No.

IN THE

SUPREME COURT OF THE UNITED STATES

Craig Kerry
Petitioner,

v.

SEC'Y FL DEPT OF CORRECTIONS
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DARLENE CALZON BARROR, ESQUIRE
CJA Court Appointed Counsel of Record
Attorney For Petitioner
506 N. Armenia Ave.
Tampa, Florida 33609
(813) 877 - 6970
Email: Darlene@barrorlaw.com
Florida Bar No.: 0860379

QUESTION PRESENTED FOR REVIEW

1. Whether the trial court erred by determining that Mr. Kerry's petition was untimely?
2. Whether the trial court erred in determining that trial counsel was not deficient for failing to request a competency examination when he learned about Mr. Kerry's mental health issues?

CORPORATE DISCLOSURE STATEMENT

There are no corporations or publicly traded companies with a stake in the outcome of this matter.

LIST OF PROCEEDINGS

1. On a certificate of appealability issued by the Eleventh Circuit from the United States District Court for the Middle District of Florida Case No.6:21-cv-00365-PGB-LHP Entered March 6, 2023.
2. Craig Kerry v. Sec'y Fl. Dept. of Corrections, et a- 11th Circuit Court of Appeals –22-11883– affirmed June 21, 2024.

LIST OF PARTIES

Petitioner Craig Kerry

Respondent Secretary, Florida Dep't of Corrections

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below where the Eleventh Circuit Court of Appeals upheld the lower court's denial of his 2254 Petition as untimely.

OPINION BELOW

The Judgment of the Middle District of Florida appears at Appendix A to the petition. The Opinion from the Eleventh Circuit affirming the Middle District of Florida appears at Appendix B to the petition and is unpublished. No petition for rehearing was filed. These opinions are unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit entered judgment was June 21, 2024. Appendix B. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves application 28 U.S.C. §2244(d)(1)(A) which states in pertinent part:

(d)

(1)A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A)the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

STATEMENT OF THE CASE

Appellant Craig Kerry was convicted after trial by jury of Attempted Voluntary Manslaughter with a Firearm, Robbery with a Firearm, and Aggravated Battery with a Firearm. Mr. Kerry was sentenced by a Florida judge to 40 years' imprisonment as a result. Mr. Kerry sought direct appellate review from the Fifth District Court of Appeals which was affirmed. Mr. Kerry filed a State Habeas petition on May 24, 2018 which was denied, and that denial was upheld on appeal. Mr. Kerry filed a second petition which was denied by the Fifth District Court of Appeals on May 20, 2020. Mr. Kerry filed a §2254 habeas petition in the United States District Court on February 15, 2021. The District Court deemed the Petition untimely. The

District court rejected other grounds as being procedurally barred or otherwise outright denied them. The opinion was filed on April 25, 2022, denying a certificate of appealability. On March 5, 2023, the 11th Circuit Court of Appeals granted a motion for a certificate of appealability on two issues regarding timeliness and ineffective assistance of counsel for failure to request a competency evaluation. The 11th Circuit upheld the dismissal of the petition as untimely on June 21, 2024.

ARGUMENT IN FAVOR OF GRANTING CERTIORARI

Title 28 U.S.C. section 2244(d) was amended by section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA), and became effective on April 24, 1996. Section 2244(d)(1)(A) specifically requires that a petition filed in federal court by a person in custody pursuant to a state conviction be filed within one year from the date the conviction became final. Section 2244(d)(2) provides that the one-year time limit is tolled for any properly filed state collateral petitions or motions. Mr. Kerry went to trial on February 13, 2017. He was convicted by a jury on February 15, 2017. He was sentenced to 40 years prison on March 24, 2017. He sought direct appeal on April 3, 2017. A per curiam opinion was issued for the direct appeal on December 1, 2017. Mr. Kerry did not seek discretionary review by the Florida Supreme Court. He did attempt to move for an enlargement of time for rehearing, which was stricken for failing to comply with appellate rules. Florida Rule of Appellate Procedure 9.120(b) states "The jurisdiction of the supreme court described in rule 9.030(a)(2)(A) shall be invoked by filing a notice, accompanied by any filing fees prescribed by law, with the clerk of

