Cruz v. Secretary, Department of Corrections et al

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UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA

OCALA DIVISION

EFRAIN CAMARILL CRUZ, Petitioner, v. Case No. 5:16-cv-531-Oc-39PRL SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents. _____

ORDER I. Introduction Petitioner, Efrain Camarill Cruz, a former detainee of the Citrus County Jail, proceeds on a petition for writ of habeas corpus under 28 U.S.C. § 2254, filed by counsel (Doc. 1; Petition). Petitioner challenges a 2013 Citrus County judgment of conviction. Respondents filed a response (Doc. 12; Response), and Petitioner counsel replied (Doc. 22; Reply). 1

Petitioner raises three grounds for habeas relief: (1) his guilty plea was not voluntary because of his mental illness, or alternatively, the ineffective assistance of counsel for failure to argue Petitioner was incompetent to enter a guilty plea and for

1 The Court will cite to the exhibits in the The Court will reference page numbers using the Bates stamps where

system numbering.

failure to request a competency hearing under the Florida Rules of Criminal Procedure; (2) the ineffective assistance of counsel for failure to move to dismiss count four of the indictment; and (3) his convictions and sentence under Florida Statutes sections 847.0135(3)(a) and (4)(a) violate double jeopardy principles. Petition at 10, 17, 18.

II. Procedural History Petitioner, a Mexican citizen, was convicted on August 19, 2013, and sentenced to serve 90 days in the county jail followed by three years of probation with possible deportation. Petition at 1. As of the date of this Order, Petitioner completed his sentence. However, when Petitioner filed his Petition, on August 19, 2016, 254 because his probationary term had not expired. Id. It appears Petitioner faces a possible collateral consequence related to his conviction because he alleges he was subject to deportation as a result. Id. Petitioner was arrested on June 22, 2012, following an undercover operation. Ex. A at 27. According to the probable cause

lure or entice or attempt to seduce, solicit, lure or entice a Id. at 28. An undercover agent, Deputy Phil Graves, posing as an adult single mother, posted a training Id. That same day, Petitioner responded to the

advertisement using an online email service. Id. Deputy Graves responded immediately and identified the child as a 13-year-old girl. Id. Petitioner exchanged numerous text messages with whom he thought was the parent of the child. Id. The two also exchanged pictures through email. Id. Petitioner spoke by phone with the supposed parent and the supposed daughter, talking to the daughter about engaging in sex acts with her. Id. at 28-29. Deputy Graves provided Petitioner an address and the two arranged to meet. Id. at 29. When Petitioner arrived, officers arrested him, confiscating two cell phones and a thumb drive device, each of which was believed to contain pertinent information. Id. at 59, 66. 2

After being read his rights, Petitioner stated he made a mistake. Id.

On July 16, 2012, Petitioner was charged by Information with four counts: (1) use of the internet or device to lure a child identified as Tiffany Wright; (2) use of the internet or device to lure the parent of a child; (3) traveling to meet a minor, identified as Jenny, 3

for illegal sexual conduct; and (4) attempted lewd/lascivious battery on a child identified as Jenny. Id. at 38.

2 A search warrant subsequently was issued and executed for the devices. Ex. A at 64-68.

3 The Information references two fictitious minors: Tiffany Wright and Jenny. Ex. A at 38. The parties do not dispute Petitioner believed there was only one minor involved. It is unclear why two different names are referenced in the Information.

open plea to the Court, not as a result of a plea negotiation with the prosecutor. Id. at 3, 4. After Petitioner was sworn in, with Petitioner prior to the proceedings to explain the terms of

the plea, including the sentence:

MR. GRANT: Mr. Cruz, Judge, for the record, reads and writes English, is extremely articulate. He, in addition to that, Your Honor, did acquire his GED and one year of years. I have, Judge, in this case, we have not taken any depositions . . . because Mr. Cruz, through the decision-making process, has agreed to take the deal that the State of Florida well, that the court is going to offer. 4 . . . . Specifically, Your Honor, we discussed it, I gave him my professional opinion, the likelihood of success at trial which was limited in this case. There are post-Miranda admissions written and oral. There were text messages, there were the government had a very strong case . . . . I want to make sure that I have advised Mr. Cruz that as a foreign national, it is my opinion that he will be deported from

the

4 negotiated with the prosecutor. As such, there was no written plea agreement. Ex. A at 3. Defense counsel stated the plea was the resu at which the parties seemingly discussed whether Petitioner would Id.

