No. _____

IN THE

Supreme Court of the United States

HAROLD MAX POMPEE
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL
Respondents.

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

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APPENDIX

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13336

D.C. Docket No. 1:14-cv-24371-RNS

HAROLD MAX POMPEE,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

(June 5, 2018)

Before ED CARNES, Chief Judge, MARCUS, and EBEL,* Circuit Judges.

PER CURIAM:

* Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

Harold Max Pompee appeals the district court's denial of his 28 U.S.C. § 2254 petition. Pompee, who is mentally ill, alleges that his trial counsel was ineffective for failing to ask for another competency hearing before he entered his guilty plea.

I. FACTS AND PROCEDURAL HISTORY

Pompee committed two armed robberies in Miami, Florida, in September 2010. He was arrested and charged with both armed robbery and unlawfully discharging a firearm in public in two separate cases. After the State filed those charges, the public defender's office referred Pompee for a psychological evaluation. A doctor diagnosed him with schizoaffective disorder, which is a cyclical psychotic illness. The doctor recommended that Pompee receive treatment and medication to manage his hallucinations and depressive symptoms. He was later placed on medication, which changed over the course of his psychological treatment.

Between September 2011 and March 2013, Pompee underwent ten court-ordered competency evaluations by five different doctors. He underwent the first two evaluations in September 2011 and the doctors found him incompetent. The court entered an order in October 2011 adjudicating him incompetent to stand trial and requiring that he receive further treatment. Pompee was admitted to a treatment center, where a doctor examined him on October 27, 2011, and noted

that he could be malingering because he denied knowing the meaning of simple words and exaggerated his memory loss.

Pompee underwent three more evaluations between November 2011 and January 2012 and the doctors found him competent in all three; in February 2012 the court entered an order to that effect. In June 2012, the court ordered another evaluation and the doctor found him incompetent, which led to the court adjudicating him incompetent to stand trial at that time.

In September 2012, Pompee underwent three more evaluations and in each of them the doctors found him competent to stand trial. At a hearing in October 2012, after all three of those doctors testified that he was malingering and competent to proceed, the court adjudicated him competent to stand trial. In February 2013, the court set a final competency hearing for March 11 and scheduled trials for both cases on that same day.

Pompee underwent his final competency evaluation on March 7, 2013, just four days before his scheduled trial date. After reviewing his background, prior psychological treatment, and current medication, the doctor determined that he appeared "well medicated, stabilized, and cognizant" of the charges he faced. The doctor also concluded that his responses appeared "to be consistent with an attempt to appear severely cognitively impaired due to the severity of his charges and in an attempt to avoid the potential repercussions of his behavior." The doctor found

that he was competent to stand trial, and her competency evaluation report was filed in open court on March 11, 2013.

Pompee faced a mandatory minimum sentence of 20 years and a maximum of life imprisonment on the armed robbery charges in each case. He chose instead to plead guilty in return for ten-year terms of imprisonment in each case. Right after the plea hearing began, Pompee questioned the court about his potential sentence, attempted to negotiate a lower sentence, asked if he could receive two years on probation, and inquired about his anticipated release date.

After responding to Pompee's questions, the court asked whether he had taken any medications that day. He denied taking any, but when questioned further stated that he had taken medication at the hospital. Pompee also said that he did not understand what was happening, but after the court made clear that Pompee could either take the plea or go to trial, he affirmed several times that he understood his charges and the conditions of his guilty plea. After consulting with his attorney, he confirmed again that he understood the conditions of his plea and the rights he was giving up. He reiterated that he wanted to plead guilty.

The court found that Pompee had entered into a knowing and voluntary plea and understood the nature and consequences of the plea. It found him guilty in both cases and sentenced him to concurrent ten-year sentences.

Pompee sought postconviction relief in Florida state court. Pompee v. State, 150 So. 3d 1158 (Fla. 3d DCA 2014). After that did not succeed, in November of 2014 he filed the pro se § 2254 petition involved in this appeal. Pompee's petition claimed that trial counsel had rendered ineffective assistance by failing to request another competency hearing before he pleaded guilty. The district court denied his petition on the merits. Pompee appealed, and a judge of this Court granted a certificate of appealability on the following issue: Whether Pompee was denied constitutionally effective assistance of counsel because of counsel's failure to request another competency hearing. He was appointed counsel to represent him in this appeal.

II. STANDARD OF REVIEW

"When examining a district court's denial of a § 2254 habeas petition, we review questions of law and mixed questions of law and fact de novo, and findings of fact for clear error." Maharaj v. Sec'y for the Dep't of Corr., 432 F.3d 1292, 1308 (11th Cir. 2005). "An ineffective assistance of counsel claim is a mixed question of law and fact subject to de novo review." Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010). Pompee did not raise his ineffective assistance claim in state court, so we review that claim without any AEDPA deference.[1] Lawrence v. Sec'y, Fla. Dep't of Corr., 700 F.3d 464, 481 (11th Cir. 2012).

[1] Pompee concedes that his ineffective assistance claim is procedurally defaulted because

III. DISCUSSION

"The Sixth Amendment secures to a defendant who faces incarceration the right to [effective] counsel at all critical stages of the criminal process," and a "plea hearing qualifies as a critical stage." Iowa v. Tovar, 541 U.S. 77, 87, 124 S. Ct. 1379, 1387 (2004) (quotation marks omitted); see also Chatom v. White, 858 F.2d 1479, 1484 (11th Cir. 1988). Pompee contends that the district court erred in rejecting his claim because a reasonable attorney would have asked for another competency hearing before he pleaded guilty and his attorney's failure to do so prejudiced him.