the district court of appeal within 30 days of rendition of the order to be reviewed." Due to the new year and calendar, the deadline to comply with Rule 9.120(b) was January 2, 2018. Mr. Kerry did not seek discretionary review with the Florida Supreme Court. 28 U.S.C. 2244(d)(1)(A) states that the one-year deadline starts at the expiration of time to seek direct appellate review. Hence his one-year clock started on January 3, 2018. At the trial level, Appellee's argued that Mr. Kerry could have sought to invoke the Florida Supreme Court's discretionary jurisdiction by claiming conflict with another district. The Florida Supreme Court set the bar for claiming conflict: "it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." *The Florida Star v. B.J.F.* 530 So.2d 286, 288 (Fla 1988). The Florida Supreme Court further explained Florida Star's rationale: "In other words, absent a citation falling into one of the limited categories identified in Jollie and reaffirmed in Florida Star, a district court decision must contain "some statement," indicating that it has "expressly addresse[d] a question of law within the four corners of the opinion itself," which could "hypothetically ... create conflict if there were another opinion reaching a contrary result," for this Court to have subject-matter jurisdiction to review the case" *Gandy v State*, 846 So2d 1141, 1144 (Fla. 2003). The Fifth District did make a statement or citation in its opinion. The opinion stated that there were five claims on direct appeal. Three were not discussed, and the other two: issues about collateral crimes and the introduction of

racial epithets to the jury, were reviewed for fundamental error because they were not properly preserved at trial. The appellate court reviewed facts introduced at trial, and concluded that while under most circumstances racial epithets should be redacted citing its own opinion on the same, it was not fundamental error in this circumstance. Not the most in depth of opinions, but one sufficient under the Gandy analysis. Mr. Kerry was misadvised by counsel as to discretionary review by the Florida Supreme Court. Had Mr. Kerry not been allowed review by the Florida Supreme Court, he would have had 90 days to seek certiorari review by the U.S. Supreme Court. See U.S. Supreme Court R.13. On May 24, 2018 Mr. Kerry timely sought postconviction relief in the trial court. This tolled the one year time period under 28 U.S.C. 2244(d)(2). Mr. Kerry's petitions for postconviction relief were denied on November 12, 2019 (his initial petition) and May 20, 2020 (a supplemental petition filed with the appellate court alleging ineffective assistance of counsel) Mr. Kerry's 2254 petition was filed on February 15, 2021. The District Court should have determined that Mr. Kerry was timely under the doctrine of equitable tolling. Equitable tolling applies to the one-year deadline governing 2254 cases. See *Holland v. Florida*, 560 U.S. 631, 645 (2010). A habeas petitioner is entitled to "equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. at 928. Mr. Kerry was misadvised that the short opinion issued by appellate court was insufficient to invoke Florida Supreme Court jurisdiction. He had otherwise been diligent in his post-conviction relief process. Mr.

Kerry tried to seek an extension of time to seek discretionary review with the Florida Supreme Court, but abandoned the process after a procedural error. Had his appellate counsel not advised him the extraordinarily bad advice that the Florida Supreme Court process was unavailable, Mr. Kerry would have continued with his review process, lengthening the time to file his petition with the District Court. The Court therefore erred in determining that Mr. Kerry was not timely, and applied equitable tolling to make that determination.

CONCLUSION

Accordingly, Mr. Kerry requests that this Court grant his petition for certiorari review.

Respectfully submitted,

Darlene Calzon Barror, Esquire
CJA Appointed Attorney for the Petitioner
506 North Armenia Avenue
Tampa, Florida 33609
Tel: (813) 877 - 6970
Darlene@barrorlaw.com
Florida Bar No.: 0860379

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[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-11883

Non-Argument Calendar

CRAIG BERNARD KERRY,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:21-cv-00365-PGB-LHP

Before WILSON, LUCK, and MARCUS, Circuit Judges.

PER CURIAM:

Craig Kerry, a Florida state prisoner who proceeded *pro se* in the district court but has appointed counsel on appeal, appeals the district court's order dismissing his 28 U.S.C. § 2254 petition as untimely and, alternatively, denying it on the merits. We issued a certificate of appealability ("COA") on two issues: (1) whether the district court erred in dismissing Kerry's petition as untimely, when he claimed that he could not seek discretionary review in the Florida Supreme Court, based on the advice of counsel and prison law clerks; and (2) whether the district court erred in denying Kerry's claim that trial counsel was ineffective for failing to order a competency hearing when presented with evidence that he attended a special-needs school, received Social Security for mental and emotional disabilities, was institutionalized in a psychiatric hospital as a teenager, and had a family history of schizophrenia and bipolar disorder. After thorough review, we affirm.

