United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 1, 2021
Lyle W. Cayce
Clerk

No. 20-30046

RICHARD LYNN LONG, JR.,

Petitioner—Appellant,

versus

DARREL VANNOY, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:18-CV-608

Before JONES, COSTA, and WILSON, *Circuit Judges*.

PER CURIAM:*

Richard Long Jr., Louisiana prisoner # 363322, seeks a certificate of appealability (COA) from the denial of his 28 U.S.C. § 2254 application challenging his conviction of first degree murder. Relevant to this inquiry, Long argues (1) that he was incompetent at the time he pleaded guilty, (2) his counsel rendered ineffective assistance, (3) the district court erred in the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

standard it applied when determining his incompetency argument, and (4) the district court erred in denying his motion for an evidentiary hearing.

To obtain a COA, Long must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). He will satisfy this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where, as here, the district court denies relief on the merits, an applicant must show that reasonable jurists "would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Long has not made the requisite showing, his COA motion is DENIED.

As Long fails to make the required showing for a COA on his constitutional claims, we cannot consider whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534–35 (5th Cir. 2020).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

RICHARD LYNN LONG, JR.	CIVIL ACTION NO. 18-0608
VERSUS	JUDGE FOOTE
DARREL VANNOY, WARDEN	MAGISTRATE JUDGE HAYES

JUDGMENT

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, noting the lack of written objections, and concurring with the findings of the Magistrate Judge under the applicable law;

It is ordered that Petitioner's Petition for Writ of Habeas Corpus [Record Document 1] and Petitioner's motion for an evidentiary hearing [Record Document 24] are **denied**.

Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The court, after considering the record in this case and the standard set forth in 28 U.S.C. Section 2253, **denies** a certificate of appealability. Jurists of reason would not find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether this court was correct in its procedural ruling. See Slack v. McDaniel, 120 S.Ct. 1595, 1604 (2000).

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 9th day of September, 2019.

ELIZABETH E. FOOTE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

RICHARD LYNN LONG, JR.	*	**CIVIL ACTION NO. 18-0608**
VERSUS	*	**JUDGE ELIZABETH E. FOOTE**
DARREL VANNOY, WARDEN	*	**MAG. JUDGE KAREN L. HAYES**

REPORT AND RECOMMENDATION

Petitioner Richard Long, Jr., an inmate in the custody of Louisiana's Department of Corrections, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 27, 2018. [doc. # 1]. Long attacks his first degree murder conviction and life imprisonment at hard labor sentence imposed by Louisiana's Fifth Judicial District Court, Richland Parish. This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing orders of the Court.

Background[1]

On October 12, 2010, Long was indicted on one count of first degree murder and one count of conspiracy to commit first degree murder for the shooting and killing of a police officer during the commission of a burglary. On November 3, 2010, Long entered a plea of not guilty to both charges, and the State served Long notice of its intent to seek the death penalty. Prior to

[1] The underlying facts in this case have been set forth by the Louisiana Second Circuit Court of Appeal, *State v. Long*, 49,398 (La. App. 2 Cir. 12/17/14), 154 So. 3d 799, 800–03. Accordingly, only the history relevant to the pending petition is included.

trial, Long filed a motion to suppress a photographic lineup, wherein the sole eyewitness identified Long as the person who shot the police officer. The trial court denied Long's motion.

On January 13, 2014, Long withdrew his not guilty plea and pleaded guilty to first degree murder, in violation of La. R.S. 14:30. He reserved his right to appeal the trial court's denial of his motion to suppress pursuant to *State v. Crosby*, 338 So. 2d 584 (La. 1976). The State agreed it would not seek the death penalty and would dismiss the conspiracy to commit first degree murder charge. Long was subsequently sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence. *Long*, 154 So. 3d at 801–02.

On September 29, 2014, Long filed a motion to withdraw his guilty plea on the grounds that the prosecution violated the terms of the plea agreement. The trial court denied Long's motion, noting that his plea was knowing and voluntary, and there was no violation of the plea agreement. [doc. # 16-1 at 366–71].