"The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants." Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995). The standard for competence to plead guilty is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." Godinez v. Moran, 509 U.S. 389, 396, 402, 113 S. Ct. 2680, 2685, 2688 (1993) (quotation marks omitted). Pompee's mental illness alone is not enough to establish that he was

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he did not properly raise it in state court, but he argues that he can show cause and prejudice to excuse that procedural default. Because his petition fails on the merits, we decline to address the procedural bar issue. See DeYoung v. Schofield, 609 F.3d 1260, 1283 n.22 (11th Cir. 2010) ("Rather than wade through [the] complexities [of the procedural bar issue], we discuss the merits of [the] claims, as that alone resolves the case.").

incompetent to plead guilty. See Medina, 59 F.3d at 1107 ("Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.") (quotation marks and alterations omitted); Bolius v. Wainwright, 597 F.2d 986, 990 (5th Cir. 1979) ("[T]he mere presence of mental illness or other mental disability at the time [the defendant] entered his plea does not necessarily mean that he was incompetent to plead . . . .").

Pompee does not allege that he was incompetent when he pleaded guilty. Instead, he argues that his trial counsel was ineffective because she failed to request another competency hearing before he pleaded guilty. See Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998) ("[U]nder certain circumstances, trial counsel's failure to apprise the court of a client's changing mental state — thereby depriving the court of critical information regarding its own potential duty to hold a Pate v. Robinson hearing — can constitute ineffective assistance.").[2]

A showing of both deficient performance and prejudice is required to establish an ineffective assistance claim. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). To establish deficient performance of the type he claims, Pompee must show that his counsel failed to bring "information raising

[2] The Supreme Court held in Pate that where "the evidence raises a bona fide doubt as to a defendant's competence to stand trial, the judge on his own motion must . . . conduct a [competency hearing]." 383 U.S. 375, 385, 86 S. Ct. 836, 842 (1966) (quotation marks omitted).

a bona fide doubt as to [his] competency" to the trial court's attention when every reasonable attorney would have done so. James v. Singletary, 957 F.2d 1562, 1570 (11th Cir. 1992). And to establish prejudice, he must show that "there was a reasonable probability that he would have received a competency hearing and been found incompetent had counsel requested the hearing." Lawrence, 700 F.3d at 479. He has not, and cannot, meet either of those requirements.

A. Deficient Performance

The "defendant's attorney is in the best position to determine whether the defendant's competency is suspect," which means that the failure of Pompee's counsel "to raise the competency issue at [the plea hearing], while not dispositive, is evidence that [his] competency was not really in doubt and there was no need for a Pate hearing." Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996). Pompee argues that several facts should have given his attorney reason to doubt his competence: (1) his history of mental illness, (2) his history of irrational behavior (such as suicide attempts), and (3) his statement at the plea hearing that he did not understand what was happening.

That argument fails. To begin with, there is no evidence that Pompee's counsel deprived the court of any information related to his mental health. See Johnston, 162 F.3d at 635 (stating that trial counsel may render ineffective assistance where she deprives "the court of critical information regarding its own

potential duty" to hold a competency hearing); see also Burt v. Uchtman, 422 F.3d 557, 568–69 (7th Cir. 2005) ("The failure by defense counsel to investigate apparent problems with a defendant's mental health may be deficient performance as defined by the first prong of Strickland."). Instead, the record shows that the trial court was well aware of Pompee's history of mental illness and irrational behavior. It knew everything that trial counsel knew.

And there was a lot to know. During the year and a half from September 2011 through March 2013, Pompee underwent ten competency evaluations from five different doctors; all of those evaluations contained detailed information about his mental illness, history of irrational behavior, and competence to stand trial. The court held four competency hearings between October 2011 and October 2012 in which it reviewed the evaluations of experts and entered four separate adjudications about whether Pompee was competent to stand trial. Not only that, but the court also ordered that Pompee undergo one final competency evaluation just days before his March 11, 2013 trial date. The doctor evaluated Pompee on March 7, determined that he was competent, and her report was filed in open court on March 11, the day Pompee pleaded guilty.[3]

[3] Pompee argues that the change in his medicine after his final competency hearing on October 22, 2012, but before his plea on March 11, 2013, was a red flag that should have alerted his counsel to the need for another competency hearing. But the doctor who examined him on March 7, 2013, took his latest medication into account when assessing his competency and found that he was competent. The "fact that [he was taking] anti-psychotic drugs [did] not per se render him incompetent to stand trial." See Medina, 59 F.3d at 1107.

Those facts show that the court was familiar with Pompee's mental illness and history of irrational behavior and that his counsel did not withhold any information from the court. Cf. Burt, 422 F.3d at 567–68 (concluding that counsel performed deficiently where they "were aware of several pieces of information beyond what was available to the trial court that should have alerted them to the need for a new competency hearing") (emphasis added). His counsel did not render deficient performance by failing to ask for yet another competency hearing just four days after he was found competent to stand trial in the last evaluation that was conducted. See Johnston, 162 F.3d at 635.

Pompee's statements during the plea hearing also would not have alerted a reasonable attorney to the need for another competency hearing. He did express confusion about his medication and state that he did not understand what was going on, but those isolated statements do not show that he was incompetent to stand trial. See Thompson v. Wainwright, 787 F.2d 1447, 1458 (11th Cir. 1986) (concluding that the trial court was not required to inquire further into the defendant's competency because "one incorrect response" at a plea hearing "hardly indicates that [the defendant] was incompetent," and noting that the defendant "correctly answered numerous questions from the judge"). The plea hearing transcript shows that Pompee tried to negotiate a lower sentence, asked whether he could appeal his sentence, and was satisfied with his counsel's representation.

Pompee confirmed that he understood the rights he was giving up by pleading guilty and repeatedly confirmed that he understood the conditions and effect of his plea. See Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1977) ("Solemn declarations in open court carry a strong presumption of verity.").

What happened during the plea hearing and the totality of Pompee's statements during it show that he had a rational understanding of the proceedings against him and, as a result, counsel did not act unreasonably in failing to ask for another competency hearing. Godinez, 509 U.S. at 396–99, 402, 113 S. Ct. at 2685–86, 2688; see also Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1259 (11th Cir. 2002) ("The best evidence of [the defendant's] mental state at the time of trial is the evidence of his behavior around that time, especially the evidence of how he related to and communicated with others then.").

Because Pompee cannot show that his counsel failed to bring to the court's attention "information raising a bona fide doubt as to [his] competency," James, 957 F.2d at 1570, he cannot establish deficient performance. That failure is enough to defeat his claim, and there is more.