When reviewing the district court's denial of a habeas petition, we review questions of law and mixed questions of law and fact *de novo* and findings of fact for clear error. *Ferguson v. Sec'y, Dep't of Corr.*, 580 F.3d 1183, 1193 (11th Cir. 2009). The district court's interpretation and application of the one-year statute of limitations is a question of law that we review *de novo*. *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir. 2000). We may affirm the denial of habeas

relief for any ground supported by the record. *Trotter v. Sec'y, Dep't of Corr.*, 535 F.3d 1286, 1291 (11th Cir. 2008).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations on § 2254 actions that begins to run from the latest of several dates, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). For a state prisoner who seeks U.S. Supreme Court review, his conviction becomes final when the U.S. Supreme Court denies *certiorari* or issues a decision on the merits. *Nix v. Sec'y for Dep't of Corr.*, 393 F.3d 1235, 1236–37 (11th Cir. 2004). A state prisoner, however, generally must seek review from the state's highest court before he will receive the benefit of the 90-day period in which to seek *certiorari* review because the U.S. Supreme Court may only review a decision of the state's highest court. *Pugh v. Smith*, 465 F.3d 1295, 1300 (11th Cir. 2006). The conviction of a person who does "not appeal to the State's highest court" becomes "final when his time for seeking review with the State's highest court expired." *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012).

The Florida Supreme Court has discretionary jurisdiction to review the decisions of a Florida district court of appeal that, among other things, "directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law" or that the district court of appeal certifies "to be in direct conflict with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3)–(4). The Florida Supreme Court may

have jurisdiction to review a case that has "some statement or citation in the opinion that hypothetically could create conflict" with another opinion. *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).

Under Florida law, however, a state appellate court's unelaborated, *per curiam* affirmance of a conviction is not reviewable by the Florida Supreme Court under its discretionary review jurisdiction. *Jackson v. State*, 926 So. 2d 1262, 1265–66 (Fla. 2006); *see also Bates v. Sec'y, Dep't of Corr.*, 964 F.3d 1326, 1329 (11th Cir. 2020) (holding that Bates could not have sought direct review of his conviction in the Florida Supreme Court because the Second District Court of Appeal ("DCA") affirmed his conviction and sentence without elaboration in a *per curiam* opinion and, thus, was correctly afforded the 90-day grace period during which he could have petitioned the U.S. Supreme Court for review before the limitations period began); *Gandy v. State*, 846 So. 2d 1141, 1144 (Fla. 2003) (holding that the Florida Supreme Court lacked jurisdiction to review a *per curiam* unelaborated denial of relief from a DCA that merely cited to a case or statute without also containing a discussion of the facts of the case). This means that, in these circumstances, the state's DCA is the highest state court in which a prisoner can seek review, and a prisoner may seek review from the U.S. Supreme Court without first seeking review from the state supreme court. *See Chavers v. Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1274–75 (11th Cir. 2006) (applying the 90-day *certiorari* period from the date of the Florida DCA's judgment when determining when the petitioner's conviction became final and the statute of limitations period began).

Section 2244(d)(2) provides that the one-year time limit is tolled for any properly filed state collateral petitions or motions. 28 U.S.C. § 2244(d)(2). Beyond statutory tolling, the statute of limitations may be equitably tolled if a petitioner establishes that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented the timely filing of the petition. *Holland v. Florida*, 560 U.S. 631, 649 (2010). We've held "that an attorney's negligence, even gross negligence, or misunderstanding about the law is not by itself a serious instance of attorney misconduct for equitable tolling purposes." *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1237 (11th Cir. 2017). "[A] petitioner ordinarily must bear the risk of attorney error and [] a garden variety claim of attorney negligence, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Id.* at 1223 (quotations omitted). Abandonment of the attorney-client relationship, however, "is an extraordinary circumstance that can, when coupled with reasonable diligence by the petitioner, justify equitable tolling, but attorney negligence or gross negligence, by themselves, are not." *Id.* at 1236–37 (concluding that the petitioner's attorney did not effectively abandon the petitioner when he misinterpreted a statute of limitations).

Generally, arguments raised for the first time on appeal that were not presented in the district court are deemed forfeited. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331–32 (11th Cir. 2004). Likewise, issues not raised in an initial brief are deemed forfeited and abandoned. *United States v. Campbell*, 26 F.4th 860, 871 (11th Cir.) (*en banc*), *cert. denied*, 143 S. Ct. 95 (2022). But we have

the discretion to resurrect forfeited issues *sua sponte* in the following "extraordinary circumstances": (1) the issue is a pure question of law and failing to consider it would result in a miscarriage of justice; (2) the appellant objects to an order that he had no opportunity to raise at the district court level; (3) consideration is in the interest of substantial justice; (4) the proper resolution is beyond any doubt; and (5) if the issue presents significant questions of general impact or of great public concern. *Id.* at 873.

