NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

VENECIA DEPAULA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-1216

Opinion filed September 16, 2020.

Appeal from the Circuit Court for Hillsborough County; Mark D. Kiser, Judge.

Venecia Depaula, pro se.

Ashley Moody, Attorney General, Tallahassee, and Helene S. Parnes, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

CASANUEVA, SILBERMAN, and LUCAS, JJ., Concur.

Appendix "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

October 28, 2020

CASE NO.: 2D19-1216
L.T. No.: 09-CF-13368

VENECIA DEPAULA	v.	STATE OF FLORIDA
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and request for issuance of a written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ATTORNEY GENERAL, TAMPA
VENECIA DEPAULA

HELENE S. PARNES, A.A.G.
PAT FRANK, CLERK

mep

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

APPENDIX "B"

P

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

VENECIA AMALIA DEPAULA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D11-1311

Opinion filed December 5, 2012.

Appeal from the Circuit Court for Hillsborough County; Emmett Lamar Battles, Judge.

James Marion Moorman, Public Defender, and C. Suzanne Bechard, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Heidi L. Bettendorf, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

SILBERMAN, C.J., and KELLY and VILLANTI, JJ., Concur.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 10, 2013

CASE NO.: 2D11-1311
L.T. No. : 09-CF-13368

Venecia Depaula v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and issuance of a written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Venecia Depaula
Pat Frank, Clerk
Heidi L. Bettendorf
Karen Kinney, A.P.D.
Robert Krauss, A.A.G.

me

James Birkhold
Clerk

Received By

Appellate Division
Public Defenders Office

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 09-CF-013368**

v.

VENECIA AMALIA DEPAULA, **DIVISION: E**
Defendant.
_____/

ORDER DISMISSING WITHOUT PREJUDICE GROUNDS ONE, TWO, THREE, FOUR, AND FIVE, AND DENYING GROUND SIX OF DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS MATTER is before the Court on Defendant's *pro se* "Motion for Postconviction Relief" (Motion), filed February 3, 2015, pursuant to Florida Rule of Criminal Procedure 3.850. After reviewing Defendant's Motion, the court file, and the record, the Court finds as follows:

PROCEDURAL HISTORY

On February 24, 2011, Defendant was found guilty by a jury of first degree premeditated murder, as charged, with a special finding that Defendant did actually possess and discharge a firearm causing death. *See* Verdict Form, attached. That same day, Defendant was sentenced to a term of natural life in prison, with a twenty-five (25) year mandatory minimum sentence. *See* Judgment and Sentence, attached. Defendant appealed her conviction and sentence, and the mandate, affirming, issued January 30, 2013. *See* Mandate, attached.

DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

In her timely,[1] sworn Motion, Defendant raises the following grounds for relief:

1. Ineffective assistance of counsel for allowing Defendant to reject a plea offer while knowing she was mentally incompetent to proceed.

[1] The Court notes that Defendant's Motion was provided to prison officials on January 28, 2015, given the stamp on the Motion. As such, Defendant's Motion is timely filed within the requirements of Rule 3.850(b).

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2. Ineffective assistance of counsel for failing to request a hearing for the trial judge to make findings and issue an order pertaining to Defendant's mental state and specifying whether Defendant was competent to proceed.

3. Ineffective assistance of counsel for failing to object on the grounds that Defendant was never declared competent to proceed before or during jury trial given that her competency to proceed was in question.

4. Ineffective assistance of counsel for allowing Defendant to waive her constitutional rights during trial, without objection, despite knowing she could not make a valid waiver given her incompetency to proceed.

5. Ineffective assistance of counsel for disclosing privileged communications to the State and trial court absent a valid waiver from Defendant.

6. Ineffective assistance of counsel for conceding that Defendant created or wrote the text messages originating from a phone registered to her.

Defendant requests the Court grant an evidentiary hearing as to the conduct of her trial counsel and grant her a competency hearing and evaluation. Defendant also requests that her judgment and sentence be vacated and that she either be granted the opportunity to accept the thirty-five (35) year plea offer previously offered to her or given a new trial, once declared competent to proceed. *See* Motion, attached.

DISCUSSION

In each of her grounds, Defendant alleges ineffective assistance of counsel. When ineffective assistance of counsel is alleged, the burden is on the person seeking collateral relief to 1) allege the grounds for relief specifically; and 2) establish whether prejudice resulted. Effective assistance of counsel does not mean that a defendant must be afforded errorless counsel or that future developments in law must be anticipated. *Meeks v. State*, 382 So. 2d 673 (Fla. 1980). In *Strickland v. Washington*, the United States Supreme Court provided the following standard for ineffective assistance of counsel:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

> produced a just result. . . . A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. . . . [T]he proper standard for attorney performance is of reasonably effective assistance.

466 U.S. 668, 686–687 (1984). In *Downs v. State*, the Florida Supreme Court stated that a defendant must prove prejudice affirmatively. *See Downs v. State*, 453 So. 2d 1102 (Fla. 1984). To adequately demonstrate prejudice, a defendant must show "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Even if a defendant's allegations are sufficient to state a claim for relief, a motion may be summarily denied, without an evidentiary hearing, if the record conclusively refutes the allegations and demonstrates that the defendant is not entitled to relief. *See Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993). An evidentiary hearing will be required unless the motion is facially insufficient or the record demonstrates that the defendant is not entitled to relief. *Id.*

Ground One

In Ground One, Defendant alleges ineffective assistance of counsel for allowing Defendant to reject a plea offer while knowing she was mentally incompetent to proceed. Specifically, Defendant states that on March 10, 2010, her trial counsel filed a motion asking the trial court to appoint Dr. Michael Gamache to determine whether Defendant was competent to proceed. Defendant states that on March 13, 2010, the trial court granted the motion, but

appointed Dr. George M. Northrup to conduct the exam, and file the resulting report by April 19, 2010.

Defendant states that on July 30, 2010, trial counsel filed a second motion to appoint Dr. Gamache for a confidential ex parte mental competency exam. Defendant alleges that trial counsel asserted that Defendant had been previously diagnosed with severe mental disorders and based on his meetings with Defendant and reports received from Dr. Patricia Phelps, he believed that Defendant was incompetent to proceed. Defendant states that on the same day, trial counsel also filed a "Notice to Rely on the Defense of Battered-Spouse Syndrome and/or Rely on Insanity at Time of the Offense." On August 10, 2010, trial counsel filed an amended motion asking the trial court to appoint Dr. Gamache as a confidential expert for a forensic psychological examination. Defendant states that, in that motion, trial counsel asked for an examination to determine whether Defendant was competent to proceed. Defendant states that the trial court granted the motions and later granted a motion for continuance to give Dr. Gamache time to complete his evaluation.

Defendant states that on November 30, 2010, the State filed a motion to strike the "Notice of Intent to Rely on the Defense of Insanity as the Time of the Offense." Defendant states that at that point, the case was set for jury trial. She states that trial counsel then filed a motion for continuance explaining the need to have Defendant evaluated by an OB/GYN expert. Defendant states that trial counsel filed another motion requesting the trial court to appoint Dr. Eldra Solomon to conduct a mental health evaluation.

Defendant states that on December 2, 2010, the State filed a motion to strike and a motion in limine regarding the "Notice of Intent to Rely on the Defense of Battered Spouse Syndrome." Defendant states that on December 3, 2010, the parties appeared before the trial court to resolve the pending motions. Defendant alleges that during the hearing, trial counsel

explained that Defendant had been evaluated by two experts regarding her competency and that neither expert considered the question of her sanity, but they both agreed she suffers from serious mental illness. Defendant states that trial counsel further explained that he then sought to have Defendant examined to determine whether she was insane at the time of the offense. Defendant states that unfortunately, Dr. Gamache could not find convincing evidence to support the second prong of the M'Naghten test, but that Dr. Gamache agreed Defendant suffers from serious mental illness. Defendant further states that trial counsel explained that he then sought examination by Dr. Solomon to develop some mitigating circumstances to present at sentencing. Defendant states that the trial court ordered the appointment but the exam did not occur.

Defendant argues that throughout all of the proceedings, the trial court never made any findings regarding her competency to proceed and no order was ever filed with such a finding. Defendant alleges that the doctors found Defendant to be seriously mentally ill but their findings were not addressed. Defendant argues that the State, at the December 3, 2010 hearing, also expressed concern that Defendant was not competent to proceed. Defendant argues that the State explained that he listened to recorded jail phone calls where Defendant stated she was not going to take the first plea offer because she had been told that the State would reduce the offer as the trial date neared, and as such, she would hold out. Defendant explains that the State expressed that it had not offered Defendant any deal and was not sure that one would be forthcoming.

Defendant argues that, even with these issues, the trial court never addressed Defendant's mental illness and never decided whether she was competent to proceed. Defendant contends that because no determination has been made as to her competency, she has not been competent to proceed since the issue of her mental health was first raised. Defendant states that she was not competent to proceed to trial and was not competent to knowingly, intelligently, and voluntarily reject the State's plea offer of thirty-five (35) years in prison. Defendant further states that she

was not competent to knowingly, intelligently, and voluntarily waive her right to testify, and could not knowingly and intelligently waive decisions impacting her rights to due process and a fair trial.

Defendant argues that trial counsel knew that she was never declared competent to proceed and knew she was unable to make a rational, fully informed, knowing and voluntary decision to reject the State's plea offer. She argues that trial counsel should have taken every measure possible to encourage her to take the offer, or postpone the proceedings until she was declared competent to proceed. Defendant further argues that trial counsel should have moved the trial court for a hearing to rule on the question of her competency to proceed and address any matters pertaining to the restoration of her competency and mental health.[2] *See* Motion, attached.

When a defendant alleges that his or her trial counsel failed to correctly advise him or her with regard to accepting or rejecting a plea offer, the defendant must show deficient performance and prejudice under *Strickland*. To prove prejudice under such a claim, the defendant must show: "(1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *See Alcorn v. State*, 121 So. 3d 419 (Fla. 2013).