B. Prejudice

Even if Pompee could show that his counsel's performance was deficient, he cannot establish prejudice. He must show that "there was a reasonable probability that he would have received a competency hearing and been found incompetent

had counsel requested the hearing."[4] Lawrence, 700 F.3d at 479. He cannot make either showing.

There is no evidence that the court would have held a competency hearing had Pompee's counsel requested one. The plea hearing transcript indicates that the court did not doubt Pompee's competency; the court repeatedly told him that he either had to plead guilty or go to trial, and it refused to put off the plea for another day. The court also told Pompee that it wanted him to "drop [the] façade" of incompetence and "[s]top the pretending," which further shows that it would not have been open to delaying proceedings for another competency hearing. The competency evaluations supported the court's belief that Pompee was pretending, as did the conclusions of several doctors that he was feigning and exaggerating his symptoms to avoid facing his charges. And even if the court had held another hearing, there is no reasonable probability that Pompee would have been found incompetent. Three different doctors found him competent in September 2012, another doctor found him competent only four days before the plea, and there is no evidence that his competency changed in the four-day interim between that final

[4] The typical standard for establishing prejudice in the guilty plea context is to "show that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Diveroli v. United States, 803 F.3d 1258, 1263 (11th Cir. 2015) (quotation marks omitted). Even if that standard applies, Pompee cannot satisfy it. He was facing a 20-year to life sentence in each case, and under the guilty plea he received only two 10-year, concurrent sentences. There is no reason to believe that he would have refused to plead guilty if only his counsel had requested another competency hearing.

evaluation and the plea hearing. As a result, he cannot establish that any alleged deficient performance prejudiced him.

Because Pompee cannot establish deficient performance or prejudice, the district court did not err in denying his § 2254 petition.[5]

AFFIRMED.[6]

[5] Pompee has also filed a "Notice of Appeal for Action," which asks us to hear this appeal; we **DENY** it as moot.

[6] We thank the Georgetown University Law Center Appellate Litigation Program for representing Pompee in this appeal. The clinic in its brief, and third-year law student Nicole Pacheco at oral argument, did as good of a job as possible in an appeal about as hopeless as they come.

United States District Court
for the
Southern District of Florida

Harold Max Pompee, Plaintiff	)	
	)	
v.	)	Civil Action No. 14-24371-Civ-Scola
	)	
Secretary, Florida Department of Corrections, Defendant	)	

Order Adopting Magistrate's Report And Recommendation

This case was referred to United States Magistrate Judge Patrick A. White, consistent with Administrative Order 2003-19 of this Court, for a ruling on all pre-trial, nondispositive matters and for a Report and Recommendation on any dispositive matters. On October 27, 2015, Judge White issued a Report, recommending that the Court deny the petition for writ of habeas corpus and dismiss the case. (Report of Magistrate, ECF No. 46.) The Petitioner has filed two documents, titled "Newly Discovered Evidence," (*see* ECF Nos. 50 and 51), that the Court construes as objections to the Report.

The Court has considered—*de novo*—Judge White's Report, the record, and the relevant legal authorities. The Court has also considered Petitioner's Objections, which are nothing more than excerpts from a legal encyclopedia, Florida Jurisprudence. The Court finds Judge White's Report and Recommendation cogent and compelling.

The Court **affirms and adopts** Judge White's Report and Recommendation (ECF No. 46). The Court **denies** the Petition for Writ of Habeas Corpus (ECF No. 1). The Court does not issue a certificate of appealability. Finally, the Court directs the Clerk to **close** this case.

Done and ordered in chambers, at Miami, Florida, on January 13, 2016.

Robert N. Scola, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-24371-Civ-SCOLA
MAGISTRATE JUDGE P.A. WHITE

HAROLD M. POMPEE,

Petitioner,

v.

REPORT OF
MAGISTRATE JUDGE

JULIE JONES,[1]

Respondent.
_____/

I. Introduction

Harold Pompee, a state prisoner currently confined at Florida State Prison in Raiford, Florida has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking his convictions for two counts of armed robbery, two counts of unlawfully discharging a firearm in public, and attempted armed robbery, entered following a guilty plea in Miami-Dade County Circuit Court, case numbers F10-26505 and F10-26622.

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), the Court has the respondent's response to an order to show cause (DE#15) with supporting Appendices (DE#13,14), containing copies of state court

[1]Julie Jones has replaced Michael D. Crews and is currently the Secretary of the Florida Department of Corrections. Jones is now the proper respondent in this proceeding and should, therefore, "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

records, including the change of plea transcript, and relevant postconviction motions, and the petitioner's traverse (DE#18) and supplement thereto (DE#19).

II. Claims

Construing the arguments liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 419 (1972), in his initial habeas petition (DE#1), the petitioner raised the following three grounds for relief:

1. He was denied effective assistance of counsel, where his lawyer failed to challenge the two ten-year minimum mandatory sentences. (DE#1:4).

2. He was denied effective assistance of counsel, where his lawyer failed to file a motion to suppress photo lineup and suggestive identification. (DE#1:5).

3. He was denied effective assistance of counsel, where a second competency hearing was not conducted before he pled guilty, rendering his pea involuntary. (DE#1:6).

III. Procedural History

On October 12, 2010, petitioner was charged by Information in two separate cases. In case number F10-26505, he was charged with armed robbery and unlawfully discharging a firearm in public (DE#13:Ex.B) and in case number F10-26622, he was charged with two counts of armed robbery and unlawfully discharging a firearm in public (DE#13:Ex.C).

On September 19, 2011, Dr. Harry Damus performed the first of many competency evaluations on petitioner and found him incompetent

to proceed.[2] (DE#14-2:1-5). Then, on September 28, 2011, Dr. Michael DiTomasso conducted a second competency evaluation and also concluded that petitioner was not competent to stand trial. (DE#14-3:1-2). The parties stipulated to the reports submitted by the doctors, and on October 20, 2011, the court entered an order adjudging the petitioner incompetent. (DE#13:Ex.M:26). One month later, petitioner was reevaluated by Dr. Robert Birkfeld and Dr. Jennifer Vanderberg. (DE#14-4:1-13). Both doctors indicated in their report that petitioner's competence was restored. (Id.).