Here, the district court did not err in dismissing Kerry's § 2254 petition as untimely. Notably, in Kerry's counseled brief on appeal, he now concedes -- although he contested it in district court -- that the district court correctly determined that his one-year limitations period to file his § 2254 petition began to run on January 3, 2018, which is 30 days after the Fifth DCA decision in his direct criminal appeal was issued. In so doing, Kerry also concedes that the DCA decision was one from which he could have sought discretionary review from the Florida Supreme Court -- because although the DCA decision was short and *per curiam*, it still made citations, discussed the facts, and made a statement that could hypothetically result in a conflict with another state court opinion -- and that he failed to do so. *See, e.g.*, *Florida Star*, 530 So. 2d at 288. Thus, as the district court explained, Kerry's one-year AEDPA clock began running on January 3, 2018, which marked the end of the 30-day period Kerry had under Florida law to seek discretionary review by the Florida Supreme Court.

In light of his concessions, Kerry's petition should have been filed by December 30, 2020, which results from counting the 141 days that followed the issuance of the DCA decision on January 3, 2018 until his state postconviction proceedings tolled the limitations period beginning on May 24, 2018; ignoring the days until his state proceedings were resolved on May 21, 2020; and then counting the remainder of the one-year AEDPA limitations period. This gave him 224 days, or until December 30, 2020, to timely file his § 2254 petition. Kerry did not file his § 2254 petition until February 15, 2021, so we agree that the district court correctly determined that his § 2254 petition was time-barred.

Nevertheless, Kerry next argues -- for the first time on appeal -- that his petition was timely under a theory of equitable tolling. Essentially, he argues that his appellate counsel gave him incorrect advice that he could not seek discretionary review of the Fifth DCA's elaborated *per curiam* opinion by the Florida Supreme Court. However, Kerry has forfeited the equitable tolling argument because he did not raise it in the district court and has not made any argument on appeal as to why we should excuse his forfeiture. *Access Now*, 385 F.3d at 1331–32.

But even if we were to address the merits of Kerry's argument, his counsel's misunderstanding of the law is not by itself a serious instance of attorney misconduct for equitable tolling purposes. We've squarely held that attorney negligence is insufficient by itself to constitute an extraordinary circumstance that would warrant equitable tolling. *Cadet*, 853 F.3d at 1223, 1236–37. Instead,

we've recognized that an attorney would need to essentially abandon the attorney-client relationship in order for an attorney's negligence to rise to the level of an extraordinary circumstance and, moreover, that an attorney's misinterpretation of a statute of limitations did not constitute an abandonment of the relationship. *Id.*

Here, the only claim related to the conduct of Kerry's trial attorney is that he misadvised that he "[did] not believe that [it was] possible" to show that the Fifth DCA's opinion in Kerry's case conflicted with another state court decision in order to seek discretionary review from the Florida Supreme Court. Kerry relied on counsel's advice and, thereafter, miscalculated when the AEDPA limitations period began to run and expired. Like the attorney in *Cadet*, Kerry's attorney may have been negligent in his advice to Kerry about the appealability of the Fifth DCA opinion and thus led Kerry astray on the issue of when his convictions became final, which later led to Kerry miscalculating the time he had remaining to file his § 2254 petition. Yet, as we've explained, a mere misunderstanding of the law is not enough for equitable tolling. Accordingly, Kerry has failed to show an exceptional circumstance that would warrant equitable tolling.

In short, the district court correctly held that Kerry failed to file his § 2254 petition within AEDPA's one-year statute of limitations and dismissed the petition as untimely. Moreover, because we affirm the district court's dismissal of Kerry's § 2254 petition as untimely, we need not address the second COA issue that relates to the district court's alternative denial of his petition on the merits.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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June 21, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-11883-JJ
Case Style: Craig Kerry v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 6:21-cv-00365-PGB-LHP

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs
No costs are taxed.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

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OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-11883-J

CRAIG KERRY,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondent-Appellee.

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

ORDER:

Craig Kerry is a Florida prisoner serving a 40-year sentence for robbery with a firearm, aggravated battery with a firearm, and attempted voluntary manslaughter with a weapon. Kerry seeks a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition, which raises the following claims: (1) the trial court erred by admitting surveillance camera footage without proper authentication; (2) trial counsel failed to object to the jury instructions for attempted voluntary manslaughter, resulting in Kerry being convicted of a non-existent offense; (3) trial counsel failed to seek suppression of evidence seized from his car and evidence of an impermissibly suggestive police identification; and (4) appellate counsel was ineffective for failing to challenge trial counsel's failure to order a competency evaluation. As relevant to Ground 3, Kerry asserted that the lineup presented to one witness was unduly suggestive because he first saw the lineup on a computer screen and then was later

presented with the same photos in paper format. The district court dismissed Kerry's petition as untimely and, in the alternative, denied it on the merits.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that reasonable jurists would debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitions filed under § 2254 are governed by a one-year statute of limitations that begins to run on the latest of four triggering events, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, reasonable jurists could debate whether Kerry's petition is time-barred in light of his claim that he could not seek discretionary review in the Florida Supreme Court on direct appeal, thereby impacting when the statute of limitations began to run. As to the court's alternative merits denial of Kerry's petition, reasonable jurists would not debate the denial of Ground 1 because Kerry failed to cite a federal basis for this claim in state court, and, therefore, this ground is procedurally defaulted. *Slack*, 529 U.S. at 484; *Snowden v. Singletary*, 135 F.3d 732, 735 (11th