Long filed a direct appeal in the Second Circuit Court of Appeal, claiming that the trial court erred in denying his motion to suppress the identification of him through the photographic lineup. On December 17, 2014 the Second Circuit affirmed his conviction and sentence. *Long*, 154 So. 3d at 806. Long applied for a supervisory and/or remedial writ, which the Louisiana Supreme Court denied on May 1, 2015. *State v. Long*, 173 So. 3d 1166 (La. 2015). Long did not file a petition for certiorari in the United States Supreme Court. [doc. # 1 ¶ 9(h)].

On March 23, 2016, Long filed an application for post-conviction relief in the state district court, alleging that (1) the State breached the plea agreement; (2) counsel was ineffective for failing to (a) investigate and present an expert on blood spatter, DNA, and handwriting analysis; and (b) know the relevant law and notify the trial court that Long was incompetent; and (3) his guilty plea was invalid because he was incompetent. [docs. # 1 ¶ 11(b), 16-1 at 356, 380,

414, 430]. The trial court denied Long's application on June 2, 2016. [doc. # 16-1 at 457–64]. On September 29, 2016, the Second Circuit denied his application for post-conviction relief. (*Id.* at 467). On March 2, 2018, the Louisiana Supreme Court denied Long's application for a supervisory and/or remedial writ. *State ex rel. Long v. State*, 2016-2071 (La. 3/2/18), 237 So. 3d 503. In its per curiam opinion, the Louisiana Supreme Court found that Long fully litigated his application for post-conviction relief in state court and exhausted his right to state collateral review. (*Id.*)

On March 27, 2018, Long filed the instant habeas corpus petition in the Middle District of Louisiana. [doc. # 1]. The Middle District transferred the proceeding to this District on May 4, 2018. [doc. # 2]. Long alleges the following: (1) the State breached the plea agreement; (2) his guilty plea was invalid because he was incompetent at the time of the plea; (3) trial counsel was ineffective for failing to investigate and present expert testimony on blood spatter physics; (4) trial counsel was ineffective for failing to hire an expert to conduct an independent analysis of DNA evidence; (5) trial counsel was ineffective for failing to hire a handwriting expert; (6) trial counsel was ineffective for failing to perform an independent, substantial investigation of the evidence; and (7) trial counsel was ineffective for failing to know the relevant law and notify the trial court that Long was incompetent. (Petition, [doc. # 1-1])

The State filed a response on September 7, 2018. (Response, [doc. # 16]). Long filed a reply on December 20, 2018.[2] (Reply, [doc. # 22]). On December 26, 2018, Long filed a supplemental reply (Supp. Reply, [doc. # 23]) and a motion for an evidentiary hearing [doc. #

[2] Long filed his initial petition as a pro se Petitioner. He subsequently obtained legal counsel who filed the December 20, 2018 reply brief.

24].[3] On January 14, 2019, the State filed an opposition to Long's motion for an evidentiary hearing. [doc. # 25]. This matter is ripe.

Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, 28 U.S.C. § 2254, governs habeas corpus relief of a state prisoner. Section 2254(a) limits federal court review to applications alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." After a state court has adjudicated a prisoner's claims on the merits, an application for a writ of habeas corpus should be granted only if the petitioner shows that the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

Federal review under § 2254(d)(1) "is limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts." *Dowthitt v. Johnson*, 230 F.3d 733, 740–41 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000)). "The 'contrary to' requirement refers to the holdings, as opposed to the dicta, of . . . [the

[3] Long claims he hired legal counsel specifically to file a motion for an evidentiary hearing, because Long believed he could file an adequate reply brief on his own but was unaware of the requirements for an evidentiary hearing. [doc. # 24].