On December 9, 2011, the trial court reappointed Dr. Damus and Dr. DiTomasso to conduct further competency evaluations on petitioner. Dr. Damus' and Dr. DiTomasso's reports indicated that petitioner was competent. (DE#s14-5,14-6). On February 24, 2012, the parties stipulated to the reports and the court entered an order restoring petitioner's competence. (DE#13:Ex.M:27).

Six months later, on June 19, 2012, the trial court ordered additional competency evaluations of petitioner. Dr. Richard Elias Fernandez completed his evaluation on June 26, 2012, and concluded that petitioner was incompetent. (DE#14-7). An order was entered on June 29, 2012, adjudging petitioner incompetent. (DE#13:Ex.M:28). Petitioner was turned over once again to the Florida Department of Children and Families.

On September 7, 2012, further evaluations were conducted by Dr. Birkfeld and Dr. Ali Mandelblatt. (DE#14-8). The evaluations indicated that petitioner was competent. (Id.). On September 20, 2012, the court ordered additional evaluations by Dr. DiTomasso and Dr. Fernandez. (DE#14-9,14-10). These evaluations also concluded

[2]Competency reports were filed under seal. (DE#14).

that petitioner was competent. (Id.). Accordingly, a competency hearing was held on October 22, 2012. At that hearing, Dr. Fernandez, Dr. DiTomasso, and Dr. Birkfeld testified that although petitioner suffers from a mental illness, he is malingering and competent to proceed. (DE#13:Ex.M:30-31). On October 29, 2012, the court entered an order adjudging petitioner competent to proceed. (Id.). Furthermore, the court remanded petitioner to the custody of the Department of Children and Families for continued treatment. (Id.).

On February 27, 2013, the court ordered Dr. Elsa Malban to conduct a final competency evaluation. (DE#14-11). The evaluation, which was conducted on March 7, 2013, concluded that there was no impairment preventing petitioner from proceeding to trial and that he did not meet the criteria for continued hospitalization. (Id.).

On March 11, 2013, petitioner appeared before the court. (DE#13:Ex.N). Petitioner initiated a dialogue with the trial judge asking, "[i]f I take the ten years, can I get gain time too?" (Id.:35). The judge explained to petitioner that he would have to do ten years day-for-day. (Id.). Next, petitioner asked the judge to reduce his term of imprisonment by allowing him to serve a portion of his 10-year sentence on probation. (Id.:36). The court responded that probation was not an option (Id.).

Following petitioner's multiple attempts to negotiate a reduced prison sentence, the court stated, "[i]f you want to take ten years, take it. If you don't want to take it, the jury is outside. Let's go to trial...." (Id.:37). Petitioner indicated that he wanted to accept the plea. (Id.:39).

Accordingly, the court proceeded to conduct a change of plea

proceeding. Petitioner was placed under oath and provided the court with some background information. (Id.:40). Next, the court inquired as to whether petitioner had taken his medication. (Id.). Petitioner first responded that he had not taken his medication. (Id.). However, he subsequently corrected himself and stated "[y]es, at the hospital. I just took it." (Id.). Petitioner further indicated that the medication affected his ability to understand the proceedings. (Id.). At that point, the court immediately stopped the proceedings and stated as follows:

> I know. See the problem is that I can't take a plea if you don't understand. So if you tell me, "I don't understand," I cant take the plea, and just so that we know, the difference between your communication when you were standing up there telling me, "Judge Thomas, I'm schizophrenic, bipolar. I've done crack cocaine since I was 12 years old. I don't know what's going on," and if you listened to the questions you were asking me when you were negotiating on behalf of yourself, you know what's going on. So you need to first and foremost drop that facade. Stop the pretending, and if you don't--if you want to take the plea, let's do it. If you don't want to take the plea, then we'll bring the jury in--we're resolving the case one way or the other.

(Id.:40-41).

The court then asked petitioner again, "[d]o you understand what we're doing here today?" (Id.:41). Petitioner immediately and without hesitation responded, "[y]es, sir." (Id.). Thereafter, the court further explained and petitioner understood that if he proceeded to trial and were convicted he would be facing a 20-year minimum mandatory sentence as to each case. (Id.). After petitioner was given another opportunity to consult with his lawyer, the court continued the change of plea proceeding. (Id.:42).

Petitioner stated that he understood each of the rights he was waiving or otherwise giving up, including the right to a jury trial. (Id.:44). Petitioner recognized that, once the court accepted the plea, he would be unable to challenge the sentence imposed. (Id.). The court then found that petitioner entered into a knowing and voluntary plea supported by sufficient facts and that he appreciates the nature and consequences of his plea. (Id.:47).

Petitioner was adjudicated guilty and sentenced to two concurrent 10-year minimum mandatory prison terms. (Id.). The written judgment and sentence was entered on the docket on March 28, 2013. No direct appeal was persecuted. Therefore, his convictions became final at the latest on Saturday, April 27, 2013, when the 30-day appeal period expired following the entry of judgment. See Fla.R.App.P. 9.110(b); Demps v. State, 696 So. 2d 1296, 1297, n.1 (Fla. 3d Dist. 1997); Ramos v. State, 658 So.2d 169 (Fla. 3d Dist. 1995); Caracciolo v. State, 564 So.2d 1163 (Fla. 4th Dist. 1990); Gust v. State, 535 So. 2d 642 (Fla. 1st Dist. 1988). See generally Ferreira v. Secretary, Dept. Of Corrs., 494 F.3d 1286, 1293 (concluding that the "AEDPA's statute of limitations begins to run from the date both the conviction and the sentence the petitioner is serving at the time he files his application become final because judgment is based on both the conviction and the sentence.")(emphasis in original)(relying on Burton v. Stewart, 549 U.S. 147, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007)). Further, under Florida law, where the thirtieth day falls on a Saturday, Sunday, or legal holiday, the petitioner has until the following business day to file an appeal. See Fla.R.App.P. 9.420(e). Since the thirtieth day fell on a Saturday, petitioner had until Monday, April 29, 2013 within which to timely file his notice of appeal.

