evidence was sufficient under the Due Process Clause. Coleman v. Johnson, 566 U.S. ___, ____, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012).

The Due Process Clause of the Fourteenth Amendment requires the State to prove each element of the offense charged beyond a reasonable doubt. Thompson v. Nagle, 118 F.3d 1442, 1448 (11th Cir. 1997) (citing Jackson v. Virginia, 443 U.S. 307, 314 (1979)). In reviewing the sufficiency of the evidence, all conflicting inferences to be drawn from the evidence are presumed to have been resolved by the jury in favor of the prosecution. Thompson, 118 F.3d at 1448 (citing Machin v. Wainwright, 758 F.2d 1431, 1435 (11th Cir. 1985)). In Jackson, the Supreme Court "provides the federal due process benchmark for evidentiary sufficiency in criminal cases." Williams v. Sec'y for Dep't of Corr's, 395 Fed.Appx. 524, 525 (11th Cir. 2010) (*per curiam*) (citing Green v. Nelson, 595 F.3d 1245, 1252-53 (11th Cir. 2010)). In accordance with this authority, the relevant question is whether any rational jury, after viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the charged offense beyond a reasonable doubt. Jackson, 443 U.S. 319.

Further, in Florida, "a simple battery becomes an aggravated battery when a person intentionally or knowingly causes great bodily harm or uses a deadly weapon." See McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1239 n.5 (11th Cir. 2003) (quotations omitted). Florida Statutes §784.045 provides that "a person commits aggravated battery who, in committing battery: 1. intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or 2. uses a deadly weapon." See Fla. Stat.

§784.045(1)(a) (capitalization omitted).

As will be recalled, the state charged petitioner by Second Amended Information with aggravated battery, in violation of Fla.Stat. §784.045(1)(a)1 (Count 1), as follows:

> COUNT 1: ANTON ERIC TUOMI on or about December 5, 2009, in the County of Palm Beach and State of Florida, did actually and intentionally or knowingly caused great bodily harm, permanent disability, or permanent disfigurement to SUSAN RENE BLACK, contrary to Florida Statute 784.045(1)(a)1. (2 DEG FEL).

(DE#11-3:Ex.17).

The prosecution was thus required to present evidence of a touching or striking of the victim against her will, and in the course thereof, that the petitioner intentionally or knowingly caused great bodily harm, permanent disability or permanent disfigurement.

At trial, the court instructed the jury as to the elements of aggravated battery, that the state has to provide the following two elements beyond a reasonable doubt:

> the first element is simply a definition of battery, and that is that Anton Eric Tuomi intentionally touched or struck Susan Black against her will; and number two, the second element--...in committing the battery, intentionally or knowingly caused Susan Black great bodily harm, or permanent disability, or permanent disfigurement....

(DE#11-3:Ex.25:T.197-198).

As previously discussed in this Report, the record reflects that the petitioner repeatedly beat the victim, hitting in and about the face and head, which resulted in a laceration that required ten stitches. The jury was shown pictures of the victim's injuries, heard the victim testify, and was able to observe whether or not a visible scar still remained. Thus, after review of the Amended Information, along with the jury charge, together with the evidence adduced at trial, it is clear that there was more than sufficient evidence to support the jury's conviction. For federal sufficiency review, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319, 99 S.Ct. at 2789 (quotation omitted).

The Supreme Court in Coleman v. Johnson explained that there are two layers of judicial deference in federal habeas proceedings. Coleman v. Johnson, 566 U.S. at ____, 132 S.Ct. at 2062. First, a reviewing court on direct appeal may only set aside the jury's verdict for insufficient evidence if no rational trier of fact could have agreed with the jury. Id. Second, a federal habeas court may only overturn the state court decision if it was objectively unreasonable. Id. The Court went on to explain that the only question for the reviewing state court under Jackson is "whether the finding was so insupportable as to fall below the threshold of bare rationality." Id. at ____, 132 S.Ct. at 2065. Such a determination is entitled to deference under the AEDPA. Id.