Further, when a defendant alleges that ineffective assistance of counsel based on trial counsel's conduct in handling the defendant's competency to proceed, the defendant must allege specific facts showing that a "reasonably competent attorney would have questioned competence to proceed," in order to sufficiently allege the deficiency prong of *Strickland*. *See Thompson v.*

[2] The Court notes that Defendant has used the same facts from pages 7 to 14 of her Motion to support her Grounds 1, 2, 3, and 4, and as such, the Court has only recited those facts in Ground 1. However, as the Court separately explains in each Ground, the facts provided do not support a finding that the Grounds are facially sufficient, and as such, the Court has not separated the facts into the Grounds to which they are relevant.

State, 88 So. 3d 312, 319 (Fla. 4th DCA 2012) ("Conclusory allegations of incompetency are not enough to warrant an evidentiary hearing."). In order to sufficiently allege the prejudice prong with such a claim, the defendant must "set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency." *Id.* at 319-320. Moreover, there is a presumption, in postconviction proceedings, that the defendant was competent, and the defendant has the burden to demonstrate otherwise. *Id.* at 320. The defendant must create a "real, substantial and legitimate doubt as to competency" in order to be entitled to an evidentiary hearing. *Id.*

After reviewing Defendant's allegations, the court file, and the record, the Court finds that Defendant has failed to sufficiently allege prejudice in trial counsel's conduct with regard to advice given in rejecting a plea offer where Defendant was never declared competent to proceed. *See Boyers v. State*, 104 So. 3d 1230, 1232 (Fla. 2d DCA 2012). **Accordingly, Ground One must be dismissed without prejudice to any right Defendant may have to refile a facially sufficient ground within sixty (60) days of the date of this Order. *See Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007).**

Ground Two

In Ground Two, Defendant alleges ineffective assistance of counsel for failing to request a hearing for the trial judge to make findings and issue an order pertaining to Defendant's mental state and specifying whether Defendant was competent to proceed. *See* Motion, attached.

After reviewing Defendant's allegations, the court file, and the record, the Court first finds that Defendant has incorporated by reference the facts that the Court has listed in Ground One. Although the Court will incorporate by reference those facts here, the Court finds that Defendant has failed to sufficiently allege both deficiency and prejudice. As discussed above, a defendant alleging ineffective assistance of counsel based on trial counsel's conduct in handling

the defendant's competency to proceed, the defendant must allege specific facts showing that a "reasonably competent attorney would have questioned competence to proceed" and must "set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency." *See Thompson*, 88 So. 3d at 319-320. The Court finds that Defendant has failed to set forth specific facts with regard to how trial counsel's conduct was deficient and Defendant has not set forth clear and convincing circumstances that create doubt as to her competency to proceed at the time of trial. Moreover, Defendant has not alleged how the outcome of the proceedings would have been different if not for trial counsel's alleged deficient performance. **Accordingly, Ground Two must be dismissed without prejudice to any right Defendant may have to refile a facially sufficient ground within sixty (60) days of the date of this Order.** ***See Spera*****, 971 So. 2d at 761.**

Throughout her recitation of the facts, Defendant appears to be alleging that the trial court erred by not addressing her mental illness and never formally deciding, or issuing an order on, whether she was competent to proceed. However, allegations of trial court error are not cognizable in a Rule 3.850 postconviction motion. *See Watts v. State*, 82 So. 3d 1215, 1216 n. 1 (Fla. 2d DCA 2012) (explaining that claims in a Rule 3.850 motion that the trial court erred by failing to have the defendant examined by at least three mental health experts and failing to hold a competency hearing consisted of claims of trial court error and thus were procedurally barred); *see also Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011) (quoting *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001) (explaining that "[a] claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion")); *Thompson*, 88 So. 3d at 316 ("In Florida state courts, neither a procedural nor a substantive competency claim of trial court error may be raised in a postconviction motion."). As such, to the extent Defendant is alleging trial court error, the Court finds that such a claim is not cognizable in a Rule 3.850 motion and is procedurally barred.

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Ground Three

In Ground Three, Defendant alleges ineffective assistance of counsel for failing to object on the grounds that Defendant was never declared competent to proceed before or during jury trial given that her competency was in question. *See* Motion, attached.

After reviewing Defendant's allegations, the court file, and the record, the Court first finds that Defendant has incorporated by reference the facts that the Court has listed in Ground One. Although the Court will incorporate by reference those facts from Ground One here, the Court finds that Defendant has failed to sufficiently allege both deficiency and prejudice. As discussed above, a defendant alleging ineffective assistance of counsel based on trial counsel's conduct in handling the defendant's competency to proceed, the defendant must allege specific facts showing that a "reasonably competent attorney would have questioned competence to proceed" and must "set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency." *See Thompson*, 88 So. 3d at 319-320. Defendant has failed to set forth specific facts with regard to how trial counsel's conduct was deficient, and has not set forth clear and convincing circumstances that create doubt as to her competency to proceed at the time of trial. Moreover, Defendant has not alleged how the outcome of the proceedings would have been different if not for trial counsel's alleged deficient performance. **Accordingly, Ground Three must be dismissed without prejudice to any right Defendant may have to refile a facially sufficient ground within sixty (60) days of the date of this Order. *See Spera*, 971 So. 2d at 761.**

Ground Four

In Ground Four, Defendant alleges ineffective assistance of counsel for allowing Defendant to waive her constitutional rights during trial, without objection, despite knowing she could not make a valid waiver given her incompetency to proceed. *See* Motion, attached.

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After reviewing Defendant's allegations, the court file, and the record, the Court first finds that Defendant has incorporated by reference the facts that the Court has listed in Ground One. Although the Court will incorporate by reference those facts from Ground One here, the Court finds that Defendant has failed to sufficiently allege both deficiency and prejudice. As discussed above, a defendant alleging ineffective assistance of counsel based on trial counsel's conduct in handling the defendant's competency to proceed, the defendant must allege specific facts showing that a "reasonably competent attorney would have questioned competence to proceed" and must "set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency." *See Thompson*, 88 So. 3d at 319-320. Defendant has not provided any specific facts with regard to her allegation that her trial counsel was ineffective for allowing her to waive her constitutional rights during trial. Defendant has not specifically alleged what constitutional rights were waived or how the outcome of the proceedings would have been different if not for counsel's alleged deficiency in allowing her to waive her constitutional rights. Defendant only states that she was not competent to knowingly, intelligently, and voluntarily waive her right to testify, and could not knowingly and intelligently waive decisions impacting her rights to due process and a fair trial. **Accordingly, Ground Four must be dismissed without prejudice to any right Defendant may have to refile a facially sufficient ground within sixty (60) days of the date of this Order.** ***See Spera*****, 971 So. 2d at 761.**

Ground Five

In Ground Five, Defendant alleges ineffective assistance of counsel for disclosing privileged communications to the State and trial court, absent a valid waiver from Defendant. Specifically, Defendant alleges that trial counsel requested a pre-trial mental health examination by Dr. Gamache, and asked for an order authorizing the expenditure. Defendant alleges that trial

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counsel also requested a confidential ex parte mental health examination. Defendant states that the trial court granted both motions and after Dr. Gamache delivered his written report to trial counsel. Defendant states that on December 3, 2010, the trial court conducted a hearing on unresolved motions and at the conclusion of the hearing, the judge asked trial counsel to provide a copy of Dr. Gamache's report to the trial court and to the State. Defendant alleges that trial counsel agreed, stating that he did not believe the matters were confidential any longer. Defendant states that the judge stated that the privilege had been waived. Defendant alleges that the trial had not commenced, the defense had not called Dr. Gamache or any other expert to testify, and Defendant was never asked about waiving the privilege. Defendant argues that the matters in the report were thus still confidential, and trial counsel was ineffective for failing to object to providing a copy of the report to the trial court and the State. Defendant alleges that trial counsel's conduct was a betrayal of Defendant given that the neither the trial court nor trial counsel questioned her about whether she wished to waive the privilege of confidentiality. Defendant alleges that the report and all information contained in it should have been sealed. *See* Motion, attached.

After reviewing Defendant's allegations, the court file, and the record, the Court finds that Defendant has failed to sufficiently allege prejudice – how the outcome of the proceedings would have been different if not for trial counsel's alleged deficient conduct. **Accordingly, Ground Five must be dismissed without prejudice to any right Defendant may have to refile a facially sufficient ground within sixty (60) days of the date of this Order.** ***See Spera*****, 971 So. 2d at 761.**

Ground Six

In Ground Six, Defendant alleges ineffective assistance of counsel for conceding that Defendant created or wrote the text messages originating from a phone registered to her.

Amanda F.

Specifically, Defendant states that during trial, the State sought to introduce text messages from phone numbers registered to Defendant and the victim. Defendant alleges that the State's goal was to use the messages to prove motive. Defendant alleges that a witness from Metro PCS was going to testify to whom the text messages were registered, but argues that there was no way to prove the identity of who wrote the unsigned text message. Defendant alleges that the State could not authenticate the text messages. Defendant argues that trial counsel solved the State's problem by conceding that Defendant wrote the text messages at issue. Defendant alleges that without the concession, the incriminating evidence would have been inadmissible and without that evidence the jury would have found her not guilty or guilty of a lesser included offense. Defendant concludes that counsel was ineffective in this regard. *See* Motion,[3] attached.