From the time the petitioner's conviction became final on

April 29, 2013, until **December 15, 2013,** when he provided prison authorities for mailing a Rule 3.850 motion for postconviction relief, the one-year federal limitations period ran unchecked for **230 days**. (DE#13:Ex.E). In the Rule 3.850 motion, petitioner raised the following two grounds for relief: (1) that counsel was ineffective in failing to challenge the ten year mandatory minimum sentence where the state failed to prove actual possession of the firearm and (2) that counsel was ineffective for failing to file a motion to suppress. (Id.). On April 9, 2014, the trial court entered a written order denying petitioner's claims. (DE#13:Ex.G). In so holding, the trial court concluded that the plea had a factual predicate and that the petitioner waived his right to challenge the sentence and possible trial evidence by entering into a negotiated plea. (Id.). The court further noted that the sentence was below the statutory minimum mandatory for crimes punishable by life, and that there was no indication the petitioner would have not otherwise taken the plea had a motion to suppress been filed. (Id.).

On April 20, 2014, petitioner filed a notice of appeal of the denial of his 3.850 motion in the Third District Court of Appeal. (DE#13:Ex.H). Petitioner raised the following claims: (1) ineffective assistance of counsel for failing to conduct a second photographic lineup and/or object to procedures employed for the first lineup; (2) ineffective assistance of counsel for failing to raise a claim relating to the false statement that the photo of petitioner holding a gun came from victim's phone; (3) ineffective assistance of counsel for failing to seek suppression of the photographic evidence depicting petitioner's possession of a firearm since the phone did not belong to defendant; (4) ineffective assistance of counsel for failing to move for withdrawal of defendant's plea due to defendant's lack of

competence at the time the plea was entered resulting from a high dose of medication; and (5) ineffective assistance of counsel for coercing defendant to enter a plea. (Id.).

On July 30, 2014, the Third District Court of Appeal *per curiam* affirmed the denial of petitioner's Rule 3.850 motion. See Pompee v. State, 150 So. 3d 1158 (Fla. 3d DCA 2014) (table); (DE#13:Ex.J). The petitioner's motion for rehearing was denied (DE#13:Ex.K:22), and the mandate issued on **September 11, 2014**. (DE#13:Ex.L).

From the denial of petitioner's Rule 3.850 motion until he came to this court on **November 14, 2014**, providing to prison authorities for mailing the instant *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. §2254, **64 days** of untolled time passed.[3] (DE#1). In all a total of **294 days** of untolled time expired from the time petitioner's conviction became final and the filing of this federal habeas petition.

IV. Threshold Issues-Timeliness, Exhaustion, & Procedural Bar

A. Timeliness

In its response to the court's order to show cause, the respondent rightfully does not challenge the timeliness of the

[3]"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 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).

initial habeas petition filed herein. See 28 U.S.C. §2244(d)(1)-(2). The petition 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). As noted previously, less than one year of the federal limitations period ran during which no state court proceedings were pending before petitioner came to this court, filing this §2254 proceeding. Thus, petitioner's federal petition (DE#1), filed within a year from the time the petitioner's convictions became final, is timely. See Artuz v. Bennett, 531 U.S. 4 (2000) (pendency of state postconviction proceedings tolls the AEDPA limitations period).

B. Exhaustion

The respondent argues that **claim 3** is unexhausted and prospectively procedurally barred from review here because it has never been fairly presented in the state forum. It is axiomatic that issues raised in a federal habeas corpus petition must have been fairly presented to the state courts and thereby exhausted prior to their consideration on the merits. See 28 U.S.C. §2254(b), (c).;[4] Anderson v. Harless, 459 U.S. 4 (1982); Hutchins v.

[4]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

Wainwright, 715 F.2d 512 (11th Cir. 1983). Exhaustion requires that a claim be pursued in the state courts through the appellate process. Leonard v. Wainwright, 601 F.2d 807 (5th Cir. 1979).

Both the **factual substance** of a claim and the **federal constitutional issue** itself must have been expressly presented to the state courts to achieve exhaustion for purposes of federal habeas corpus review. Henderson v. Campbell, 353 F.3d 880, 898 n.25 (11th Cir. 2003); Baldwin v. Reese, 541 U.S. 27 (2004); Gray v. Netherlands, 518 U.S. 152 (1996); Duncan v. Henry, 513 U.S. 364 (1995); Picard v. Connor, 404 U.S. 270 (1971). Exhaustion also requires review by the state appellate and post-conviction courts. See Mason v. Allen, 605 F.3d 1114 (11th Cir. 2010), Herring v. Sec'y Dep't of Corr's, 397 F.3d 1338 (11th Cir. 2005).

Thus, the "exhaustion of state remedies requires that petitioners fairly present federal claims to the state courts in order to give the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995)(*per curiam*)(citation, alterations, and internal quotation marks omitted). Moreover, the habeas petitioner must do "more than scatter some makeshift needles in the haystack of the state court record." McNair v. Campbell, 416 F.3d 1291, 1303 (11th Cir. 2005)(citation and internal quotation marks omitted). Careful review of the Rule 3.850 post-conviction motion reveals that **claim 3** was not raised therein. Thus, the respondent's

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(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . .

(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.

argument regarding exhaustion is correct. Further, no cause or prejudice has been demonstrated to excuse the procedural default of this claim.

Although this Court acknowledges that the procedural bar issue should ordinarily be resolved first, judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated. 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."). Since the petitioner cannot prevail on the merits of his claims, there is no need to belabor the procedural exhaustion and bar issues here.[5]

V. Standard of Review

This federal habeas petition is governed by 28 U.S.C. §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA imposes a highly deferential standard for reviewing the state court rulings on the merits of constitutional claims raised by a petitioner. "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

[5]Even if certain claims are technically unexhausted, this Court will exercise 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).

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. ____, 131 S.Ct. 770, 786-87 (2011). See also Greene v. Fisher, 565 U.S. ___, ___, 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).