United States upon . . . entering of the plea of guilty. . . . . I want to make it abundantly clear that my client understands that, is prepared to go to Mexico if the United States government does, in fact, deport him. Id. at 5-6. Mr. Grant also informed the judge the following:

Your Honor, we have discussed that [my client is] waiving his right to a jury trial, waiving the right to confront witnesses, waiving his right to an appeal other than for any legal [sic] sentence, that he has waived going to be getting DNA from the Court, and

rights that relate to a jury trial and the right to confront witnesses and challenge the witnesses and the evidence that the government may present against him. In light of that, plea of guilty, receive 90 days in the Citrus County Jailhouse and three years standard probation. Id. at 9.

to enter a guilty plea understanding the implications and potential consequences, the judge engaged Petitioner in the following exchange:

THE COURT: Mr. Cruz, you heard your representations. Is that how you want to handle this matter?

THE DEFENDANT: Yes, sir. THE COURT: Are you presently under the influence of any alcohol or intoxicant

that would negatively affect your good judgment here today?

THE DEFENDANT: No, sir. THE COURT: Have you ever been found to be insane, incompetent, or mentally challenged?

THE DEFENDANT: No, sir. THE COURT: Okay. Are you comfortable in the English language?

THE DEFENDANT: Yes, sir. THE COURT: Have you been able to e said in English as well as what [your attorney] has said in English?

THE DEFENDANT: Yes, I did, sir. THE COURT: Very good. Now, then, Mr. Cruz, you heard about your situation regarding your immigration status, residency status, and/or likely deportation status. Do you understand that this plea could and likely would subject you to deportation by the federal authorities, you understand that?

THE DEFENDANT: Yes, sir. THE COURT: [A] guilty plea is one saying that I am guilty of this offense, that you heard your attorney indicate the rights each one of those rights individually like

THE DEFENDANT: No, sir. Id. at 10-11.

The trial judge then stated the factual predicate for the plea, as follows:

Mr. Cruz, the facts of the case would tell me that on or about June the 22nd, of 2012 . . . you did knowingly utilize a computer online service, Internet service, local bulletin board, or other electronic status storage device to seduce, solicit, lure, entice a Tiffany Wright believed by you, Mr. Cruz, to be a child to commit an illegal act as defined by Florida [laws], this by conversing or chatting or sending emails or messages to this person. Id. at 11-12.

The judge further explained Petitioner communicated with someone Petitioner believed to be the parent of the child to

illegal act. Id. at 12. The judge explained Petitioner traveled

somebody else utilizing this electronic data storage matter, and explained:

In other words, you traveled for the purpose of having sex with Jenny and that further on or about this same date, that you did attempt to engage in sexual activity with Jenny who was believed by you to be a person over the age of 12 but less than 16, this [sic] by attempting to have sexual contact . . . . Id. at 13.

After setting forth the factual predicate, the judge explained to Petitioner that Mr. Grant was not appointed as reiterated may result in his deportation. Id. at 14. The judge said:

If you ar back later on and say that Mr. Grant has done anything improper or has given you bad advice has and you know your situation. Is that correct, Mr. Cruz? Id. Petitioner respon

5 The judge explained to Petitioner his guilty plea would result in the waiver of certain rights:

appeal or challenge any of the facts of this the case or any legalities of any decisions that have already been made by me and of course, you still have the right to, you know, have an immigration hearing . . . . You understand that? Id. at 14- Id. at 15.

Id. The judge explained Petitioner would be designated a sexual offender and would be subject to the requirements of the Jimmy Ryce and Lunsford Acts. Id. at 19-20. of guilty

after the factual basis was established. Id. at 17.

5 the courtroom when Petitioner entered his guilty plea. Ex. A at 23.