Cir. 1998) (explaining that a petitioner "must make the state court aware that the claims asserted present federal constitutional issues"). Ground 2 turns on the question of what constitutes an offense under Florida law, and we will not second guess the Florida court's interpretation of its own law. *Pinkney v. Sec'y, Dep't of Corr.*, 876 F.3d 1290, 1295 (11th Cir. 2017) (giving deference to the state's construction of its own law). As to Ground 3, the photographic lineup was not unduly suggestive merely because the witness saw the photos both on a computer and in paper form. *Caver v. Alabama*, 537 F.2d 1333, 1335 (5th Cir. 1976) (holding that a lineup is unduly suggestive if it is "virtually inevitable that the witness will select the individual whom the police have singled out"). And the search of Kerry's vehicle was permissible under the automobile exception to the search warrant requirement. *United States v. Lindsey*, 482 F.3d 1285, 1293 (11th Cir. 2007) (holding that the police may search a vehicle without a warrant as long as the vehicle is functional and there is probable cause for the search, even if no exigent circumstances exist).

However, reasonable jurists would debate the district court's denial of Ground 4 on the merits because the state-court record indicates that Kerry has significant psychological problems, but it does not clearly establish whether or not Kerry had a rational, as well as a factual, understanding of the proceedings. *Dusky v. United States*, 362 U.S. 402, 402 (1960). Therefore, we GRANT Kerry leave to proceed *in forma pauperis* and GRANT a COA on the following issues:

(1) Whether the district court erred in dismissing Kerry's petition as untimely, when he claimed that he could not seek discretionary review in the Florida Supreme Court, based on the advice of counsel and prison law clerks?

(2) Whether the district court erred in denying Kerry's claim that trial counsel was ineffective for failing to order a competency hearing when presented with evidence that he attended a special-needs school, received Social Security for mental and emotional disabilities, was institutionalized in a psychiatric hospital as a teenager, and had a family history of schizophrenia and bipolar disorder?

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRAIG BERNARD KERRY,

Petitioner,

v. Case No. 6:21-cv-365-PGB-LHP

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Craig Bernard Kerry's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition ("Response to Petition," Doc. 8) in compliance with this Court's instructions. Petitioner filed a Reply to the Response to Petition ("Reply," Doc. 10), after which the Court directed Respondents to file a Supplemental Response to the Petition. Respondents filed a Supplemental Response ("Supplemental Response," Doc. 12), and Petitioner filed a Reply to the Supplemental Response ("Reply to Supplemental Response," Doc. 15).

Petitioner asserts four grounds for relief. For the following reasons, the

Petition is dismissed as untimely and otherwise denied on the merits.

I. PROCEDURAL HISTORY

The State charged Petitioner with attempted second-degree murder (Count One), robbery with a firearm (Count Two), and aggravated battery with a firearm (Count Three). (Doc. 9-1 at 16-18.) A jury found Petitioner guilty as charged as to Counts Two and Three and of the lesser offense of attempted voluntary manslaughter with a weapon as to Count One. (*Id.* at 34-42.) The state court sentenced Petitioner to a thirty-year term of imprisonment for Count One, to a forty-year term of imprisonment for Count Two, and to a twenty-five-year term of imprisonment for Count Three with all sentences to run concurrently. (*Id* at 45.) Petitioner appealed his convictions. On December 1, 2017, the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed by written opinion. (*Id.* at 65-67.) Mandate issued on December 26, 2017. (*Id.* at 69.)

On May 24, 2018, Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which he amended.[1] (*Id.* at 81-121.) The state court denied the motion. (*Id.* at 130-36.)

[1] This is the filing date under Florida law. *See Thompson v. State*, 761 So.2d 324, 326 (Fla. 2000) ("[H]enceforth we will presume that a legal document submitted by an inmate is timely filed if contains a certificate of service showing that the pleading was placed in the hands of prison or jail officials for mailing on a particular date. . . . This presumption will shift the burden to the state to prove that the document was not timely placed in prison officials' hands for mailing."); *see also Hoever v. Fla. Dep't of Corr.*, 156 So. 3d 543, 546 (Fla. 1st DCA 2015) ("[B]ecause DOC had 'established a procedure for tracking the

Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 215.) Mandate issued on January 10, 2020. (*Id.* at 217.)