In light of these principles, the AEDPA permits federal courts to grant habeas relief to a state court prisoner on any claim adjudicated on the merits in state court only if the state court's decision: (1) "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) "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); see Lee v. Commissioner, Alabama Dept. of Corrections, 726 F.3d 1172 (11th Cir. 2013).

Section 2254(d)(1) includes the phrase "clearly established Federal law." This phrase refers "to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). The phrase "contrary to" means that the state court decision "contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts." Kimbrough v. Secretary, Florida Dept. of Corrections, 565 F.3d 796, 799 (11th Cir. 2009). See also Bell v. Cone, 535 U.S. 685, 694, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914

(2002).

An "unreasonable application" of clearly established federal law occurs when "the state court correctly identifies the governing legal principle ... but unreasonably applies it to the facts of the particular case." Bell v. Cone, 535 U.S. 685, 694, 122 S.Ct. 1843, 1850 (2002). "An unreasonable application of federal law is different from an incorrect application of federal law," Williams, 529 U.S. at 410, 120 S.Ct. at 1522. "A state court's application of clearly established federal law or its determination of the facts is unreasonable only if no 'fairminded jurist' could agree with the state court's determination or conclusion." Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1257 (11th Cir. 2012)(*quoting* Harrington, 131 S.Ct. at 780)).

Additionally, the federal court will presume the correctness of state court findings of fact unless the petitioner is able to rebut that presumption by clear and convincing evidence. See 28 U.S.C. §2254(e)(1). Due to the presumption under §2254(e)(1) that state court findings of fact are correct, "where factual findings underlie the state court's legal ruling, the Court's already deferential review [under §2254(d)] becomes doubly so." Childers v. Floyd, 642 F.3d 953, 972 (11th Cir. 2011)(en banc).

VI. Applicable Legal Principles

A. Lawfulness of Guilty Plea

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Since a guilty plea is a waiver of substantial

constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748 (1970). See also United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002); Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

"A plea is voluntary in a constitutional sense if the defendant receives real notice of the charge against him and understands the nature of the constitutional protections he is waiving." United States v. Frye, 402 F.3d 1123, 1127 (11th Cir. 2005), *citing*, Brown, 117 F.3d at 476. To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. Frye, 402 F.3d at 1127, *quoting*, United States v. Mosely, 173 F.3d 1318, 1322 (11th Cir. 1999). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary intelligent choice among the alternative courses open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Boykin, 395 U.S. at 242.

B. Ineffective Assistance of Trial Counsel

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v.

Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Id. at 689.

More specific to this case, a criminal defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. Padilla v. Kentucky, 559 U.S. 356, 364-65, 130 S.Ct. 1473, 1480-81, 176 L.Ed.2d 284 (2010). It is beyond dispute that an attorney has a duty to advise a defendant who is considering a guilty plea of the available options and possible consequences. See generally Brady v. United States, 397 U.S. 742, 756 (1970). See also Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948)("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman ...."). The law requires counsel to research the relevant law and facts and to make informed decisions regarding the fruitfulness of various avenues. United States v. Grammas, 376 F.3d 433, 436 (5th Cir. 2004).

Thus, the *Strickland* two-part standard is applicable to ineffective-assistance-of-counsel claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 57-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Generally, as indicated, a court first determines whether counsel's performance fell below an objective standard of reasonableness, and then determines whether there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. Padilla, 130 S.Ct. at 1482.

In the context of a guilty plea, the first prong of *Strickland* requires petitioner to show his plea was not voluntary because he received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he would not have pled guilty but would have gone to trial. Hill, 474 U.S. at 56-59, 106 S.Ct. at 370-71. See generally Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 1385 (2012); Missouri v. Frye, ___ U.S. ____, 132 S.Ct. 1399 (2012).[6] A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 104 S.Ct. at 2052.

If the petitioner cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1100 (11th Cir. 2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000). "Surmounting *Strickland*'s high bar is never an easy task." Richter, 131 S.Ct. at 788 (*quoting* Padilla, 559 U.S. at 371, 130 S.Ct. at 1485). A state court's adjudication of an ineffectiveness claim is accorded great deference. "The standards created by *Strickland* and §2254(d) are both 'highly deferential,' [*Strickland*], at 689, 104 S.Ct. 2052; Lindh v. Murphy, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is

[6]The Supreme Court in *Frye* and *Lafler* clarified that the Sixth Amendment right to effective assistance of counsel under the standard established in Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) extends to the negotiation and consideration of plea offers that lapse or are rejected. See Frye, 132 S.Ct. at 1404-08; Lafler, 132 S.Ct. at 1384.

'doubly' so, *Knowles*[7], 556 U.S., at ____, 129 S.Ct. at 1420." Richter, 131 S.Ct. at 788. The 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." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933 (2007).

VII. Discussion

Petitioner argues in this federal proceeding that his lawyer was ineffective in failing to request a second competency hearing before petitioner pled guilty and therefore his plea was not voluntary. (DE#1:6). Moreover, petitioner also asserts that his lawyer was ineffective in failing to file a motion to suppress and in failing to challenge the two ten-year mandatory minimum sentences imposed in each case. (Id.:4,5).

A. Lawfulness of Pleas

Before proceeding to address the ineffective assistance of trial counsel claims, the lawfulness of the subject pleas must first be determined. Contrary to the petitioner's claim in this habeas proceeding, as will be demonstrated below, it is readily apparent that the petitioner's pleas and admissions were entered freely, voluntarily, and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by petitioner.

From the start of the change of plea hearing, petitioner thoroughly and cogently communicated with the judge. Initially, petitioner asked, "[i]f I take the ten years, can I get gain time

[7]Knowles v. Mirzayance, 556 U.S. 111 (2009).

too?" (DE#13:Ex.N:35). The judge explained to petitioner that he would not receive gain time because the plea offer involved a minimum mandatory 10-year prison sentence, which required "ten years day-for-day." (Id.). Next, petitioner inquired as to whether he could complete a portion of the 10-year prison term on probation. (Id.:35-36). The judge responded "[n]o, sir, it's ten years and that's it." (Id.:36). Petitioner then asked the court whether he could appeal the conviction if he lost at trial. (Id.). The court explained to petitioner that if there was an appealable issue then he could appeal. (Id.). The court informed petitioner that if the cases were reversed on appeal for a new trial, petitioner would still face, as to each case, a 20-year minimum mandatory prison sentences. (Id.).