Petitioner, through counsel, filed a direct appeal, id. at 82, which he voluntarily dismissed, Ex. B. then filed a motion under Florida Rule of Criminal Procedure 3.850 requesting the trial court vacate judgment. Ex. D-5. The trial court denied the 3.850 motion. Ex. D-3; Ex. G. 6

Petitioner On August 18, 2015, the appellate court affirmed without opinion. Ex. M. The appellate 2015, Ex. O, and the mandate issued on October 8, 2015, Ex. P.

III. Timeliness & Exhaustion Respondents assert the Petition appears to have been timely filed 7

and the claims have been exhausted in state court except for one portion of ground one. See Response at 9, 11. Respondents

due to Petitioner present a copy of the exhibit. Id. at 11. Exhibit A is a letter from a neuropsychologist, Dr. Ginart, who evaluated Petitioner at postconviction proceedings. See Petition at 10, 26. Petitioner

6 The trial court issued two orders on the 3.850 motion. Ex. D-3; Ex. G. On the day the court issued the first order, it reserved ruling on one claim and directed the state to respond to that claim. Ex. D-2. After the state responded, the trial court issued a final order. Ex. G.

7 For purposes of this Order, the Court construes the Petition as timely filed.

asserts Florida law does not require him to have provided the exhibit to the state court because he referenced opinion in his 3.850 motion. Reply at 3-4. position is well-founded. In his 3.850 motion, Petitioner asserted

he suffered a mental illness, and his counsel referenced the has concluded -5 at 6. Petitioner was not required to attach the written opinion to his motion. See Mann v. State, 21 So. 3d 894, 895 (Fla. 2d DCA 2009) (recognizing Florida law does not require a prisoner to support his sworn motion with evidence). The Court concludes Petitioner has exhausted all claims in his Petition. Accordingly, in analyzing ground one, the Court will consider, to the extent relevant, the exhibit Plaintiff attaches to his Petition.

IV. Evidentiary Hearing Petitioner requests an evidentiary hearing on grounds one and two. See Petition at 14, 15, 18. Petitioner has the burden to establish the need for a federal evidentiary hearing. Chavez v. Sec y, Fla. Dep t of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011). A district court is not required to hold an evidentiary hearing if the record refutes the asserted factual allegations or otherwise precludes habeas relief. A petitioner fails to demonstrate an

evidentiary hearing is warranted based upon conclusory allegations. Id. at 1061.

In determining whether an evidentiary hearing is warranted, a federal court should take into consideration the deferential standards of federal habeas review under § 2254. Schriro v. Landrigan, 550 U.S. 465, 474 (2007). Therefore, before a habeas petitioner may be entitled to a federal evidentiary hearing . . . he must demonstrate a clearly established federal-law error or an unreasonable determination of fact on the part of the state court, based solely on the state court record. Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1295 (11th Cir. 2015).

After a thorough review of the record, the Court finds Petitioner fails to carry his burden to demonstrate the need for an evidentiary hearing. The Court finds the pertinent facts are fully developed in this record or the record otherwise precludes habeas relief. Consequently, this Court can adequately assess [Petitioner s] claim[s] without further factual development. Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003).

V. Standard of Review The Antiterrorism and Effective Death Penalty Act (AEDPA) governs a state prisoner s federal petition for habeas corpus. See § 2254. relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error

Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 642 (11th Cir. 2016), cert. denied, 137 S. Ct. 1432 (2017) (quoting Greene v. Fisher, 565 U.S. 34, 38 (2011)). As such, federal habeas review of final state court decisions is Id. (quoting Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011)).

The first task of a federal habeas court is to identify the last state court decision, if any, that adjudicated the

Corr., 828 F.3d 1277, 1285 (11th Cir. 2016). The state court need not issue an opinion explaining its rationale for its decision to qualify as an adjudication on the merits. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). W the merits is unaccompanied by an explanation, the district court should presume the unexplained decision adopted the reasoning of the lower court:

unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. Id. The presumption is rebuttable by a showing that the higher

Id. at 1192, 1196.

When a state court has the merits, a federal court cannot grant habeas relief unless the

involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United

facts in light of the evidence presented in the State court proceeding. The burden of proof is high; clear error Virginia v. LeBlanc, 137 S. Ct. 1726, 1728

2254(e)(1).