On December 26, 2019, Petitioner filed a state petition for writ of habeas corpus. (*Id.* at 220-29.) The Fifth DCA denied the petition on May 20, 2020. (*Id.* at 233.)

Petitioner filed the Petition on February 15, 2021. (Doc. 1.)

II. ANALYSIS

A. Timeliness

Pursuant to 28 U.S.C. § 2244:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

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date that *legal mail* changes hands for purposes of establishing jurisdictional timeframes in court proceedings. . . , DOC has a mechanism to rebut the presumption [established by] the inmate's assertion that his pleading was actually placed in the hands of prison or jail officials on a particular date.' (Emphasis supplied.) Notably, the procedure for legal mail requires the prison staff member to date stamp outgoing legal mail in the inmate's presence, and have the inmate initial the stamp and seal the envelope in the staff member's presence. . ."); *Crews v. Malara*, 123 So. 3d 144, 146 (Fla. 1st DCA 2013) (holding that the prison date stamp on the prisoner's petition rebutted presumption that it was delivered on the date contained on the certificate of service).

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

28 U.S.C. § 2244(d)(1)-(2).

In the instant case, the Fifth DCA issued a written opinion affirming Petitioner's convictions on December 1, 2017. Consequently, Petitioner was allowed to seek discretionary review to the Supreme Court of Florida. *See Gandy v. State*, 846 So. 2d 1141, 1144 (Fla. 2003); *see also Moore v. Sec'y, Fla. Dep't of Corr.*, 762 F. App'x 610, 618 (11th Cir. 2019) (noting "the Supreme Court of Florida lacks the jurisdictional power to review a *per curiam* affirmance filed by an intermediate state appellate court without a reasoned opinion."); *Ho v. Sec'y of Dep't of Corr.*, No. 20-CV-80010, 2020 WL 7890670, at *5 (S.D. Fla. Nov. 5, 2020) (rejecting argument that the petitioner could not seek discretionary review from the Supreme Court of Florida where the district appellate court issued a written opinion), *report and recommendation adopted sub nom. Ho v. Sec'y of Dep't of Corr.*, No. 20-80010-CIV, 2021 WL 38268 (S.D. Fla. Jan. 5, 2021), *certificate of appealability denied sub nom. Ho v. Sec'y, Fla. Dep't of Corr.*, No. 21-10334-C, 2021 WL 6803349 (11th Cir. Aug. 26, 2021).

Petitioner, therefore, had thirty days, or through January 2, 2018, to seek discretionary review. *See* Fla. App. P. 9.120(b) (requiring petition for discretionary review to be filed within thirty days of the entry of the order to be reviewed); Fla. R. Jud. Admin. 2.514(a) (rule for computation of deadlines). However, Petitioner did not petition the Supreme Court of Florida for discretionary review. Consequently, his judgment of conviction became final when the time for filing a petition for discretionary review expired. *See Gonzalez v. Thaler*, 565 U.S. 134, 150-54 (2012) (holding the petitioner's judgment became final under § 2244(d)(1)(A) when the time for seeking discretionary review with the state's highest court expired and concluding the petitioner was not entitled to the ninety-day period to seek certiorari review in the United States Supreme Court because he did not seek discretionary review from the state's highest court). Thus, Petitioner's judgment became final on January 2, 2018, and he had one year from that date, absent any tolling, to timely file his petition.

Under § 2244(d)(2), the one year was tolled during the pendency of Petitioner's "properly filed" state post-conviction proceedings. Petitioner filed a Rule 3.850 motion on May 24, 2018. Prior to the filing of the motion, 141 days of the limitation period expired. The time was tolled from May 24, 2018, through May 20, 2020, when the Fifth DCA denied Petitioner's habeas petition. At that time, 224 (365 - 141 = 224) days remained to timely file a federal petition, or through

December 30, 2020. However, Petitioner filed the Petition, on February 15, 2021. Therefore, the Petition is untimely.

B. Merits

Alternatively, Petitioner's grounds are denied either as procedurally barred or on the merits as follows. Ground One, that the trial court erred by admitting an improperly authenticated video into evidence, was not raised as a federal issue in the state court. *See* Doc. 13-1 at 971-75. Thus, this ground is unexhausted and procedurally barred absent an exception to the procedural default bar. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (To satisfy the exhaustion requirement, a state petitioner must "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights."). Petitioner has not demonstrated cause and prejudice or actual innocence to overcome the procedural default. *See Gore v. Crews*, 720 F.3d 811, 816 (11th Cir. 2013) ("Under the doctrine of procedural default, a federal habeas court may not review the merits of a claim that is procedurally barred unless the petitioner can demonstrate cause for the default and actual prejudice, or that he is actually innocent of his crime of conviction."). Consequently, Ground One is procedurally barred from review.