Following the discussion above, petitioner once again asked the court to consider allowing him to complete half of his sentence on probation. (Id.). To which the court explained, "[n]o probation. It's not happening. Probation is not happening. I won't put you on probation, because you cannot do probation." (Id.:36-37). After petitioner insisted that he could do probation, the court stated "[i]t's not happening. If you want to take ten years, take it. If you don't want to take it, the jury is outside. Let's go to trial...." (Id.:37). Subsequently, petitioner indicated his desire to accept the plea offer. (Id.:39).

Petitioner was sworn in. (Id.). He stated that he had taken his medication at the hospital. (Id.:40). However, he also stated that the medication affected his ability to understand the proceedings. (Id.). The court responded as follows:

> I know. See the problem is that I can't take a plea if you don't understand. So if you tell me, "I don't understand," I can't take the

> plea, and just so that we know, the difference between your communication when you were standing up there telling me, "Judge Thomas, I'm schizophrenic, bipolar. I've done crack cocaine since I was 12 years old. I don't know what's going on," and if you listened to the questions you were asking me when you were negotiating on behalf of yourself, you know what's going on. So you need to first and foremost drop that facade. Stop the pretending, and if you don't - if you want to take the plea, let's do it. If you don't want to take the plea, then we'll bring the jury in- we're resolving the case on way or the other.

(Id.:40-41).

The court then asked petitioner one more time if he understood the proceedings, to which petitioner immediately and without hesitation responded, "[y]es sir." (Id.:41). The petitioner also confirmed he understood the 20-year minimum mandatory sentence and the maximum life imprisonment sentence he could receive for each offense of conviction. (Id.:41-42). Although petitioner confirmed that he had already spoken with his attorney, the court gave petitioner yet another opportunity to further confer with her. (Id.:42).

Thereafter, petitioner acknowledged he understood the numerous rights he was giving up as a result of the plea, including the right to a trial, to be presumed innocent, to have the state prove the charges beyond a reasonable doubt, etc. (Id.:44-45). Petitioner also acknowledged that he was giving up his right to a direct appeal. (Id.:45). The court accepted petitioner's plea, finding it to be freely and voluntarily given, with an understanding of the nature and consequences of the plea, and supported by a factual basis. (Id.:47). The trial court adjudicated petitioner guilty as

charged. (Id.). The court sentenced petitioner, as to each case, to 10-years minimum mandatory imprisonment, to be served concurrently. (Id.).

As evidenced by the record, the trial court in this case took great pains to ensure that the pleas were knowingly, voluntarily and freely entered. The trial court thoroughly communicated with petitioner. The petitioner was expressly and in great detail advised by the trial court of the terms of the plea agreement and the constitutional rights he was waiving as a result therefrom. Petitioner indicated that he understood all explained to him by the court and agreed to waive his constitutional rights. The waiver necessarily included the waiver of his right to make the state prove him guilty by presenting evidence beyond a reasonable doubt as to the charged offenses. By entering the plea, petitioner understood no further investigation into the facts of the case would be conducted and that no defense, challenging the state's evidence against him would be undertaken. More specifically, by pleading guilty to the charges, petitioner understood there would be no further investigation into any possible defenses or to the evidence provided by the state during discovery.

A defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as the representations of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). See also Kelley v. Alabama, 636 F.2d 1082, 1084 (5th Cir. Unit B. 1981); Scheele v. State, 953 So.2d 782, 785 (Fla. 4th DCA 2007)("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a

crossroads in the case. What is said and done at a plea conference carries consequences."); Iacono v. State, 930 So.2d 829 (Fla. 4th DCA 2006)(holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie).

Petitioner is, therefore, not entitled to relief in this habeas corpus proceeding on any challenge to the lawfulness of his plea in that his plea was not in violation of federal constitutional principles. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Brady v. United States, 397 U.S. 742, 748 (1970).

B. Ineffective Assistance of Trial Counsel Claims

As to **claim 3**, petitioner asserts that counsel was ineffective for failing to order an additional competency evaluation before the entry of his guilty plea. (DE#1:6). He suggests that the additional evaluation would have revealed his lack of competency where he was under a heavy dose of a medication called Seroquel. (Id.).

Review of the record reveals that a final evaluation was conducted right before petitioner's entry of his guilty plea. Based on the final evaluation, Dr. Elsa Marban reported that petitioner appeared to be well medicated, stabilized, and cognizant of his charges and legal proceedings. (DE#14-11:5). The report further indicated that during the evaluation, petitioner attempted to give the appearance of a lack of knowledge of basic legal concepts that even a cognitively impaired individual would know. (Id.). Dr. Marban noted that petitioner's responses were consistent with an attempt to appear severely cognitively impaired due to the severity of the charges in an attempt to avoid potential repercussions of his behavior. (Id.). Petitioner maintains that Dr. Marban's report

was not sufficient and that his lawyer was ineffective in failing to request yet another evaluation.

The Due Process Clause of the Fourteenth Amendment prohibits states from trying or convicting a defendant who is mentally incompetent. See Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). The Supreme Court set the standard to be used in determining mental competency as 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 v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (*per curiam*); Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *see also* Indiana v. Edwards, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008).

In Drope, the Court elaborated as follows:

> [t]he import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Drope, 420 U.S. at 180.

In applying these standards, the Eleventh Circuit Court of Appeals has noted that "[N]either low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir. 1995) (citation omitted). A Pate analysis must focus on "what the trial court did in light of what it then knew, [and] whether objective facts known to the trial court were sufficient to raise a bona fide doubt as to the defendant's competency." Fallada v. Dugger, 819 F.2d 1564, 1568 (11th Cir. 1987)(citations omitted).