After reviewing Defendant's allegations, the court file, and the record, the Court finds that Defendant has alleged a facially sufficient ground. However, the Court finds that Defendant's allegation lacks merit. Contrary to Defendant's allegations, trial counsel did object to the introduction of the text messages into evidence based on a lack of foundation and made an oral motion to the trial court on the issue. *See* Trial Transcript (T.T.), p. 587, attached. While trial counsel did concede that the State had shown a relation between Defendant and the number that she wrote on an application for a gun permit and that was the number reflected by Metro PCS, trial counsel did argue that there was an issue with regard to whether Defendant authored the text messages. *Id.* Trial counsel argued that no one could come in and testify that they recognized the language, attitude or connotation to distinguish and specifically identify the author of the text

[3] At the end of Defendant's Motion she states that trial counsel and appellate counsel were ineffective for failing to preserve these issues for appeal and raise them on direct appeal. *See* Motion, attached. To the extent Defendant attempts to use this as prejudice for her grounds for relief, the Court finds that the failure to preserve an issue for appeal or to raise an issue on direct appeal does not show the necessary prejudice under *Strickland*. *See Strobridge v. State*, 1 So. 3d 1240, 1242 (Fla. 4th DCA 2009); *see also Parker v. State*, 904 So. 2d 370, 381 (Fla. 2005) (*quoting Ragan v. Dugger*, 544 So. 2d 1052, 1054 (Fla. 1st DCA 1989) ("The proper method by which to raise a claim of ineffective assistance of appellate counsel is by petition for writ of habeas corpus directed to the appellate court which considered the direct appeal.").

messages. *See* T.T., pp. 610-611, attached. The Court heard argument from the State with regard to the issue as well. *See* T.T., pp. 614-621, attached. However, the Court determined that he was not going to grant any motion to exclude the text messages on the basis of authentication, and reserved on that point to allow counsel to argue the issue as appropriate. The trial court also determined that it was the State's burden to authenticate the text messages should they seek to introduce them. *See* T.T., pp. 621, 627 attached.

During the testimony of Larry Smith, a senior security investigator for Metro PCS, the State sought to introduce the text messages and trial counsel objected based on the motions in limine he had previously raised. *See* T.T., p. 677, attached. The Court then ruled that the text messages in the Metro PCS records were business records and that the circumstances and the testimony of Mr. Smith, authenticated the records. *See* T.T., p. 678, attached. The Court admitted the record containing the text messages into evidence. *See* T.T., p. 679, attached.

After reviewing Defendant's Motion, the court file, and the record, the Court finds that Defendant's allegation is conclusively refuted from the record. Defendant's trial counsel did not concede that Defendant created or wrote the text messages originating from a phone registered to her, but in fact, objected to the introduction of the text messages on that basis. As such, Defendant has failed to meet his burden as required by *Strickland*. **Accordingly, no relief is warranted on Ground Six.**

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ORDER

It is therefore **ORDERED and ADJUDGED** that Grounds One, Two, Three, Four, and Five of Defendant's "Motion for Postconviction Relief" are hereby **DISMISSED WITHOUT PREJUDICE** to any right Defendant may have to refile timely, facially sufficient grounds within **SIXTY (60) DAYS** of the date of this Order.

It is further **ORDERED and ADJUDGED** that Ground Six of Defendant's "Motion for Postconviction Relief" is hereby **DENIED**.

This Order is a non-final, non-appealable Order. Defendant may not appeal until such time as this Court has entered a Final Order.

DONE and ORDERED in Chambers in Hillsborough County, Tampa, Florida, this _____ day of November, 2015.

ORIGINAL SIGNED
NOV 13 2015
GREGORY P. HOLDER
CIRCUIT JUDGE

GREGORY P. HOLDER, Circuit Judge

Attachments:
Motion
Verdict Form
Judgment and Sentence
Mandate
Trial Transcript Excerpts

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished to **Venecia Amalia Depaula** (DC # 155466), Homestead Correctional Institution, 19000 S. W. 377th Street, Florida City, Florida 33034-6409, by regular U.S. Mail; and to the **Office of the State Attorney, Division E**, 419 N. Pierce Street, Tampa, Florida 33602, by inter-office mail; on this 16th day of November 2015.

Harmony Gracey
DEPUTY CLERK

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

CASE NO.: 09-CF-013368

v.

VENECIA DEPAULA,
Defendant.

DIVISION: E

_____/

ORDER DISMISSING WITHOUT PREJUDICE CLAIM ONE AND RESERVING RULING ON CLAIM TWO OF DEFENDANT'S AMENDED GROUNDS ONE, TWO, THREE, FOUR AND FIVE OF MOTION FOR POST CONVICTION RELIEF
and
ORDER DENYING WITH PREJUDICE CLAIMS THREE, FOUR, AND FIVE OF DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

THIS MATTER is before the Court on Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief," filed on March 3, 2016. Previously, Defendant filed her "Motion for Postconviction Relief" on February 3, 2015. On November 16, 2015, the Court dismissed claims one, two, three, four, and five of Defendant's "Motion for Postconviction Relief' without prejudice for Defendant to refile facially sufficient claims within sixty (60) days of the Court's order. The Court also denied claim six of Defendant's "Motion for Postconviction Relief."

On December 28, 2015, and January 4, 2016, Defendant requested an enlargement of time to file her amended claims. On January 7, 2016, the Court granted Defendant an additional forty-five (45) days to file her amended claims. Because Defendant provided her "Amended Grounds One, Two Three, Four and Five of Motion for Post Conviction Relief" to prison officials for mailing within the timeframe prescribed by the Court, Defendant has made a timely filing. After reviewing Defendant's motions, the court file, and the record, the Court finds as follows:

In case 09-CF-013368, on February 24, 2011, a jury found Defendant guilty of first-degree premeditated murder, as charged, with a special finding that Defendant did actually possess and discharge a firearm causing death. *See* Verdict Form, attached. That same day, the Court sentenced Defendant to a term of natural life in prison, with a twenty-five (25) year mandatory minimum sentence. *See* Judgment and Sentence, attached. The Second District Court of Appeal affirmed Defendant's conviction and sentence and issued the mandate on January 30, 2013. *See* Mandate, attached.

In her timely, sworn motions, Defendant raises the following grounds for relief:

1. Counsel rendered ineffective assistance by allowing her to reject a favorable plea offer when counsel knew Defendant suffered from severe mental illness;

2. Counsel was ineffective for failing to move the Court to conduct a hearing to rule on the question of Defendant's competency;

3. Ineffective assistance of counsel for failing to object on the grounds that Defendant was never declared competent to proceed before or during jury trial given that her competency to proceed was in question;

4. Ineffective assistance of counsel for allowing Defendant to waive her constitutional rights during trial, without objection, despite knowing she could not make a valid waiver given her incompetency to proceed; and

5. Ineffective assistance of counsel for disclosing privileged communications to the State and trial court absent a valid waiver from Defendant.

See Motion for Post Conviction Relief and Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief, attached.

In all of her remaining claims, Defendant alleges ineffective assistance of counsel. When ineffective assistance of counsel is alleged, the burden is on the person seeking collateral relief to allege the grounds for relief specifically, and to establish whether prejudice resulted. Effective assistance of counsel does not mean that a defendant must be afforded errorless counsel or that future developments in law must be anticipated. *Meeks v. State*, 382 So. 2d 673 (Fla. 1980). In

Appendix E

Strickland v. Washington, 466 U.S. 668, 686-87 (1984), the U.S. Supreme Court provided the following standard for ineffective assistance of counsel:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction...has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable...[T]he proper standard for attorney performance is of reasonably effective assistance.

In *Downs v. State*, 453 So. 2d 1102 (Fla. 1984), the Florida Supreme Court stated that a defendant must prove prejudice affirmatively. The test for prejudice is:

> [T]hat there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. However, even if a defendant's allegations are sufficient to state a claim for relief, a motion may be summarily denied, without an evidentiary hearing, if the record conclusively refutes the allegations and demonstrates that the defendant is not entitled to relief. *See Anderson v. State*, 627 So. 2d 1170. An evidentiary hearing will be required unless the motion is facially insufficient or the record demonstrates that the defendant is not entitled to relief. *Id.*

Claim One

In claim one, Defendant alleges that counsel rendered ineffective assistance by allowing her to reject a favorable plea offer when counsel knew Defendant suffered from severe mental illness. *See* Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief, attached. Defendant argues that she rejected a plea offer of thirty-five years prison followed

Amanda F

by probation because counsel "advised her to reject the plea offered and proceed to trial because to accept the plea would eliminate her right to continue to 'fight the case.'" *Id.* Defendant states that she believed she had to go to trial "in order to preserve her right to appeal her conviction." *Id.* Defendant contends that due to mental illness, she "lacked the capacity to weigh the risk of going to trial versus acceptance of the plea" and that counsel "had a duty to seek a hearing to making findings pertaining to her competency." *Id.* Defendant states that her counsel knew about her "history of mental disorders" as evidenced by the fact that she "underwent multiple psychiatric examinations, with varying results." *Id.* "Defendant asserts that the pretrial record in conjunction with the psychiatric reports support that counsel should have sought a competency hearing." *Id.* Defendant contends that the State "informed the court 'the homicide committee would probably offer 35 years, maybe 40 years,' to which the court responded, 'I'd approve that.'" *Id.*

Defendant states that she "rejected a favorable plea offer due to mistake and misadvice of counsel and was prejudiced by counsel's deficient performance in advising [her] to reject the plea offer if she wanted to continue to 'fight her case.'" *Id.* Defendant states that she "was mentally incompetent when she rejected the State's offer [and] therefore, the rejection of the plea was involuntary." *Id.* Defendant concludes by arguing that her claim has met the elements of *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013), because "(1) were it not for mistake and misadvise of counsel, [she] would have accepted the plea; (2) the State would not have withdrawn the plea as it would have been accepted under its terms; (3) the record reflects that the Court would have accepted the offer because it was fair and reasonable; and (4) the sentence under the terms of the offer would have been less severe than the life sentence imposed following trial." *Id.*

After reviewing the allegations, the court file, and the record, the Court finds that when a defendant alleges that his or her trial counsel failed to correctly advise him or her with regard to accepting or rejecting a plea offer, the defendant must show deficient performance and prejudice

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under *Strickland*. To prove prejudice under such a claim, the defendant must show: "(1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *See Alcorn*, 121 So. 3d at 419.