Likewise, Petitioner has not demonstrated that the state court's denial of Grounds Two, Three, and Four is contrary to, or an unreasonable application of,

Strickland v. Washington, 466 U.S. 668 (1984). *See* Doc. 9-1 at 132, 134-35, 233 (state court orders denying Grounds Two, Three, and Four). With respect to Ground Two, Florida courts have held that attempted voluntary manslaughter by act is a cognizable offense. *See Ware v. State*, 112 So. 3d 532, 534 (Fla. 3d DCA 2013) ("[A]ttempted voluntary manslaughter by act remains a viable offense after [*State v. Montgomery*, 39 So. 3d 252 (Fla. 2010)]."). The trial court instructed the jury on attempted manslaughter by act, not by negligence. *See* Doc. 9-1 at 208. Thus, counsel was not deficient for failing to object to the attempted voluntary manslaughter by act instruction nor did prejudice result from counsel's failure to do so.

As to Ground Three, Petitioner has not demonstrated that any basis existed to suppress the evidence from the vehicle or the photo identification. First, Petitioner has not demonstrated that he had a legitimate expectation of privacy in the vehicle. *See United States v. Dixon*, 901 F.3d 1322, 1338 (11th Cir. 2018) (indicating that "a 'passenger in a private car, who has no possessory interest in the automobile, does not have a legitimate expectation of privacy in the interior of the automobile because he does not have the right to exclude others from the car'" and concluding that the defendant lacked standing to challenge the search of the vehicle because he was a passenger in the vehicle and was not the owner). The vehicle's title was not in Petitioner's name, and Petitioner referred to the vehicle

as belonging to his mother during a call he made while in custody and in his police interview. (Doc. 13-1 at 596, 728, 740.)

Moreover, at trial, an officer testified that he spoke with Petitioner around midnight on the night of the offenses near the Gator's Dockside after receiving a call about a man waving people down to try to use their cell phones. (Doc. 13-1 at 489-90.) Petitioner, who identified himself by name to the officer, was wearing a dark hoodie and jeans. (*Id.* at 490.) After their conversation, the officer observed Petitioner enter a white Mustang with a blue stripe on it, and he followed the vehicle and got its license plate number because he was suspicious of Petitioner's behavior. (*Id.* at 490-91, 496.) Later that morning around 2:15 a.m., within one minute of hearing a "Code 3 for shots fired" at the same Gator's Dockside, the officer arrived at the scene of the offenses. (*Id.* at 496-97, 505, 508.) Prior to arriving at the scene, the officer put out a BOLO for the white Mustang and black male in dark clothing based on Petitioner's suspicious nature that evening. (*Id.* at 499, 503.)

As the officer was entering the restaurant, he heard the roar of a vehicle and saw the same white Mustang speeding away from the same apartment complex it had entered and exited earlier that morning. (*Id.* at 498-99.) The officer viewed the video of the robbery and said that the perpetrator matched Petitioner's height, weight, and clothing. (*Id.* at 501, 507.)

Another officer located the Mustang around 3:00 a.m. at a hotel

approximately fifteen minutes from the scene of the offenses. (*Id.* at 510-15.) Around 5:00 a.m., a customer in Gator's Dockside at the time of the robbery identified Petitioner as the gunman from a photographic lineup that he viewed first on a computer and then in printed form. (*Id.* at 535-44.) Petitioner, who was wearing a dark hoodie, was detained when he exited the hotel around sunrise. (*Id.* at 522-24.)

Based on this evidence, probable cause existed to arrest Petitioner for the offenses and to search the vehicle that was observed speeding away from the area of the offenses and in which Petitioner was a passenger and driver on the night of the offenses.[2] *See, e.g., United States v. Lindsey,* 482 F.3d 1285, 1293 (11th Cir. 2007) (law enforcement may conduct a warrantless search of a vehicle, under the automobile exception to the warrant requirement, if (1) the vehicle is readily mobile, and (2) law enforcement has probable cause for the search); *see also United States v. Moreno,* 559 F. App'x 940, 945 (11th Cir. 2014) (affirming denial of motion to suppress under the automobile exception where officers searched a parked and secured vehicle).