Supreme Court's] decisions as of the time of the relevant state-court decision." *Id.* at 740 (citations and internal quotations omitted). "[U]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from . . . [the Supreme Court's] decisions but unreasonably applies the principle to the facts of the prisoner's case." *Id.* at 741 (quoting *Williams*, 529 U.S. at 413).

Section 2254(d)(2) speaks to the state court's factual determinations. *Dowthitt*, 230 F.3d at 741. Federal courts presume such determinations to be correct; however, a petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). AEDPA has put into place a deferential standard of review, and a federal court must defer to a state court adjudication on the merits. *Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court 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, 103 (2011).

Further, § 2254(e)(2) controls whether a petitioner may receive an evidentiary hearing on claims that were not adjudicated on the merits in state court. *Williams v. Taylor*, 529 U.S. 420, 429 (2000). If a petitioner has "failed to develop the factual basis of a claim in State court proceedings," an evidentiary hearing will not be granted unless the petitioner shows that his claim relies on "a new rule of constitutional law" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). Once petitioner overcomes the restrictions of § 2254(e)(2), the district court

retains discretion to determine whether an evidentiary hearing is proper. *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998).

Discussion

I. Evidentiary Hearing

Long requests an evidentiary hearing concerning his mental competency at the time he pleaded guilty. [docs. # 22 at 8, 24].[4] However, his claim that he was incompetent to plead guilty does not rely on a new rule of constitutional law or a factual predicate that could not have been previously discovered. Long claims incompetence based on a neuropsychological evaluation completed by a clinical psychologist, Dr. James Pinkston, in 2011. Dr. Pinkston evaluated Long to determine his general mental health status, mental condition, ability to distinguish between right and wrong at the time of the offense, capacity to understand the proceedings against him, and ability to assist his attorney with his own defense and proceed to trial. In the evaluation, Dr. Pinkston noted that Long had a history of psychosis, which would make it difficult for him to recall certain facts, listen to the testimony of others for inconsistencies, or testify in his own defense. Dr. Pinkston determined that Long was "currently incapable of assisting legal counsel in his defense," but understood the nature of the charges against him, the defenses available to him, the consequences of either plea, and the possible verdicts. [doc. # 22-1].

Long submitted the evaluation in his application for post-conviction relief in state court. The state court reviewed the evaluation and ultimately made a factual determination that Long was competent to plead guilty. [doc. # 16-1 at 462–64]. Thus, Long's claim of incompetency was

[4] Although Long did not specify the grounds for an evidentiary hearing, his counsel requests this matter "be remanded to the Fifth Judicial District Court, State of Louisiana with instructions to conduct a hearing regarding the defendant's mental capacity to proceed and if he is able to proceed to make the decision for trial or plea after he is found to be sufficiently sane to make such a serious decision." [doc. # 22 at 8].

adjudicated on the merits in the state court proceedings and falls within the scope of § 2254(d). Long has failed to rebut the state court's factual findings or set forth the evidence he intends to present at a hearing.[5] The record provides a sufficient basis for this court to decide this habeas corpus claim. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[A]n evidentiary hearing is not required on issues that can be resolved by reference to the state court record." (citations omitted)).

Accordingly, Long's motion for an evidentiary hearing should be **DENIED**.

II. Breach of Plea Agreement

Long alleges that he entered into a plea agreement with the prosecution, wherein the parties agreed to argue only "specifically defined components of the case" in the appeal of the trial court's denial of Long's motion to suppress. (Petition at 1). Long claims he adhered to the agreement, but the State introduced additional "elements" into its appellate brief, which created a "prejudicial legal environment" and violated the terms of the plea agreement. (*Id.*) Long claims he is therefore no longer lawfully bound by the plea agreement, and the state court's decision to uphold the breached agreement violated his right to equal protection under the Fourteenth Amendment to the United States Constitution. (*Id.*)

The State responds that Long "entered into a voluntary and knowing guilty plea with the intent to avoid the death penalty." (Response at 8). The State claims that the record demonstrates Long (1) "had a full understanding of the consequences of his plea"; (2) was advised and waived his constitutional rights on the record; and (3) "voluntarily plead[ed] guilty because the plea was to his benefit." (*Id.*) The State also claims that Long has failed to identify the evidence the State

[5] In a separate filing, Long submitted a list of the medications he is currently taking and a mental health screening report from the Louisiana State Penitentiary [doc. # 23-1], but neither support a claim of incompetence.

introduced in its brief that allegedly violated the plea agreement. The State notes that even if it did introduce improper evidence, any error would be harmless based on the Louisiana appellate court's affirmation of the photographic lineup. (*Id.* at 8–9).