Here, the Court finds that Defendant has failed to specifically allege what counsel misadvised her about regarding the plea offer. Defendant's only allegations concerning counsel's advice are that she was told "accept[ing] the plea would eliminate her right to continue to 'fight the case'" and that she believed "she had to go to trial in order to preserve her right to appeal her conviction." Because both of those pieces of information are generally correct, counsel could not have misadvised her regarding those consequences of taking a plea.[1] Additionally, the Court notes that to the extent counsel "misadvised" her by failing to ensure that she was competent in order to under the plea offer, the Court will address those allegations within claim two below. As such, upon refiling, Defendant must specifically allege what misadvice counsel provided her with regard to the plea offer. **Consequently, claim one of Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief" is dismissed without prejudice to any right Defendant may have to refile a facially sufficient claim in accordance with the order above within sixty (60) days of the date of this order.** *See Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007).

[1] The Court recognizes that Florida Rule of Appellate Procedure 9.140(b)(2)(a) outlines the instances under which a defendant may appeal from a guilty plea, thereby allowing a defendant to appeal their conviction even when he or she has pleaded guilty. However, from the Court's understanding of Defendant's claim, it does not appear that she is alleging counsel was ineffective for failing to inform her of her appellate rights in the instance of a guilty plea.

Claim Two

In claim two, Defendant alleges that counsel was ineffective for failing to move the Court to conduct a hearing to rule on the question of her competency.[2] *See* Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief, attached. Defendant argues that the record "manifestly indicates that [counsel] questioned [her] competence to proceed" and that "her mental illness impaired her ability to rationally understand the facts or the proceedings against her." *Id.* By incorporating facts included within claim one, Defendant alleges that she has "a lifelong history of severe mental illness and is being treated by the Department of Corrections for Depressive Disorder, Borderline Personality Disorder and Borderline Intellectual Functioning." *Id.* Defendant argues that counsel knew of her history of mental disorders as he received "medical reports...from Dr. Patricia Phelps, PhD, and [through] interviews with [her] family." *Id.* Defendant also notes that counsel "twice requested appointment of experts to conduct forensic psychological examinations" and that "they plainly reflected that [she] suffered from serious mental illness that would likely affect her ability to make rational decisions to accept or reject a plea offer or proceed to trial." *Id.*

Defendant argues that were it not for her "mental incompetence, had she been of sound mind, had she been capable of rational thinking, she would have accepted the favorable plea offered by the State rather than face a mandatory life sentence." *Id.* Defendant contends that "[q]uite simply, [she] was not in her right mind and her attorney did nothing to establish her incompetence to participate in pretrial or trial proceedings." *Id.* Defendant "asserts that she was not competent to proceed to trial, not competent to reject the State's plea offer, and not competent

[2] The Court notes that Defendant "consolidates" claims two, three, and four of her "Motion for Postconviction Relief" into just claim two of her "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief." **As such, the Court will deny claims three and four of Defendant's "Motion for Postconviction Relief" with prejudice and proceed with claim two as outlined in Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief."**

to waive her right to testify on her own behalf." *Id.* Defendant argues that counsel's "failure to motion the court to determine her competency, particularly in light of his knowledge of the severity of her mental illness demonstrates deficient performance." *Id.*

After reviewing the allegations, the court file, and the record, the Court finds that "a postconviction movant claiming ineffective assistance of counsel for failure to investigate or request a competency determination must establish '*at least*' a reasonable probability that he or she would have been found incompetent." *Thompson v. State*, 88 So. 3d 312, 318 (Fla. 4th DCA 2012). "To satisfy the deficiency prong based on counsel's handling of a competency issue, the postconviction movant must allege specific facts showing that a reasonably competent attorney would have questioned competence to proceed." *Id.* at 319. The question for the Court is "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings." *Id.* (quoting Fla. R. Crim. P. 3.211(a)(1)). Furthermore,

> [t]he focus of the prejudice inquiry is on actual prejudice, whether, because of counsel's deficient performance, the defendant's substantive due process right not to be tried while incompetent was violated. In order to establish prejudice in a properly raised ineffective assistance of counsel claim, the postconviction movant must, as with a substantive incompetency claim, set forth clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency.

Id.

Here, the Court finds that Defendant's claim is facially sufficient. Further, the Court finds that the record does not conclusively refute Defendant's allegations. The Court notes it appears that Defendant's attorney did file at least one motion requesting an evaluation of Defendant's competency, however nothing in the record reflects the outcome of the evaluation nor does the record reflect that there was a hearing held to discuss the results of the evaluation. **However,**

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because the Court is allowing Defendant sixty (60) days to cure the facial deficiencies in claim one, the Court reserves ruling on claim two at this time.

Claim Five

In claim five, Defendant alleges that counsel rendered ineffective assistance by disclosing priviledged communications to the State and to the Court absent a valid waiver. *See* Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief, attached. Defendant "concedes this ground on the basis that prejudice cannot be established because neither the State nor the defense relied on this disclosed report at trial" but "reasserts that counsel erred in disclosing Dr. Gamache's privileged competency evaluation that was protected by attorney-client privilege where she did not waive confidentiality." *Id.*

Consequently, because Defendant agrees that she is unable to cure the deficiencies in claim five after being given the opportunity to do so, claim five of Defendant's "Motion for Post Conviction Relief" is properly denied with prejudice. *See* Fla. R. Crim. P. 3.850(f)(2) (2017).

Amanda L

It is therefore **ORDERED and ADJUDGED** that claim one of Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief" is hereby **DISMISSED WITHOUT PREJUDICE** to any right Defendant may have to refile a timely, facially sufficient claim within **SIXTY (60) DAYS** of the date of this order.

It is further **ORDERED and ADJUDGED** that claims three, four, and five of Defendant's "Motion for Postconviction Relief" are hereby **DENIED WITH PREJUDICE.**

It is further **ORDERED** that the Court hereby **RESERVES RULING** on claim two of Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief."

Defendant may not appeal until such time as this Court has entered a final order.

DONE and ORDERED in Chambers in Hillsborough County, Tampa, Florida, this _____ day of June, 2017.

ORIGINAL SIGNED
CONFORMED COPY

JUN 09 2017

MARK D. KISER
CIRCUIT JUDGE

MARK KISER, Circuit Judge

Attachments:

Verdict Form
Judgment and Sentence
Mandate
Motion for Post Conviction Relief
Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief

CERTIFICATE OF SERVICE

I hereby certify that a copy of this order has been furnished to **Venecia Depaula, DC # 155466**, Homestead Correctional Institution, 19000 S. W. 377th Street, Florida City, Florida 33034-6409, by regular U.S. Mail; and to the **Office of the State Attorney, Division E**, 419 N. Pierce Street, Tampa, Florida 33602, by inter-office mail; on this 12th day of June, 2017.

DEPUTY CLERK

Appendix E

Copy

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

VENECIA AMALIA DEPAULA,
Defendant/Petitioner,

v. **CASE NO.: 09-CF-013368**

STATE OF FLORIDA **DIVISION: E**
Plaintiff.
_____/

AMENDED GROUNDS ONE,
OF MOTION FOR POST CONVICTION RELIEF

VENECIA AMALIA DEPAULA, pro se, herein responds to the order of this Honorable Court issued August 29, 2017 granting leave to amend ground one (1) of her Post Conviction Motion filed pursuant to Florida Rule 3.850.

Defendant offers amendment of her post conviction motion as follows:

The Defendant was granted the opportunity to amend her ground through Spera, defendant is a pro se litigant in this case. Defendant is unversed in the law and lacks the level of comprehension to learn complex criminal procedure, legal reasoning and legal doctrines required to present a coherent theory to challenge given the opportunity to amend and due to lack of counsel the amendment was again found insufficient and the claim was denied. Defendant do not possess a six (6) grade

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TABE score and is incapable of understanding the nature and complexity of her case even with the guidance of an inmate law clerk. Moreover this honorable court has not explained to defendant how she should cure these defects in her motion on grounds 3, 4, and 5 in which the court denied these ground with prejudice. The Defendant is requesting this honorable court grant her opportunity to cure and revisit these defects at evidentiary hearing with the assistance of the evidentiary hearing attorney that is appointed to Defendant.

Appendix G

GROUND I

COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLOWING DEFENDANT TO REJECT A FAVORABLE PLEA OFFER WHERE COUNSEL POSSESSED KNOWLEDGE THAT DEFENDANT SUFFERED FROM SEVERE MENTAL ILLNESS.

Defendant rejected a favorable plea offer of thirty (30) years in Florida State prison with Ten (10) Years probation. Defendant proceeded to trial for First Degree Premeditated Murder with a Firearm where she was found guilty and sentenced to natural life with a twenty-five (25) year mandatory minimum in prison without the possibility of parole. Defendant asserts that counsel failed to correctly inform her of the maximum penalty that she faced. Counsel advised defendant to reject the plea offer because if she proceeded to trial she would receive a lesser sentence because of her mental illness. On the assurance and persuasive argument of trial counsel Defendant went to trial without a plea agreement and was sentenced to a term of imprisonment longer than what she would have served had she accepted the plea agreement it's evident that, due to defendant mental illness, defendant lacked the capacity to rationally weigh the risk of going to trial versus acceptance of the plea. The record in this case is clear; Defendant had a lifelong history of severe mental illness. The defendant presently is diagnosed with a mental illness and is being treated by the Department of corrections for Depressive Disorder, Borderline

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Personality Disorder and Borderline Intellectual Functioning. Counsels knew that defendant's has history of mental disorder that was supported by medical report.

Furthermore, counsel indicated that he and the State were **"trying to reach a resolution" and the Defendant, "does not necessarily want a trial".** State informed the court **"the homicide committee could probably offer 35 years, maybe 40 years", to which the court responded, "I'd approve that".**

Rules of professional conducts as framed by the Florida Bar, ascribe counsel's responsibilities as an advisor are to provide the defendant with an informed understanding of her legal rights and obligations and to explain their practical implications. Defense counsel failure to convey a favorable plea offer falls below this standard. The defendant's constitutional rights to adequate legal representation as provided under the Sixth Amendment were violated. This supported in the case of **Montejo v. Louisiana**, 129 S.Cts. 2079, 566 U.S. 778 (U.S. (La.) 2009) citing **United States v. Wade**, 388 U.S. 218 227-228 (1967) which held that **"Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings."** The Supreme Court opinion rendered in **Frye**, found that **"plea bargains have become so central to the administration**

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of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render adequate assistance counsel that the Sixth Amendment requires in the criminal process critical stages Because our system is for the most part a system of pleas and not a system of trials,' during plea negotiations."