Finally, Petitioner has not shown that prejudice resulted from the admission of the evidence recovered from the vehicle. The jury heard Petitioner's admission

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[2] Probable cause exists for a search where, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in the vehicle. *United States v. Lindsey,* 482 F.3d 1285, 1293 (11th Cir. 2007).

to police that he allowed others to use his vehicle to commit the offenses. (Doc. 13-1 at 747-59.) Therefore, it is logical to assume that evidence relevant to the offenses would have been in the car. Further, the evidence of Petitioner's guilt was substantial without consideration of the evidence from the vehicle. This evidence included an eyewitness identification of Petitioner, testimony that Petitioner's face was swollen under his left eye consistent with the victim's testimony that he struck the perpetrator in the face with a cashbox, testimony that the firearm used in the offenses was found in a backpack in the hotel parking lot where the Mustang was parked, a video from the hotel showing Petitioner carrying the backpack, and Petitioner's recorded call, after he was arrested, directing his girlfriend to retrieve the gun that implicated him in the offenses from the parking lot in a bag by the car. Consequently, counsel was not deficient for failing to move to suppress the evidence from the vehicle and a reasonable probability does not exist that the outcome of the trial would have been different had counsel done so.

Similarly, Petitioner has not shown that the photographic lineup was unduly suggestive. The record refutes Petitioner's contention that the witness was shown Petitioner's picture alone on a computer before being given the photographic lineup. At trial, the witness, who identified Petitioner, testified that he first viewed the photographic lineup containing "pictures" on the officer's computer and recognized Petitioner and then was given the same printed

photographic lineup to view from which he identified Petitioner in picture number 2. (Doc. 13-1 at 539-40, 543-44.) There is no indication that the photographs in the lineup were unduly suggestive or that the officer said or did anything during the witness' identification that was unduly suggestive. Thus, counsel had no reason to move to suppress the identification, prejudice did not result from counsel's failure to do so, and Ground Three is without merit.[3]

In Petitioner's final ground, he asserts appellate counsel rendered ineffective assistance by failing to argue that the trial court erred by not ordering a competency evaluation based on his mother's testimony at sentencing. (Doc. 1 at 9.) Specifically, Petitioner notes that his mother testified that he had been diagnosed with ADHD, antisocial behavior, and schizophrenia. (*Id.*)

The record reflects that Petitioner's mother testified at sentencing that Petitioner was diagnosed with ADHD as a child, received SSI disability because he was emotionally handicapped, and last was treated when he was

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[3] Petitioner complains that the totality of the circumstances rendered the identification unreliable. Namely, he argues *inter alia* that the witness had limited time to view the perpetrator, the witness had been drinking and was twenty feet from the perpetrator, and the perpetrator was wearing a mask. (Doc. 15 at 8.) However, because the photographic lineup was not unduly suggestive, it is not necessary to consider these factors in determining the reliability of the identification. *See United States v. Felix*, 591 F. App'x 777, 780 (11th Cir. 2014) ("'First, we must determine whether the original identification procedure was unduly suggestive. *If we conclude that the identification procedure was suggestive, we must then consider whether, under the totality of the circumstances, the identification was nonetheless reliable.*'") (emphasis added). Rather, these were factors for the jury to consider in assessing the weight to give the identification.

approximately sixteen-years old.[4] (Doc. 13-1 at 935, 937-38.) Petitioner was twenty-four years old at the time of sentencing. (*Id.* at 934.) Defense counsel made it clear that he was presenting this evidence solely in mitigation for sentencing. (*Id.* at 942.)

There is no indication from either the testimony presented at sentencing or from the record that Petitioner was unable to consult with his attorney with a reasonable degree of understanding or did not have a rational and factual understanding of the proceedings against him. *See Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) for the proposition that "The legal test for mental competency is whether, at the time of trial and sentencing, the petitioner had 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and whether he had 'a rational as well as factual understanding of the proceedings against him.'"). From the record, Petitioner communicated and consulted with his attorney throughout the proceedings, understood the questions posed to him by the trial court, and understood the proceedings against him. *See* Doc. 13-1 at 252-56, 816-18, 912-14, 947. Consequently, appellate counsel was not deficient for failing to raise an unpreserved issue and a reasonable probability does not exist that the outcome of the appeal would have been different had counsel done so.

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[4] Contrary to Petitioner's contention, his mother did not testify that he was schizophrenic. Rather, she testified that other members of Petitioner's family suffered from schizophrenia. *See* Doc. 13-1 at 935.

Accordingly, Ground Four is without merit under § 2254(d).

Any allegations not specifically addressed are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's

procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

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

1. The Petition (Doc. 1) is **DENIED**, and this case is **DISMISSED with prejudice**.
2. Petitioner is **DENIED** a Certificate of Appealability.
3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on April 25, 2022.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party