As such relief for prisoners whose claims have been adjudicated in state Burt v. Titlow, 571 U.S. 12, 19 may grant habeas relief only when a state court blundered in a

Tharpe v. Warden, 834 F.3d

1323, 1338 (11th Cir. 2016), cert. denied, 137 S. Ct. 2298 (2017). (quoting Harrington v. Richter, 562 U.S. 86, 102-03 (2011)).

The AEDPA standard is intended to be difficult for a petitioner to meet. Richter, 562 U.S. at 102. A district court

not to flyspeck the state court order or grade it. Meders v. Warden, Ga. Diagnostic Prison, 911 F.3d 1335, 1349 (11th Cir. 2019) (citing Wilson, 138 S. Ct. at 1191-92). A federal district court must give appropriate deference to a state court decision on the merits. Wilson, 138 S. Ct. at 1192. Appropriate deference requires the court to defer to the reasons articulated by the state, if they are reasonable. Id.

not apply because the trial court did not conduct an evidentiary hearing. Petition at 15, 18. In support of his contention, Petitioner cites three opinions from other circuits. 8

Petitioner

conclusions are not entitled to a presumption of correctness solely because the court reaches those conclusions without the benefit of an evidentiary hearing. In fact, the Eleventh Circuit has held an evidentiary hearing is not a prerequisite presumption of correctness, recognizing:

8 Alston v. Redman, 34 F.3d 1237 (3d Cir. 1994); Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998), abrogation recognized by Smith v. Aldridge, 904 F.3d 874, 886 (10th Cir. 2018); and Valdez v. Cockrell, 288 F.3d 702 (5th Cir. 2002). Not only are these decisions not binding, one of the opinions upon which Petitioner relies is a dissent from a petition for rehearing en banc. See Valdez, 288 F.3d at 702. In the underlying opinion, the Fifth Circuit held not a precondition to s presumption of correctness to state Valdez v. Cockrell, 274 F.3d 941, 951 (5th Cir. 2001) (emphasis added).

[T]here does not appear to be any binding Supreme Court or Eleventh Circuit precedent on whether § 2254(d)(2) deference is conditioned on a state court having held an evidentiary hearing . . . . More

broadly, the Supreme Court seems to have foreclosed a per se rule that a state court must conduct an evidentiary hearing to resolve every disputed factual question. . . . Thus, we conclude that an evidentiary hearing in state court cannot be a requirement for § 2254(d)(2) deference for all disputed factual issues in a state court proceeding. Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1297 (11th Cir. 2015). In accordance with binding precedent, this Court must give appropriate deference to the relevant state court decision. Wilson, 138 S. Ct. at 1192.

VI. Ineffective Assistance of Counsel Petitioner claims he received the ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. To demonstrate his trial counsel was ineffective, Petitioner must satisfy a rigorous two-prong test by showing (1) co deficient, meaning it fell below an objective standard of reasonableness, and performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 688, 692 (1984). Restated, a h Amendment right to effective assistance of counsel a defense attorney Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Wiggins v. Smith, 539 U.S.

510, 521 (2003); Strickland, 466 U.S. at 687). The prejudice prong requires a showing that there is a reasonable probability that, but for counsel s deficiencies, the result of the proceeding would have been different. Strickland, 466 U.S. at 695.

The two-prong Strickland test applies when a petitioner the entry of a guilty plea such that a petitioner still must demonstrate . Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). To establish prejudice, however, a petitioner must show there is a reasonable probability that, but for counsel s errors, he would not have pleaded guilty and would have insisted on going to trial. Id. at 59.

-clad rule requiring a court to tackle one prong of the Strickland Ward v. Hall, 592 F.3d 1144, 1163 (11th Cir. 2010). Since both prongs of the two-part Strickland test must be satisfied to show a Sixth Ame prong if the petitioner cannot meet the prejudice prong, and vice-

Id. (citing Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)).

When a petitioner claims his counsel was ineffective, [r]

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822 F.3d 1248, 1262 (11th Cir. 2016) (quoting Strickland, 466 U.S. at 689). Strickland is

prong is afforded double deference. Richter, 562 U.S. at 105.