In his Reply, Long suggests that the plea agreement was never completed in the first place because Long did not equivocally admit to the facts in the record to support his plea. Specifically, Long did not admit that he killed the police officer. Long claims plea agreements are governed by contract law, which requires a meeting of the minds, but here the parties "never clearly understood what each other was supposed to receive or supposed to do." (Reply at 2–3). Long also claims he pleaded guilty because it was his only way to challenge the eyewitness' pretrial identification, not to avoid the death penalty. (Supp. Reply at 8).

Long raised this issue in his application for post-conviction relief in state court, and the court held that the State did not violate the plea agreement. [doc. # 16-1 at 459–60]. In doing so, the court observed that the "record of the guilty plea shows that Mr. Long understood what he was doing, waived his constitutional rights, understood his constitutional rights and understood the terms of the plea agreement." (*Id.* at 459). Further, the court noted it was at a loss to determine what Long alleged to be the State's violation of the plea agreement. The court suggested that Long's allegation related to the State referring to items other than the photographic lineup in its appellate brief. However, the court concluded that the State simply provided the facts of the case so the appellate court could determine the validity of the lineup, which did not violate the plea agreement. In its review of the record, the trial court did not find any evidence of a breach of the plea agreement. (*Id.* at 459–60).

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise

must be fulfilled." *King v. Kieth*, No. 13-CV-2737, 2016 WL 4446316, at *2 (W.D. La. July 26, 2016) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). To obtain habeas corpus relief on the grounds that the prosecution breached the terms of a plea agreement, the petitioner bears the burden of proving (1) the terms of the alleged agreement; (2) when, where, and by whom such an agreement was made; and (3) the identity of eyewitnesses to the agreement. *Id.* (citing *Bonvillain v. Blackburn*, 780 F.2d 1248, 1251 (5th Cir. 1986)).

Long has failed to point to any evidence in the state court record that indicates the prosecution agreed to limit the "elements" it would reference in its brief. The written plea agreement, signed by Long, notes that Long pleaded guilty to first degree murder under La. R.S. 14:30, the agreed upon sentence was pursuant to La. R.S. 14:30(c)(2), and the guilty plea was subject to *State v. Crosby*, "limited only to the issue of pretrial identification." [doc. # 16-1 at 38]. During the plea hearing, Long acknowledged that by pleading guilty, he waived his rights, except those he reserved under *State v. Crosby*, and denied the existence of any promises outside those stated in court at the hearing. (*Id.* at 199–200). The record contains no reference to the issues the prosecution would include in its brief. Therefore, Long has not satisfied his burden of proving breach of the plea agreement.

Further, to the extent Long is suggesting the plea agreement was never completed in the first place, the undersigned finds such a claim unavailing. The record reflects that Long signed a plea agreement and, under oath, agreed he was pleading guilty to first degree murder under R.S. 14:30. Long has failed to point to any evidence that he did not understand the terms of the plea agreement.

The state court rejected Long's claim on the merits. Long has failed to rebut the state court's factual findings with clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1), and

there is no basis to conclude that the state court's determination is contrary to, or involves an unreasonable application of, clearly established federal law.

Accordingly, this claim should be **DISMISSED.**

III. Validity of Guilty Plea

Long claims his 2014 guilty plea was invalid because Dr. Pinkston found him incompetent to stand trial in 2011. (Petition at 7). According to Long, his trial counsel did not inform him of the contents of the evaluation. Because Long was unaware of the report at the time he pleaded guilty, he did not enter a voluntary, intelligent, and knowing plea. (Reply at 4–7).