Given the evidence adduced at trial, contrary to the petitioner's arguments here and in the state forum, he cannot demonstrate that there was insufficient evidence to support his aggravated battery conviction. Based on all the facts presented, a

rational trier of fact could have found the essential elements of the offense of aggravated battery were met by the prosecution, beyond a reasonable doubt. See Jackson, 443 U.S. at 319, 99 S.Ct. at 2789. This Court must defer to the jury's judgment as to the weight and credibility of the evidence. See Wilcox v. Ford, 813 F.2d 1140, 1143 (11 Cir. 1987), citing, Jackson v. Virginia, 443 U.S. at 326. Even if there was some evidence which gave support to petitioner's theory of defense, such a fact does not warrant habeas corpus relief. See Gibson v. Collins, 947 F.2d 780, 783 (5 Cir. 1991), cert. denied, 506 U.S. 833 (1992). Relief is therefore not warranted on this claim.

B. State Habeas Corpus Petition Claims

In **claim 11**, petitioner asserts that he was denied effective assistance of appellate counsel, where his lawyer failed to assign as error on appeal the trial court's error in failing to appoint conflict free counsel to represent the petitioner at a critical stage of the proceeding. (DE#1:22; DE#4:28). The claim was presented by petitioner in his state habeas corpus petition, which was summarily rejected by the appellate court on the merits. (DE#11-3:Exs.55-56).

As will be recalled, in **claim 2**, as discussed above, the petitioner raised the substantive issue underlying this ineffective assistance of appellate counsel claim. Because the arguments raised in support thereof warrant no federal habeas corpus relief, petitioner cannot demonstrate deficient performance or prejudice under Strickland arising from counsel's failure to raise the issue of trial court error in failing to appoint conflict free counsel on direct appeal. See Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). Thus, the rejection of this claim in the state habeas

corpus proceeding was not error. Relief is not warranted on this basis.

In **claim 12**, petitioner asserts that he was denied effective assistance of appellate counsel, where his lawyer failed to assign as error on appeal the trial court's error in permitting petitioner to proceed *pro se* without conducting an adequate Faretta inquiry prior to vacating petitioner's plea and setting the case for trial. (DE#1:23; DE#4:33). This claim was raised by petitioner in his state habeas corpus petition, which was denied by the appellate court on the merits. (DE#11-3:Exs.55-56).

As will be recalled, in **claim 3**, petitioner raised as a separate, independent claim, the substantive issue underlying this ineffective assistance of counsel claim. Since the petitioner's arguments in support of claim 3 are devoid of merit, the petitioner cannot demonstrate deficient performance or prejudice arising from counsel's failure to pursue the claim on appeal, as suggested. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). Therefore, the rejection of the claim in the state habeas corpus proceeding is entitled to deference and should not be disturbed here. Williams v. Taylor, supra. Relief is therefore not warranted on the ground presented here.

Under the totality of the circumstances present here, petitioner has not demonstrated that his constitutional rights were violated, much less that counsel was deficient under Strickland for any of the reasons stated, or that petitioner suffered prejudice arising therefrom. Consequently, relief must be denied. Thus, whether or not any of the grounds raised herein were properly exhausted in the state forum, since they it fails on the merits, the rejection or lack thereof should not be altered here. Williams v.

Taylor, supra. In conclusion, the record reflects that the petitioner received vigorous and able representation more than adequate under the Sixth Amendment standard. See Strickland v. Washington, 466 U.S. 668 (1984).

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

VIII. Evidentiary Hearing

Petitioner's request for an evidentiary hearing must be denied. To determine whether an evidentiary hearing is needed, `The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess [Petitioner's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), cert. den'd, 541 U.S. 1034 (2004), an evidentiary hearing is not warranted.

IX. Certificate of Appealability

As amended effective December 1, 2009, §2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2254 Proceedings, Rule 11(b), 28 U.S.C. foll. §2254.

After review of the record, petitioner is not entitled to a certificate of appealability. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, petitioner cannot satisfy the *Slack* test. Slack, 529 U.S. at 484.

As now provided by Rules Governing §2254 Proceedings, Rule 11(a), 28 U.S.C. foll. §2254: "[B]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

X. Conclusion

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

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 12th day of April, 2017.

UNITED STATES MAGISTRATE JUDGE

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