Accordingly, the question for a federal court is not whether

any reasonable argument that counsel satisfied Strickland Id. that counsel satisfied Strickland federal

court may not disturb a state-court decision denying the claim. Id. Strickland Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

VII. Findings of Fact & Conclusions of Law

A. Ground One Petitioner asserts his guilty plea was involuntary because he was mentally incompetent at the time. Petition at 10. Alternatively, Petitioner argues his counsel was ineffective for failure to request a competency hearing under the Florida Rules of Criminal Procedure. Id. 9

Petitioner raised these claims in ground one of his 3.850 motion, Ex. D-5 at 6.

9 Respondents contend counsel failed to request a competency hearing under the Florida Rules of Criminal Procedure presents solely a state-law issue. Response at 17. Petitioner presents his competency claim as a denial of

claim as follows:

[he] was not able to fully comprehend his guilty plea and therefore the plea was involuntary. . . . Alternatively, the [Petitioner] alleges that his defense Counsel was ineffective by failing to properly evaluate and argue that [he] was incompetent to enter a guilty plea and failing to request a hearing pursuant to [Florida Rule of Criminal Procedure] 3.210. D-3 at 2. The trial court found the record conclusively refuted assertions. Ex. D-3 at 4.

l court referenced the plea transcript, which the court found revealed the following:

[Petitioner] had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, understood the rights he was giving up in his plea agreement, understood that he would be subject to deportation, understood the sexual offender registration and monitoring requirements, was satisfied with the representation of his attorney, and that there was simply no indication of any mental incompetency.

effective assistance of counsel, invoking the Sixth Amendment. Therefore, his claim is cognizable under § 2254.

Id. at 4 (emphasis added). The trial court further found request a competency hearing was without merit. Id.

The Fifth District Court of Appeal (DCA) affirmed without opinion. Ex. M. To the extent the Fifth DCA affirmed the trial l on the merits, the Court will address the claim in accordance with the deferential standard for federal court review of state court adjudications. See Wilson, 138 S. Ct. at

1194. As

trial Id. 10

The trial s are presumed correct unless Petitioner overcomes the presumption with clear and convincing evidence. See § 2254(e).

After a review of the record and the applicable law, the Court

contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Thus, Petitioner is not entitled to relief on this claim.

10 per curiam Wilson, 138 S. Ct. at 1194.

Even if the state court finding is not entitled to deference, A habeas petitioner who asserts he was tried or convicted while he was incompetent raises a substantive due process claim. James v. Singletary, 957 F.2d 1562, 1571-72 (11th Cir. 1992). of an incompetent defendant denies him or her the due process of Id. at 1573. To succeed on a substantive competency claim, a petitioner must demonstrate by a preponderance of the evidence that he was in fact incompetent at the relevant time. Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995); see also Johnston v. Singletary, 162 F.3d 630, 637 n.7 (11th Cir. 1998).

mental competency is set forth in Dusky v. United States, 362 U.S.

402, 402 (1960). The Dusky standard requires a court to determine whether a defendant with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of

the proceedings agai Id. See also Godinez v. Moran, 509 U.S. 389, 401-02 (1993) (holding the Dusky standard similarly applies in the context of guilty pleas). To demonstrate actual incompetence, a . Sheley v. Singletary, 955 F.2d 1434, 1438 (11th Cir. 1992). corpus proceedings should not consider claims of mental

incompetence [to enter a plea] where the facts are not sufficient to positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to the mental capacity of the Id. (quoting Reese v. Wainwright, 600 F.2d 1085, 1091 (5th Cir. 1979)). When a petitioner contends he was substantively incompetent to enter a plea, he is entitled to an evidentiary

James, 957 F.2d at 1572 (quoting Fallada v. Dugger, 819 F.2d 1564, 1568 (11th Cir. 1987)).

Whether a petitioner has the present ability to consult with his lawyer and understand the proceedings may be gleaned from hearing and trial transcripts: The best evidence of [a

at the relevant time, such as during trial or during a plea hearing. See , 278 F.3d 1245, 1259 (11th Cir. 2002). A petitioner must do more than simply assert he has low intelligence or was suffering from a mental deficiency at the time:

demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.