Review of the record confirms that petitioner's mental health issues which required medications did not impair his ability to proceed with the plea. To the contrary, the transcript of the change of plea hearing shows that petitioner engaged the trial judge in a lengthy discussion, that he negotiated extensively on his behalf, and that he answered the court's questions during the plea colloquy. Petitioner's responses were coherent and there was no indication that he did not understand what was transpiring during the proceeding.

Under these circumstances, no showing has been made in this collateral proceeding that counsel was ineffective for failing to have the movant examined once more to ascertain his mental competency. The law is clear that it is a fundamental requirement of Due Process that defendants be mentally competent upon entering a guilty plea or proceeding to trial. The test for determining a defendant's competency to stand trial is "whether he 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 v. United States, 362 U.S. 402 (1960). The mere presence of mental

illness or other mental disability at the time of trial does not necessarily mean that a defendant is incompetent under the Dusky test. The mental illness or disability must have been so debilitating that the defendant was unable to consult with his lawyer and did not have a rational and factual understanding of the proceedings. See generally Bolius v. Wainwright, 597 F.2d 986, 990 (5 Cir. 1979). No such showing has been made here.

Even if counsel had requested that the movant undergo yet another psychological and/or psychiatric evaluation and/or testing prior to the change of plea proceeding, no showing has been made here that such an exam was warranted, nor that the court would have granted the request. Consequently, no prejudice has been established arising from counsel's failure to pursue this claim. He is therefore entitled to no relief.

Next, as to **claims 2 and 3**, these claims are also not entitled to review on the merits because they are barred and/or otherwise waived from review here due to petitioner's knowing and voluntary guilty plea. In **claims 2 and 3**, petitioner asserts that his lawyer was ineffective in failing to challenge the two 10-year minimum mandatory prison sentences and that his lawyer was also ineffective in failing to file a motion to suppress. (DE#1:4-5).

A voluntary and intelligent guilty plea forecloses federal collateral review of alleged constitutional errors preceding the entry of the plea. See Tollett v. Henderson, 411 U.S. 258, 266-67, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992); McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (holding that defendant who pled guilty was not entitled to federal habeas review of claim that his confession was obtained unconstitutionally); Boykin v.

Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (finding a plea of guilty is a waiver of several constitutional rights, including the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to insist on a jury trial); Stano v. Dugger, 921 F.2d 1125, 1150 (11th Cir. 1991).

Petitioner does not allege, let alone demonstrate here that he might not have pleaded guilty if his trial counsel had challenged the 10-year mandatory minimum prison sentence and filed the motion to suppress, and would have instead insisted on a trial. Regardless, the court's plea colloquy ensured that petitioner's guilty plea was free from coercion and that petitioner understood both the nature of the charges to which he was pleading guilty and the consequences of his pleas.

That being the case, petitioner's claims that his trial counsel provided ineffective assistance by failing to file motions to suppress and failing to challenge the 10-year minimum mandatory sentences are barred by the guilty plea. A defendant's plea of guilty, made knowingly, voluntarily, and with the benefit of competent counsel, waives all nonjurisdictional defects and defenses in that defendant's court proceedings. See United States v. Yunis, 723 F.2d 795, 796 (11th Cir. 1984); see also, Wilson v. United States, 962 F.2d 966 (11th Cir. 1992); United States v. Broce, 488 U.S. 563 (1989). "This includes claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary." Id. To enter into a voluntary plea, the defendant must understand the law in relation to the facts. McCarthy v. United States, 394 U.S. 459 (1969); see also, Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Here, the guilty plea was entered knowingly and voluntarily, Petitioner has provided no reason

whatsoever to doubt the competence of his counsel. Thus, claims one and two, which set forth claims based on counsel's alleged failure to file motions to suppress and failure to challenge the 10-year mandatory minimum sentence prior to the change of plea are barred by petitioner's knowing and voluntary plea.

Consequently, the rejection of the claims in the state habeas proceeding was not in conflict with clearly established federal law or based on an unreasonable determination of the facts in light of the evidence presented. Relief must therefore be denied pursuant to 28 U.S.C. §2254(d). Williams v. Taylor, 529 U.S. 362 (2000).

In conclusion, the record reveals that petitioner is not entitled to relief on any of the claims presented in this habeas petition as it is apparent from the extensive review of the record that the claims warrant no relief, and more particularly, that the plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Brady v. United States, 397 U.S. 742, 748 (1970). See also Hill v. Lockhart, supra; Strickland v. Washington, supra. 466 U.S. 668 (1984).

VIII. Evidentiary Hearing

Based upon the foregoing, petitioner's request for an evidentiary hearing should be denied. An evidentiary hearing is not required in this case, because the habeas petition can be resolved by reference to the state court record. 28 U.S.C. §2254(e)(2); Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)(holding that if record refutes the factual allegations in the petition or otherwise precludes habeas relief,

a district court is not required to hold an evidentiary hearing). See also Atwater v. Crosby, 451 F.3d 799, 812 (11th Cir. 2006)(addressing the petitioner's claim that his requests for an evidentiary hearing on the issue of trial counsel's effectiveness during the penalty phase of his trial in both the state and federal courts were improperly denied, the court held that an evidentiary hearing should be denied "if such a hearing would not assist in the resolution of his claim."). Petitioner has failed to satisfy the statutory requirements in that he has not demonstrated the existence of any factual disputes that warrant a federal evidentiary hearing.

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 petition is clearly time-barred, 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: "Before 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. Recommendations

It is therefore recommended that this petition for habeas corpus relief be denied; that no certificate of appealability issue, and that 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 27th day of October, 2015.

UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13336-GG

HAROLD MAX POMPEE,

Petitioner - Appellant

versus

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents - Appellees

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

BEFORE: ED CARNES, Chief Judge, MARCUS, and EBEL,* Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

ORD-41

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13336-GG

HAROLD MAX POMPEE,

Petitioner - Appellant

versus

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents - Appellees

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, MARCUS, and EBEL,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

*Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

ORD-42

28 U.S.C. § 2254
State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(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 an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(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.

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) 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.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89–711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104–132, title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.