The State responds that Long's trial counsel met with him numerous times and concluded he was competent to proceed. Likewise, the trial court personally addressed Long and found him competent. (Response at 20-21). The State also notes that in Long's state post-conviction relief application, he admitted to making a careful choice between entering a *Crosby* versus *Alford* plea after meeting with his attorney. Further, during his plea, Long informed the court that "he participated in crafting the plea agreement" and clarified that he was preserving his right to appeal the denial of his motion to suppress, which "is the very antithesis of a defendant who is not competent to assist in his defense." (*Id.* at 23).

A federal court will uphold a guilty plea provided the plea was made knowingly, voluntarily, and intelligently. *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). A guilty plea was knowing, voluntary, and intelligent if the "defendant understood the nature and substance of the charges against him." *Id.* (citations omitted). When analyzing the validity of a guilty plea entered pursuant to a plea bargain, "the representations of the defendant, his lawyer, and the prosecutor at [the original plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in

open court carry a strong presumption of verity." *Johnson v. Deville*, No. 5:16-CV-971, 2017 WL 1659058, at *9 (W.D. La. Apr. 12, 2017) (quoting *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977)).

However, a mentally incompetent defendant is unable to knowingly and voluntarily plead guilty. *See Bouchillon v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990) (citing *Pate v. Robinson*, 383 U.S. 375, 384 (1966)). The test for incompetency 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." *Id.* (citations omitted). Petitioner bears the burden of proving, by a preponderance of the evidence, that he was incompetent at the time of the plea. *Id.* "Unless the facts 'positively, unequivocally and clearly' generate a 'real, substantial and legitimate doubt as to the mental capacity' of the defendant to knowingly plead, a court will not find the defendant entitled to habeas relief." *Howard v. Wilkinson*, No. CIV.A. 08-1452, 2011 WL 807471, at *4 (W.D. La. Jan. 7, 2011) (quoting *Flugence v. Butler*, 848 F.2d 77, 79 (5th Cir. 1988)).

Here, Long has failed to prove that he was incompetent at the time of his plea. In the neuropsychological evaluation, Dr. Pinkston suggested that Long suffered from some sort of psychosis or psychological distress. He stated that Long "demonstrates some difficulties with his rational understanding of the consequences related to his charges" and at the time of the evaluation, was "incapable of assisting legal counsel in his own defense." [doc. # 22-1 at 6–7]. However, Dr. Pinkston contradicted himself by also stating that Long understood the nature of the charges against him and the consequences of either plea and verdict. Further, Dr. Pinkston noted that it is probable Long will become capable of assisting legal counsel in his own defense. (*Id.*)

Other than this 2011 evaluation, Long has not submitted any psychological assessments or other documents that indicate he was incompetent to plead guilty in 2014. As discussed above, *supra* Part I, the state court reviewed the evaluation in connection with Long's application for post-conviction relief and concluded Long was competent to enter a plea. Long does not raise a real, substantial, or legitimate doubt as to his mental capacity at the time of his plea.

Having found that Long was not incompetent when he pleaded guilty, the question turns to whether the plea was voluntary, knowing, and intelligent. The transcript from the plea hearing indicates that the trial court thoroughly questioned Long concerning his understanding of the charges against him and the effects of a guilty plea to satisfy the mandate of *Boykin v. Alabama*, 395 U.S. 238 (1969). The court ensured Long (1) was aware of the charge, the corresponding sentence, and his legal rights; (2) understood the consequences of entering a guilty plea; (3) understood the plea agreement; and (4) was competent to plead guilty. Long confirmed he had ample time to confer with counsel regarding the plea agreement, he had not been threatened, tricked, or framed into entering a guilty plea, and no one promised him anything in exchange for pleading guilty. [*see* doc. # 16-1 at 189–204]. Upon review of the record, the undersigned finds that Long understood the nature and substance of the charge against him and entered a voluntary, knowing, and intelligent plea.