Defense counsel was ineffective and violated the defendant's Sixth Amendment rights to representation by counsel at this most critical point of the Defendant's case and his performance fell below both the State and Federal standards for adequate legal representation and directly caused a harsher sentence to be imposed on the Defendant. Had counsel properly advised the defendant she would have accepted the plea offer of thirty (30) years offered by the State. Defendant went to trial without a plea agreement and was sentenced to a term of imprisonment longer than what defendant would have served had she accepted the plea agreement. Counsel's deficient performance prejudiced the Defendant who was denied the opportunity to accept a lesser sentence. The Defendant rejected a favorable plea offer due to error and misadvise of counsel. Counsel could not effectively meet this standard because the defendant in this case was incapable of comprehending his advice Defendant was mentally incompetent when she rejected the State's offer; therefore, the rejection of the plea was involuntary.

Appendix G

In considering the case of **Alcorn v. State**, 121 So.3d 419 (Fla. 2013) the Florida Supreme Court applied the U.S. Supreme Court's decisions in **Missouri v. Frye**, 132 S.Ct. 1399, and **Lafler v. Cooper**, 132 S.Ct. 1376, (U.S. 2012) and their impact on Florida Jurisprudence concerning ineffective assistance of counsel claims where a plea is not accepted based on counsel's misadvise or because of counsel's failure to convey the plea to the defendant. The Florida Justices held that:

> **"to establish prejudice the defendant must allege and prove a reasonable probability that he would have accepted plea offer, the prosecutor would not have withdrawn the offer, the court would have accepted the offer, and the conviction or sentence would have been less severe."**

The Defendant has met all of the elements of *Alcorn* based on the following:

1. the Defendant would have accepted the plea;
2. The State would not have withdrawn the plea as it would have been accepted under its terms;
3. The Court would have accepted the offer because it was fair and reasonable and,
4. The sentence under the terms of the offer would have been less severe than the natural life and twenty-five (25) mandatory minimum sentence imposed following trial.

Appendix B

Based on the foregoing the proper remedy for ineffective assistance is to order the State to reoffer the plea agreement and resentence the Defendant and/or conduct an evidentiary hearing.

Respectfully Submitted,

Venecia A Depaula 155466

VENECIA AMALIA DEPAULA, DC# 155466

CERTIFICATION AND OATH OF DEFENDANT

Under penalty of perjury, I, **VENECIA AMALIA DEFENDANT**, the Defendant, hereby certify that I am filing this Amended Motion for Post Conviction Relief, pursuant to Fla.R.Crim.P. 3.850, in good faith with a reasonable belief that it is timely, has potential merit and does not duplicate any previous motions that have been disposed by the court.

By signing this motion pursuant to this rule, I certify that I understand English, have read the motion or had the motion read to me and I understand its content.

Based on the foregoing I hereby certify that the foregoing document and the contained therein, to the best of my knowledge and recollection, are true and correct.

Executed on this 21st day of September 2017.

Venecia A Depaula 155466

VENECIA AMALIA DEPAULA, DC# 155466

Appendix G

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I PLACED THAT **AMENDED GROUNDS ONE MOTION FOR POST CONVICTION RELIEF** INTO THE HANDS OF **HOMESTEAD CORRECTIONAL INSTITUTION'S** MAILROOM STAFF FOR MAILING TO:

Hillsborough County Clerk of the Circuit Court
Felony Division
P.O. Box 1110
Tampa, FL 33601-1110

(And to)

Office of the State Attorney
Hillsborough County
419 N. Pierce Street
Tampa, FL 33602

On this 6nd day of July, 2017

Venecia A. Depaula 155466

VENECIA AMALIA DEPAULA, DC# 155466
HOMESTEAD CORRECTIONAL INSTITUTION
19000 S.W. 377TH STREET, SUITE 200
FLORIDA CITY, FLORIDA 33034

Appendix G

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 09-CF-013368**

v.

VENECIA DEPAULA, **DIVISION: E**
Defendant.
_____/

ORDER GRANTING EVIDENTIARY HEARING ON CLAIM ONE OF DEFENDANT'S AMENDED GROUNDS ONE OF MOTION FOR POST CONVICTION RELIEF AND ON CLAIM TWO OF DEFENDANT'S AMENDED GROUNDS ONE, TWO, THREE, FOUR AND FIVE OF MOTION FOR POST CONVICTION RELIEF
and
ORDER APPOINTING THE OFFICE OF THE PUBLIC DEFENDER
and
ORDER SETTING MATTER FOR STATUS ON FEBRUARY 12, 2018 AT 8:30A.M.

THIS MATTER is before the Court on the "State's Response to the Order of the Court," filed on December 19, 2017. Previously, Defendant filed her "Motion for Postconviction Relief" on February 3, 2015. On November 16, 2015, the Court dismissed claims one, two, three, four, and five of Defendant's "Motion for Postconviction Relief' without prejudice for Defendant to refile facially sufficient claims within sixty days of the Court's order. The Court also denied claim six of Defendant's "Motion for Postconviction Relief."

On December 28, 2015, and January 4, 2016, Defendant requested an enlargement of time to file her amended claims. On January 7, 2016, the Court granted Defendant an additional forty-five days to file her amended claims. Defendant filed her "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief" on March 3, 2016.

On June 12, 2017, the Court dismissed claim one of Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief" without prejudice for Defendant to refile a facially sufficient claim within sixty days of the Court's order. Further, the Court

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reserved ruling on claim two of Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief" and denied claims three and four of Defendant's "Motion for Postconviction Relief" with prejudice as Defendant did not refile those claims in accordance with the Court's November 16, 2015, order. The Court also denied claim five of Defendant's "Motion for Postconviction Relief" with prejudice after Defendant conceded that she could not amend the claim in accordance with the Court's order.

On July 10, 2017, Defendant filed her "Amended Grounds One of Motion for Post Conviction Relief," but because it was not under oath, the Court dismissed it without prejudice on August 30, 2017. In its August 30, 2017, order, the Court allowed Defendant sixty days to refile a sworn, facially sufficient motion in accordance with Rule 3.850. Defendant then filed a sworn version of her "Amended Grounds One of Motion for Post Conviction Relief" on September 25, 2017.

On November 21, 2017, the Court rendered an order for the State to respond to claim one of Defendant's "Amended Grounds One of Motion for Post Conviction Relief" and to ground two of Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief." The State filed its response on December 19, 2017. After reviewing Defendant's motions, the State's response, the court file, and the record, the Court finds as follows:

In case 09-CF-013368, on February 24, 2011, a jury found Defendant guilty of first-degree premeditated murder, as charged, with a special finding that Defendant did actually possess and discharge a firearm causing death. *See* Verdict Form.[1] That same day, the Court sentenced Defendant to a term of natural life in prison, with a twenty-five year mandatory minimum sentence.

[1] The Court notes that it will not provide attachments with the instant order as they were previously provided in the Court's November 21, 2017, order for the State to respond.

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See Judgment and Sentence. The Second District Court of Appeal affirmed Defendant's conviction and sentence and issued the mandate on January 30, 2013. *See* Mandate.

In her timely, sworn motions, Defendant raises the following grounds for relief:

1. Counsel rendered ineffective assistance by allowing her to reject a favorable plea offer when counsel knew Defendant suffered from severe mental illness; and

2. Counsel was ineffective for failing to move the Court to conduct a hearing to rule on the question of Defendant's competency.

See Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief and Amended Grounds One of Motion for Post Conviction Relief, attached.

In her remaining claims, Defendant alleges ineffective assistance of counsel. When ineffective assistance of counsel is alleged, the burden is on the person seeking collateral relief to allege the grounds for relief specifically, and to establish whether prejudice resulted. Effective assistance of counsel does not mean that a defendant must be afforded errorless counsel or that future developments in law must be anticipated. *Meeks v. State*, 382 So. 2d 673 (Fla. 1980). In *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), the U.S. Supreme Court provided the following standard for ineffective assistance of counsel:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction...has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable...[T]he proper standard for attorney performance is of reasonably effective assistance.