The state court adjudicated on the merits Long's claim that his guilty plea was invalid. Long has failed to prove the court's denial was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. 2254(d).

Thus, this claim should be **DISMISSED**.

IV. Ineffective Assistance of Counsel

To prevail on an ineffective assistance claim, a petitioner (1) "must show that counsel's performance was deficient," and (2) "the deficient performance prejudiced [him]." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to prove either prong defeats the claim. *Green v. Johnson*, 160 F.3d 1029, 1035 (5th Cir. 1998). A court need not analyze the prongs of this test in any particular order or even address both prongs if the defendant fails to make a sufficient showing on one. *Strickland*, 466 U.S. at 697. Further, "[m]ere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue." *Green*, 160 F.3d at 1042.

The two-part *Strickland* test applies to ineffective assistance of counsel claims following a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To satisfy the first prong, Long must prove his counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In applying the first prong, federal courts presume counsel has provided competent professional assistance. *Id.* at 689–90. A court deciding an ineffectiveness claim must judge the reasonableness of counsel's conduct on the facts of the case, at the time of the conduct, keeping in mind that counsel's function "is to make the adversarial testing process work in the particular case." *Id.* at 690.

To satisfy the second prong, Long must show "counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

"In cases in which a defendant has entered a guilty plea, the only question for the court to determine is whether the defendant's decision to plead guilty was voluntary." *United States v.*

Harrison, No. CR 09-00279-09, 2014 WL 12572909, at *5 (W.D. La. Aug. 21, 2014). "Once a voluntary, knowing and intelligent guilty plea has been entered by a criminal defendant, all non-jurisdictional defects in the proceedings preceding the plea are waived, including all claims of ineffective assistance of counsel that do not attack the voluntariness of the guilty plea." *Thomas v. Cain*, No. CIV.A. 07-0739, 2007 WL 2874778, at *14 (W.D. La. Sept. 7, 2007) (citing *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983)).

A. Failure to Investigate

Long asserts five ineffective assistance of counsel claims. The first four deal with counsel's alleged failure to conduct an effective investigation as follows:

First, Long claims that his trial counsel was ineffective for failing to hire a blood spatter expert. He claims an expert could have refuted the prosecution's experts who analyzed the pattern of blood found on the victim, which "would have substantially impacted the outcome of a potential trial." (Petition at 2).

Second, Long claims that his trial counsel "had a duty to conduct an independent examination" of the prosecution's report on the DNA evidence, and the failure to do so meant that trial counsel did not develop an "informed strategic choice" into the best line of defense. (*Id.* at 3). Had trial counsel conducted an independent investigation, he would have "discovered questionable discrepancies" in the prosecution's report, which could have "fundamentally changed the outcome of this case." (*Id.*)

Third, Long notes that during a search of his jail cell in April of 2013, officials found a news article about his case with the handwritten statement "I did this" across the top. He claims his trial counsel agreed to hire a handwriting expert to prove Long did not author the statement, and the failure to do so constitutes ineffective assistance of counsel. (*Id.* at 4).

Fourth, Long claims that his trial counsel relied solely on the prosecution's reports and did not attempt to conduct an independent examination of the prosecution's evidence. Long claims trial counsel's failure demonstrates a lack of defensive strategy and "is tantamount to petitioner not having any counsel at all." (*Id.* at 5).

As explained above, *supra* Part III, Long's guilty plea was made knowingly, voluntarily, and intelligently. Trial counsel's alleged failure to investigate or hire experts constitutes non-jurisdictional defects that are waived by Long's guilty plea. *See, e.g.*, *Smith*, 711 F.2d at 682 (finding that, by pleading guilty, defendant waived his ineffective assistance claims related to counsel's alleged failure to review the prosecutor's file to verify laboratory test results or investigate witnesses); *Johnson v. Deville*, No. 5:16-CV-971, 2017 WL 1659058, at *13–15 (W.D. La. Apr. 12, 2017) (collecting cases and finding that the failure to investigate is a non-jurisdictional defect that defendant waived when he pleaded guilty).