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In *Downs v. State*, 453 So. 2d 1102 (Fla. 1984), the Florida Supreme Court stated that a defendant must prove prejudice affirmatively. The test for prejudice is:

> [T]hat there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. However, even if a defendant's allegations are sufficient to state a claim for relief, a motion may be summarily denied, without an evidentiary hearing, if the record conclusively refutes the allegations and demonstrates that the defendant is not entitled to relief. *See Anderson v. State*, 627 So. 2d 1170. An evidentiary hearing will be required unless the motion is facially insufficient or the record demonstrates that the defendant is not entitled to relief. *Id.*

Claim One

In claim one, Defendant alleges that counsel rendered ineffective assistance by allowing her to reject a favorable plea offer when counsel knew Defendant suffered from severe mental illness. *See* Amended Grounds One of Motion for Post Conviction Relief. Defendant states that she "rejected a favorable plea offer of thirty (30) years in Florida State prison with ten (10) years probation" and was ultimately sentenced to "natural life with a twenty-five (25) year mandatory minimum in prison without the possibility of parole." *Id.*

Defendant "asserts that counsel failed to correctly inform her of the maximum penalty that she faced" and "advised [her] to reject the plea offer because if she proceeded to trial she would receive a lesser sentence because of her mental illness." *Id.* Defendant states that she "lacked the capacity to rationally weigh the risk of going to trial versus acceptance of the plea." *Id.* Defendant contends that if counsel had "properly advised [her,] she would have accepted the plea offer of thirty (30) years offered by the State" and that because of counsel's deficient performance, she "was denied the opportunity to accept a lesser sentence." *Id.*

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Defendant cites to *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013), and argues that she has met all of the elements of *Alcorn* because she "would have accepted the plea; the State would not have withdrawn the plea as it would have been accepted under its terms; the Court would have accepted the offer because it was fair and reasonable; and the sentence under the terms of the offer would have been less severe than the natural life and twenty-five (25) mandatory minimum sentence imposed following trial." *Id.*

In response, the State highlights that while Defendant is now claiming "that her trial counsel 'failed to inform her of the maximum penalty that she faced' and 'advised the defendant to reject the plea offer because if she proceeded to trial she would receive a lesser sentence because of her mental illness,'" Defendant "did not make these allegations" in her previous filing "and, in fact, alleged different 'misadvice' from her trial counsel." *See* State's Response to Order of the Court attached. The State notes "that a plea offer was made to the defendant between February 14, 2011, and February 21, 2011," which "was to allow her to plead guilty to [the] reduced lessor included offense of Second Degree Murder with a Firearm in exchange for a sentence of 35 years in the Florida State Prison following by 10 years [of] probation with a 25 year minimum mandatory sentence pursuant to the 10-20-Life statute." *Id.* The State argues that Defendant is mistaken that there was a thirty-year plea offer and states that "the suggested 'favorable' plea offer was not as favorable as the defendant is alleging in her motion, especially to a defendant who had never been sentenced to prison before." *Id.*

The State argues that "[a]lthough the allegations as to the alleged advice from her counsel as now pleaded in her most recent motion cannot, on their face, be refuted by the record, the allegations, when looked at in light of the previously filed motion and it's totally different allegations of 'misadvice' from her counsel, appear to be completely disingenuous and false." *Id.* However, the State acknowledges that the "Court is required upon summary review to accept the

Appendix H

defendant's allegations as being true unless they are conclusory in nature or are refuted by the record." *Id.*

After reviewing the allegations, the court file, and the record, the Court finds that in light of the State's response, Defendant is entitled to an evidentiary hearing on claim one of her "Amended Grounds One of Motion for Post Conviction Relief."

Claim Two

In claim two, Defendant alleges that counsel was ineffective for failing to move the Court to conduct a hearing to rule on the question of her competency. *See* Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief. Defendant argues that the record "manifestly indicates that [counsel] questioned [her] competence to proceed" and that "her mental illness impaired her ability to rationally understand the facts or the proceedings against her." *Id.* By incorporating facts included within claim one, Defendant alleges that she has "a lifelong history of severe mental illness and is being treated by the Department of Corrections for Depressive Disorder, Borderline Personality Disorder and Borderline Intellectual Functioning." *Id.* Defendant argues that counsel knew of her history of mental disorders as he received "medical reports...from Dr. Patricia Phelps, PhD, and [through] interviews with [her] family." *Id.* Defendant also notes that counsel "twice requested appointment of experts to conduct forensic psychological examinations" and that "they plainly reflected that [she] suffered from serious mental illness that would likely affect her ability to make rational decisions to accept or reject a plea offer or proceed to trial." *Id.*

Defendant argues that were it not for her "mental incompetence, had she been of sound mind, had she been capable of rational thinking, she would have accepted the favorable plea offered by the State rather than face a mandatory life sentence." *Id.* Defendant contends that "[q]uite simply, [she] was not in her right mind and her attorney did nothing to establish her

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incompetence to participate in pretrial or trial proceedings." *Id.* Defendant "asserts that she was not competent to proceed to trial, not competent to reject the State's plea offer, and not competent to waive her right to testify on her own behalf." *Id.* Defendant argues that counsel's "failure to motion the court to determine her competency, particularly in light of his knowledge of the severity of her mental illness demonstrates deficient performance." *Id.*

In response, the State argues that "the fact that the defendant rejected the plea offer from the State, in and of itself, is not a determinative fact suggesting incompetence of this defendant." *See* State's Response to the Order of the Court, attached. The State concedes that a "hearing wherein the Court can hear from trial counsel ... will be necessary" to determine whether Defendant had "sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant [had] a rational, as well as factual, understanding of the pending proceedings." *Id.*

After reviewing the allegations, the court file, and the record, the Court finds that in light of the State's response, Defendant is entitled to an evidentiary hearing on claim two of her "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief."

Amanda H

It is therefore **ORDERED AND ADJUDGED** that Defendant is hereby **GRANTED AN EVIDENTIARY HEARING** on claim one of her "Amended Grounds One of Motion for Post Conviction Relief" and on claim two of her "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief."

It is further **ORDERED** that the Office of the Public Defender is hereby **APPOINTED** in this matter for the limited purpose of representing Defendant at the evidentiary hearing. Such representation shall terminate automatically upon conclusion of the evidentiary hearing unless otherwise ordered by the Court.

It is further **ORDERED** that this matter is **SET FOR A STATUS HEARING** on **February 12, 2018, at 8:30 a.m.** at which time **APPOINTED COUNSEL SHALL ADVISE** the Court whether there is any conflict in further representation of Defendant by the Office of the Public Defender.

Defendant may not appeal until this Court has entered a final order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this _____ day of January, 2018.

ORIGINAL SIGNED
CONFORMED COPY

JAN 22 2018

MARK D. KISER
CIRCUIT JUDGE

MARK KISER, Circuit Judge

Attachments:
State's Response to the Order of the Court

DANIEL CASTILLO

CERTIFICATE OF SERVICE

I hereby certify that a copy of this order has been furnished to **Venecia Depaula, DC#: 155466**, Homestead Correctional Institution, 19000 S. W. 377th Street, Florida City, Florida 33034-6409, by regular U.S. Mail; and to the **Office of the Public Defender**, 700 East Twiggs Street, Tampa, Florida 33602, and to **Scott Harmon, Assistant State Attorney**, 419 N. Pierce Street, Tampa, Florida 33602, by inter-office mail; on this 23rd day of January, 2018.

H. G. Lacey
DEPUTY CLERK

Appendix H

Copy

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

VENECIA DEPAULA,
APPELLANT

VS. **CASE NO.: 09CF13368**

STATE OF FLORIDA,
RESPONDENT
_____/

MOTION TO APPOINT CONFLICT FREE COUNSEL

COMES NOW, the Appellant, **VENECIA DEPAULA**, pro se and requests this Honorable Court to grant her motion to appoint conflict free counsel. In support thereof the appellant states the following:

1. On May 15, 2018 the appellant had a legal call in the classification department of Homestead Correctional Institution with her court appointed attorney Ms. Kay Murray in reference to a motion for post conviction in which the court granted the appellant an evidentiary hearing.
2. Ms. Murray stated that she did not believe the appellant's claim that her trial attorney Bryant Camarno misadvised her to reject plea offer and that she would face a lesser sentence at trial.

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3. Ms. Murray stated that she does not believe for a minute that Mr. Camarano told the defendant not to take the 30year plea deal offered by the State. Ms Murray further stated that defendant stories change from her original motion from 35 years to 30 years. Defendant admits that they are lot of typographical errors in her motion, however, the court still found merit in her petition. Ms Murray is aware that defendant's first language is Spanish and her comprehension of English is very poor. Her intellectual capacity to understand the court proceedings is in question, and that an interpreter is needed due to her comprehension issues. The defendant IQ is under 70
4. Ms. Murray stated that she has more than 25 years experience as an attorney and believed that the defendant is lying about her trial attorney's actions Ms. Murray attempted to coerce the defendant to recant her earlier claims in the post conviction motion because trial attorney in the words of Mr. Camarano is a good lawyer and that Depaula must have misconstrued what he explained to her.
5. Defendant informed Ms. Murray that she would like to be present at her status hearing because she received a notice that states that her presence is required. Ms Murray has repeatedly denied her request to be present at the status hearing.

6. Ms. Murray has an obvious bias in favor of Mr. Camarano in believing that there is no merit to Defendant's case. Ms. Murray is not the judge and therefore cannot extrapolate what a judge would rule in the matter of the evidentiary hearing. Ms. Murray should be transferred from this case this establishes prejudice on the defendant case because of her relationship/ friendship with Mr. Camarano this is a gross conflict of interest.

Appellant prays this court to appoint her a conflict free attorney so that she may proceed with the evidentiary hearing granted by the court.

Respectfully Submitted

Venecia Depaula

VENECIA DEPAULA DC# 155466

UNNOTARIZED OATH

UNDER PENALTIES OF PERJURY, I, VENECIA DEPAULA DC# 155466, and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the forgoing motion, that the facts contained in the motion are true and correct, and I have a reasonable belief that the motion is timely filled. I certify that this motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English and have read the forgoing motion or had the motion read to me, or the foregoing motion was translated completely into language which I understand and read to me:

5/16/18 — **DATE**

Venecia Depaula — VENECIA DEPAULA DC# 155466

Appendix I - page 4 of 5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I PLACED THIS **MOTION TO APPOINT CONFLICT FREE COUNSEL** IN THE HANDS OF **HOMESTEAD CORRECTIONAL INSTITUTION** MAILROOM STAFF FOR MAILING TO:

Clerk of Court
Hillsborough County
P.O. BOX 3360
Tampa, Florida 33601-3360

(And to)

Office of the State Attorney
419 N. Pierce Street
Tampa, Florida 33602

On this 16 day of May, 2018

Venecia Depaula

VENECIA DEPAULA DC# 155466
Homestead Correctional Institution
19000 S.W. 377TH Street, Suite 200
Florida City, Florida 33034

Appendix I - Page 5 of 5

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

v.