Accordingly, these claims should be **DISMISSED**.

B. Failure to Raise Issue of Incompetency

Long claims that his trial counsel's failure to present Dr. Pinkston's evaluation to the court constitutes ineffective assistance. (Petitioner at 6). Long notes that he was not informed that a medical professional had found him incompetent to stand trial. He claims the evaluation was "essential information" and "should not have been held back from him." (Reply at 7–8). According to Long, no matter the trial strategy, his counsel "was at least obligated to inform the defendant of the contents of the report from Dr. Pinkston." (*Id.* at 6).

Whether his counsel was ineffective for failure to raise the issue of incompetency implicates the validity of Long's guilty plea, and therefore survives the waiver. *See United States of Am. v. Michele*, No. CR 13-160, 2016 WL 1660179, at *8 (E.D. La. Apr. 27, 2016); *United*

States v. White, 307 F.3d 336, 343 (5th Cir. 2002) ("[A]n ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself."). However Long has not established that counsel's performance was deficient or caused prejudice.

In its ruling on Long's application for post-conviction relief, the state court determined that Long was competent to plead guilty based on the record, which included Dr. Pinkston's report. [doc. # 16-1 at 462–63]. Long has failed to provide clear and convincing evidence that the state court's factual determination is incorrect as required under 28 U.S.C. § 2254(e)(1). As explained above, *supra* Part III, Long does not raise a real, substantial, or legitimate doubt as to his mental capacity at the time of his plea. Further, during the plea hearing, Long's counsel informed the court that Long had "been competent and able to discuss the case." [doc. # 16-1 at 201]. Long's counsel has also indicated that, in his opinion, Dr. Pinkston's report would not support a claim of incompetency to stand trial. (*Id.* at 364).[6] Based on the facts of the case, the understand does not find that counsel's conduct was unreasonable.

Additionally, Long has failed to show that, even if counsel erred, Long would not have pleaded guilty. Long was facing the death penalty for the homicide of a police officer during the commission of a burglary. As the state court observed, the State had a strong case proving Long's guilt, which included DNA and other evidence, a co-defendant's testimony, and eyewitness identification. (*Id.* at 461). Under the circumstances of this case, the undersigned cannot find that Long would have insisted on going to trial had he known of the 2011 evaluation.

[6] In his state court application for post-conviction relief, Long included a letter from his trial counsel, Jason Waltman, to the Louisiana Office of Disciplinary Counsel. The letter indicates that Long filed an ethical conduct complaint against Waltman in 2014. In the letter, Waltman responds to Long's allegations and explains his actions as Long's trial counsel. [doc. # 16-1 at 362–64].

To the contrary, a criminal defendant in Long's situation would reasonably have agreed to the plea bargain to avoid the death penalty. Thus, Long's ineffective assistance of counsel claim is without merit.

Accordingly, this claim should be **DISMISSED**.

Conclusion

Based on the foregoing, **IT IS RECOMMENDED** that the petition for habeas corpus filed by Petitioner Richard Long, Jr. [doc. # 1] be **DENIED and DISMISSED WITH PREJUDICE**.

IT IS FURTHER RECOMMENDED that Petitioner's motion for an evidentiary hearing [doc. # 24] be **DENIED**.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Rule 72(b), parties aggrieved by this Report and Recommendation have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy of any objections or response to the District Judge at the time of filing. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before the Judge makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN FOURTEEN (14) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR,

FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, this Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. **Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on whether a certificate of appealability should issue.** *See* 28 U.S.C. § 2253(c)(2). **A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.**

In Chambers, Monroe, Louisiana, this 22nd day of January 2019.

KAREN L. HAYES
UNITED STATES MAGISTRATE JUDGE

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