VENECIA DEPAULA,
Defendant.
_____/

FILED
MAR 13 2019
CLERK OF CIRCUIT COURT

CASE NO.: 09-CF-013368

DIVISION: E

FINAL ORDER DENYING CLAIM ONE OF DEFENDANT'S AMENDED GROUNDS ONE OF MOTION FOR POST CONVICTION RELIEF AND CLAIM TWO OF DEFENDANT'S AMENDED GROUNDS ONE, TWO, THREE, FOUR AND FIVE OF MOTION FOR POST CONVICTION RELIEF

THIS MATTER is before the Court on Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief," filed on March 3, 2016, her "Amended Grounds One of Motion for Post Conviction Relief," filed on September 25, 2017, and the "State's Response to the Order of the Court," filed on December 19, 2017. On January 23, 2019, the Court entered an order granting Defendant an evidentiary hearing on claim one of her "Amended Grounds One of Motion for Post Conviction Relief" and on claim two of her "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief." The Court held an evidentiary hearing on Defendant's allegations on February 8, 2019. After reviewing Defendant's motions, the State's response, the evidence and testimony presented at the evidentiary hearing, the court file, and the record, the Court finds as follows:

In case 09-CF-013368, on February 24, 2011, a jury found Defendant guilty of first-degree premeditated murder, as charged, with the special finding that Defendant did actually possess and discharge a firearm causing death. *See* Verdict Form.[1] That same day, the Court sentenced Defendant to a term of natural life in prison, with a twenty-five year mandatory minimum sentence.

[1] The Court notes that it will not provide attachments with the instant order as they were previously provided with the Court's November 21, 2017, order for the State to respond.

Appendix J

See Judgment and Sentence. The Second District Court of Appeal affirmed Defendant's conviction and sentence and issued the mandate on January 30, 2013. *See* Mandate.

In her timely, sworn motions, Defendant raises the following grounds for relief:

1. Counsel rendered ineffective assistance by allowing her to reject a favorable plea offer when counsel knew Defendant suffered from severe mental illness; and

2. Counsel was ineffective for failing to move the Court to conduct a hearing to rule on the question of Defendant's competency.

See Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief and Amended Grounds One of Motion for Post Conviction Relief.

Evidentiary Hearing Testimony

The defense first called Mr. Bryant Camareno, Defendant's trial counsel. Mr. Camareno testified he represented Defendant either from the time of her arrest, or shortly after her arrest, through her trial. *See* Evid. Hrg. T. p. 8, attached. Mr. Camareno testified he filed a "Notice of Intent to Rely on the Defense of Battered Spouse Syndrome and/or Intent to Rely on Insanity at Time of the Offense" in July of 2010. *See* Hrg. T. pp. 8-9, attached. Mr. Camareno testified he had both Dr. Gamache and Dr. Northrup evaluate Defendant, but that neither doctor found Defendant to be incompetent or eligible to claim the defense of insanity at the time of the offense. *See* Hrg. T. p. 10, attached. Mr. Camareno was aware Defendant "suffered from depression [and] perhaps anxiety" and knew that Defendant had previously contemplated suicide. *See* Hrg. T. p. 11, attached. When asked what his input was to the doctors with regard to Defendant's state of mind, Mr. Camareno testified as follows:

> MR. CAMARENO: Well, it was my hope that they would say she was insane at the time or that she was incompetent either at the time of the incident or, perhaps, during the course of the trial. She was very, Ms. DePaula, very soft spoken, very quiet. Nothing that I observed that would lead me to believe that she would commit such a violent act. So I was concerned with her mental health, if you will, or well being.

But in terms of – so the hope was that either Dr. Gamache or Dr. Northrop would give me something to pursue that battered spouse syndrome or insanity at the time. So since they didn't give me that, I could only give them what I knew of her which was, again, that she was not a victim of physical abuse but more of emotional abuse. And that's, again, one of the things, I think that took the wind out of the sails of my battered spouse syndrome that it wasn't a violent relationship. It was just toxic in that he would – the victim would come and go and have women, girlfriends while living with her and taking advantage of her kindness, if you will.

So to answer your question, I tried to get these doctors to give me something that I could go forward with, but Ms. DePaula was a very candid, very honest person with everything that had gone on in her life, that nothing that she was giving me would help them in their assessment and plus, I guess, whatever conversation she had with them privately. Also, there was nothing there. So there was only so much I could do in terms of what I knew of Ms. DePaula.

See Hrg. T. pp. 13-14, attached.

Mr. Camareno testified he did not consider having a competency hearing because, based on what Dr. Gamache and Dr. Northrup indicated in their reports, he did not "think [he] had a good faith basis to do that." *See* Hrg. T. pp. 14-15, attached.

Mr. Camareno testified he believed the plea offer from the State was for a thirty-five year prison sentence. *See* Hrg. T. p. 19, attached. Mr. Camareno could not specifically recall when that offer was extended by the State, but did know "that it was some time before July of 2010." *See* Hrg. T. p. 20, attached. Mr. Camareno testified the offer was conveyed to Defendant and that he would have last discussed it with her "leading up to the pretrial." *See* Hrg. T. p. 21, attached. When asked what Defendant's "state of mind" was at the time the offer was conveyed, Mr. Camareno testified as follows:

MR. CAMARENO: She was not happy. She was not happy that the State was making that kind of offer. You know, she had just clearly just had a baby. Again, she was pregnant during the

> commission of the offense, gave birth to the baby in jail, had not seen the baby, had no contact and her thought process was a 35-year offer was pretty much a life sentence for her personally because – not that she was older, but it was just a lifetime for her and certainly a lifetime of not having contact with her child, so her thought process was she wasn't happy with that offer.

See Hrg. T. p. 22, attached.

Mr. Camareno testified that while Defendant "was definitely depressed and anxious about the whole process ... [it was] never to the point where [he] felt that she didn't understand what was going on." *See* Hrg. T. p. 23, attached. Mr. Camareno reiterated that he "had no concerns about her not understanding what was being conveyed because of her concerns about a 35-year sentence, the loss of not being able to see her child for the next 35 years ... [He] didn't have concerns that she didn't understand what was going on." *See* Hrg. T. p. 31, attached. Mr. Camareno testified it was "made clear to her that if [they] proceeded to trial and she lost, no matter how much mitigation [he] offered ... it was a mandatory life sentence." *Id.* Mr. Camareno reiterated that Defendant "wasn't happy" with the offer provided by the State, so she gave him the authority to counter-offer ten years' prison, which was rejected by the State. *See* Hrg. T. p. 35, attached.

When asked whether he ever attempted to determine if Defendant was on any medications at the time he discussed the plea offer with her, Mr. Camareno testified he "never had any questions or concerns [about] whether she was on medication or not." *See* Hrg. T. p. 37, attached.

On cross-examination, Mr. Camareno testified that while it was his recollection that Defendant was willing to serve ten years in prison, it may have been five. *See* Hrg. T. pp. 45-46, attached. Mr. Camareno testified that while he could not recall the specific number of times he met with Defendant, he knew "that leading up to the trial that it had to be very frequently because ... [they] were about to make a decision [on] ... yes versus no about going to trial and then the trial prep itself." *See* Hrg. T. p. 48, attached. When asked whether Defendant was involved in her

defense, Mr. Camareno testified that she was "involved in the sense that she knew what [his] theory was early on and then [she] would try to help supplement that." *See* Hrg. T. p. 49, attached.

Mr. Camareno testified if Dr. Northrup or Dr. Gamache "had said she's not competent, then [he] immediately would have brought that to the Court's attention and then the Judge would have had a hearing on it." *See* Hrg. T. p. 53, attached. Mr. Camareno testified he never had questions about Defendant's competency and explained that his "only question ... was what was going on in [Defendant's] mind at the time of the incident ... not during the time [they] were interacting." *See* Hrg. T. p. 54, attached. Mr. Camareno agreed both Dr. Northrup and Dr. Gamache found Defendant competent to proceed and found there was not a sufficient basis for her to rely on the insanity defense at trial. *See* Hrg. T. pp. 55-70, attached. Mr. Camareno testified that in addition to Dr. Northrup and Dr. Gamache, he also consulted with Dr. Maher, Dr. McLeod, and Dr. Eldra Solomon regarding Defendant's case. *See* Hrg. T. p. 70, attached.

Mr. Camareno testified he "didn't see any indication that [Defendant] was under the influence of any drugs, alcohol, or medication" nor did she appear incompetent when he discussed the plea offer from the State with her. *See* Hrg. T. p. 81, attached. Mr. Camareno reiterated that Defendant was "depressed, without a doubt, but competent." *See* Hrg. T. p. 82, attached. Mr. Camareno testified he "would never tell any client, and [he] didn't tell [Defendant], don't take this plea because ... it's a decision that [they are] going to have to live with for the rest of [their lives]." *See* Hrg. T. p. 84, attached.

On re-direct examination, Mr. Camareno testified he summarized Dr. Northrup's and Dr. Gamache's reports for Defendant by explaining, "look, there's no insanity, there's no incompetency, in terms of what their findings were and, unfortunately, there's not battered spouse syndrome defense." *See* Hrg. T. p. 85, attached.

Defendant was called to testify next. Defendant testified Mr. Camareno originally told her the State's offer was thirty years' prison, but then she found out in court that it was thirty-five. *See* Hrg. T. pp. 99-100, attached. Defendant testified Mr. Camareno told her "that if [she took] the plea, [she would] not [be] able to fight [her] case any more and that [she would] have to do the time." *See* Hrg. T. p. 100, attached. Defendant testified Mr. Camareno also told her that if she went to trial and lost, she could "come back and fight [her] case and get less time." *Id.* Defendant testified this played a "very big part" in her decision not to accept the plea agreement and reiterated that Mr. Camareno told her should would get "less time by fighting [her] case if [she lost at] trial." *See* Hrg. T. p. 101, attached.

Defendant testified leading up to trial, she was taking Prozac every day. *See* Hrg. T. p. 102, attached. Defendant testified that if Mr. Camareno had told her about the State's plea offer "the same way that he discussed it ... [at the hearing]," she "would have accepted it, definitely." *Id.* Defendant testified Mr. Camareno spent "no more than an hour" discussing the State's offer with her. *See* Hrg. T. p. 103, attached. When asked whether she felt that Mr. Camareno did "everything reasonably possible to tell [her] what would happen if [she] accepted the plea offer," Defendant answered no and testified she believed "he could have explained it into more depths [sic] so [she] could really understand the depths of what [she] was facing." *See* Hrg. T. pp. 104-05, attached.

On cross-examination, Defendant initially testified she did not know she was facing a life sentence prior to trial. *See* Hrg. T. p. 107, attached. Defendant testified she never asked Mr. Camareno for a five-year offer, but agreed that thirty-five years is "a long time." *See* Hrg. T. p. 108, attached. Defendant then testified that she did know she would receive a life sentence if she was convicted as charged, but reiterated that she "was under the impression ... that [she] could come back and fight [her] case and get less time." *See* Hrg. T. pp. 109-10, attached. Defendant

Amended +

testified that while Mr. Camareno "never told [her] to reject [the offer] ... he advised [her] that if [she went] to trial, [she] would get less time." *See* Hrg. T. p. 118, attached.

Claim One

In claim one, Defendant alleges that counsel rendered ineffective assistance by allowing her to reject a favorable plea offer when counsel knew Defendant suffered from severe mental illness. *See* Amended Grounds One of Motion for Post Conviction Relief. Defendant states that she "rejected a favorable plea offer of thirty (30) years in Florida State prison with ten (10) years probation" and was ultimately sentenced to "natural life with a twenty-five (25) year mandatory minimum in prison without the possibility of parole." *Id.*

Defendant "asserts that counsel failed to correctly inform her of the maximum penalty that she faced" and "advised [her] to reject the plea offer because if she proceeded to trial she would receive a lesser sentence because of her mental illness." *Id.* Defendant states that she "lacked the capacity to rationally weigh the risk of going to trial versus acceptance of the plea." *Id.* Defendant contends that if counsel had "properly advised [her,] she would have accepted the plea offer of thirty (30) years offered by the State" and that because of counsel's deficient performance, she "was denied the opportunity to accept a lesser sentence." *Id.*

Defendant cites to *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013), and argues that she has met all of the elements of *Alcorn* because she "would have accepted the plea; the State would not have withdrawn the plea as it would have been accepted under its terms; the Court would have accepted the offer because it was fair and reasonable; and the sentence under the terms of the offer would have been less severe than the natural life and twenty-five (25) mandatory minimum sentence imposed following trial." *Id.*

After reviewing the motion, the testimony and evidence presented at the evidentiary hearing, the court file, and the record, the Court finds Defendant is not entitled to relief. Initially,

the Court finds that when an ineffective assistance claim is based on rejection of a plea offer, "to establish prejudice, the defendant must allege and prove a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Alcorn v. State*, 121 So. 3d at 430. Here, the Court finds that Defendant has failed to meet her burden.

Specifically, the Court finds Defendant has failed to demonstrate deficient performance by Mr. Camareno. In making this determination, the Court finds credible Mr. Camareno's testimony that he "made [it] clear to [Defendant] that if [they] proceeded to trial and she lost, no matter how much mitigation [he] offered ... it was a mandatory life sentence." The Court finds this is supported by State's Exhibit 1, the report prepared by Dr. Northrup, in which Defendant acknowledged that a "life sentence [was] her worst case scenario." *See* State's Exhibit 1.

Further, the Court finds credible Mr. Camareno's testimony that he was not concerned about Defendant's competency during the course of his representation. Specifically, the Court finds credible Mr. Camareno's testimony that he was able to communicate with Defendant and that he never had concerns that she did not understand what was going on. This is supported by the Court's determination within claim two that Defendant was competent at the time of her trial.

The Court also finds credible Mr. Camareno's testimony regarding Defendant being "unhappy" with the State's offer because it would prevent her from seeing her children for a lengthy period of time due to her incarceration. This is supported by Defendant's agreement at the evidentiary hearing that thirty-five years is "a long time" and her testimony that after receiving the life sentence, she would now be willing to accept the State's thirty-five year offer.

Additionally, the Court notes that it finds credible Mr. Camareno's testimony that he discussed the appellate process with Defendant, which included an explanation that if she accepted a plea, she would not be able to further litigate her case. However, the Court did not find credible Defendant's testimony regarding Mr. Camareno telling her that if she went to trial and lost, she would receive less time after "fighting her case."

Accordingly, the Court finds Defendant failed to show that Mr. Camareno did not provide competent evidence when advising her regarding the possible outcomes if she went to trial and was found guilty. As such, Mr. Camareno cannot be said to have performed below an objective standard of reasonableness or that trial counsel's performance was unreasonable under professional norms. Therefore, no relief is warranted. **Accordingly, the Court denies claim one of Defendant's "Amended Grounds One of Motion for Post Conviction Relief."**

Claim Two

In claim two, Defendant alleges that counsel was ineffective for failing to move the Court to conduct a hearing to rule on the question of her competency. *See* Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief. Defendant argues that the record "manifestly indicates that [counsel] questioned [her] competence to proceed" and that "her mental illness impaired her ability to rationally understand the facts or the proceedings against her." *Id.* By incorporating facts included within claim one, Defendant alleges that she has "a lifelong history of severe mental illness and is being treated by the Department of Corrections for Depressive Disorder, Borderline Personality Disorder and Borderline Intellectual Functioning." *Id.* Defendant argues that counsel knew of her history of mental disorders as he received "medical reports...from Dr. Patricia Phelps, PhD, and [through] interviews with [her] family." *Id.* Defendant also notes that counsel "twice requested appointment of experts to conduct forensic psychological examinations" and that "they plainly reflected that [she] suffered from serious mental illness that

would likely affect her ability to make rational decisions to accept or reject a plea offer or proceed to trial." *Id.*

Defendant argues that were it not for her "mental incompetence, had she been of sound mind, had she been capable of rational thinking, she would have accepted the favorable plea offered by the State rather than face a mandatory life sentence." *Id.* Defendant contends that "[q]uite simply, [she] was not in her right mind and her attorney did nothing to establish her incompetence to participate in pretrial or trial proceedings." *Id.* Defendant "asserts that she was not competent to proceed to trial, not competent to reject the State's plea offer, and not competent to waive her right to testify on her own behalf." *Id.* Defendant argues that counsel's "failure to motion the court to determine her competency, particularly in light of his knowledge of the severity of her mental illness demonstrates deficient performance." *Id.*

After reviewing the motion, the testimony and evidence presented at the evidentiary hearing, the court file, and the record, the Court finds Defendant is not entitled to relief. Specifically, the Court finds that trial counsel did have Defendant evaluated for competency twice and both evaluations were returned with a finding of competency. In the first evaluation, which was performed on April 14, 2010, Dr. Northrup noted that the "purpose of [the] evaluation [was] to examine [Defendant's] competency to stand trial and [her] mental state at the time of the offense (sanity)." *See* State's Exhibit 1. Dr. Northrup opined "within reasonable medical certainty [that] the defendant [was] competent to stand trial" and found she "demonstrated an appreciation of the charges against her and the nature of the possibility penalties." *Id.* He further opined "within reasonable medical certainty [that] the defendant [did] not meet criteria for legal insanity." *Id.*

In the second evaluation, which was performed on August 17, 2010, and August 26, 2010, Dr. Gamache found that "with regard to competency, [Defendant] remains depressed at the present time and is no longer taking medication. However, her depression is presently not so severe that it

renders her unable to participate in legal proceedings or unable to assist [counsel] in preparing a defense." *See* State's Exhibit 2. Consequently, Dr. Gamache did "not find any psychological basis to question [Defendant's] current mental state and her competency to proceed." *Id.*

In addition to the findings made by the doctors, the Court finds credible the testimony of Mr. Camareno. Specifically, the Court finds credible Mr. Camareno's testimony that he had no concerns about Defendant's competency to proceed with trial because he was able to effectively communicate with her and she never appeared to not understand what they were discussing. Consequently, the Court finds that the testimony and evidence that was presented demonstrates that Defendant was able to consult with Mr. Camareno with a reasonable degree of rational understanding and that she understood the pending proceedings. As such, Mr. Camareno cannot be said to have performed below an objective standard of reasonableness or that trial counsel's performance was unreasonable under professional norms. Therefore, no relief is warranted. **Accordingly, the Court denies claim two of Defendant's "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief."**

It is therefore **ORDERED AND ADJUDGED** that claim one of Defendant's "Amended Grounds One of Motion for Post Conviction Relief" and claim two of her "Amended Grounds One, Two, Three, Four and Five of Motion for Post Conviction Relief" are hereby **DENIED.**

Defendant has thirty (30) days within which to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this 12 day of March, 2019.

MARK KISER, Circuit Judge

Attachments:
Evidentiary Hearing Transcript

CERTIFICATE OF SERVICE

I hereby certify that a copy of this order has been furnished to **Venecia Depaula, DC#: 155466**, Homestead Correctional Institution, 19000 S. W. 377th Street, Florida City, Florida 33034-6409; and **Julian Hayes, Esquire,** P.O. Box 271682, Tampa, Florida 33688, by regular U.S. Mail; and to **Scott Harmon, Assistant State Attorney,** 419 N. Pierce Street, Tampa, Florida 33602, by inter-office mail; on this 13th day of March, 2019.

Harmony Lacey
DEPUTY CLERK

Appendix J

DISTRICT COURT OF APPEAL

SECOND DISTRICT
Post Office Box 327
LAKELAND, FLORIDA 33802
(863)940-6060

ACKNOWLEDGMENT OF NEW CASE

DATE: March 28, 2019

STYLE: VENECIA DEPAULA v. STATE OF FLORIDA

2DCA#: 2D19-1216

The Second District Court of Appeal has received the Appeal reflecting a filing date of March 22, 2019.

The county of origin is Hillsborough.

The lower tribunal case number provided is 09-CF-13368.

The filing fee is: No Fee-3.850.

Case Type: Criminal 3.850 Final Non-Summary

The Second District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts enclosed with this acknowledgment.

cc: Attorney General, Tampa Venecia Depaula Pat Frank, Clerk