Medina, 59 F.3d at 1107 (internal citations omitted). In Wright, the court held the petitioner failed to carry his heavy burden even though he had been declared incompetent to stand trial seventeen years previously, he pled not guilty by reason of insanity in the underlying criminal case, and expert witnesses

e he committed the crime. Id.

The court reasoned the petitioner, at the relevant times,

attorney, and understood the charges. Id. As such, the court found immaterial that, months after his trial in the underlying case, the defendant was declared incompetent to stand trial on subsequent charges. Id. n.4. See also Medina, 59 F.3d at 111 (finding relevant that petitioner coherently testified at trial and at sentencing, ;

Sheley, 955 F.2d at 1438 (holding the petitioner failed to carry

ed he had taken psychotropic medication on the day of the plea and he had a history of mental illness).

Here, Petitioner has not met his high burden to demonstrate by a preponderance of the evidence he was incompetent when he entered his guilty plea. See Medina, 59 F.3d at 1106. The record

demonstrates Petitioner was able to communicate with his attorney

against him, and the waiver of rights associated with his plea; exhibited no confusion; and responded appropriately when the judge asked him questions. Ex. A at 10-11. Petitioner chose, through - and understood his plea resulted in the waiver of certain rights and could result in his deportation. Id. at 6, 7. Petitioner s rational and appropriate responses, and his full and lucid participation in the plea proceeding, demonstrate Petitioner s reasonable degree of rational understanding of the proceedings.

Storey v. State, 32 So. 3d 105 (Fla. 2d DCA 2009), is misplaced. See Petition at 12. In Storey, the state appellate court remanded the case to the trial court to conduct an evidentiary hearing, finding the plea colloquy did not Storey, 32 So. 3d at 107. Petitioner here argues the plea colloquy similarly did not refute his claim of incompetency and he, therefore, should have been afforded an evidentiary hearing. Petition at 12.

Importantly, it is not the province of this Court to review whether the trial court should have held an evidentiary hearing on

unreasonable application of federal law. § 2254(d). Here, as

ed the Strickland standard is supported by the record. And the plea colloquy demonstrates Petitioner was competent to enter a guilty plea. Based on the record, Petitioner decidedly had the ability to consult with his lawyer and understand the plea proceedings.

incompetence is the opinion of neuropsychologist Dr. Ginart. Dr. positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to the mental capacity Sheley, 955 F.2d at 1438. First, Dr. Ginart concludes Petitioner,

the upper level of the [m]ild [m]ental [r]etardation range (i.e.,

in the lower end of the [b]orderline Petition at 26. Mild mental retardation, however, does not equate to incompetency under the Dusky standard. See Medina, 59 F.3d at incompetence to stand trial; rather, the evidence must indicate a

Second, Petition at 26. But

Dr. Ginart does not explain the nature of the injury or its effects

on Petitioner at the time of the plea hearing. In fact, Dr. Ginart offers n Petitioner at all. Instead, Dr. Ginart explains in general terms

conditions and react to stressors. Id.

Finally, and most importantly, Dr. Ginart concludes

incompetent to enter a plea (on his own), under stress/duress without adequate legal representation Id. (emphasis added). Petitioner was represented by counsel who explained the nature of the charges, the rights Petitioner waived by entering a plea, and potential consequences of his plea, including possible deportation. Ex. A at 9-11. his counsel failed to request a competency hearing, there is no suggestion Petitioner was denied adequate legal representation. In

17, 25. Considering the circumstances under which Petitioner entered his guilty plea (with imply Petitioner was competent at the time.

In short, Dr. Ginart does not conclude that on the day Petitioner entered his plea, he exhibited neurological problems such that he was unable to understand the proceedings or aid in his defense. Nor could Dr. Ginart have reached such a conclusion

because his opinion was based on an evaluation of Petitioner after the fact, 11

and there is no indication Dr. Ginart reviewed the plea transcript or mental health/medical records generated close in time to the plea hearing. Indeed, Dr. Ginart states his opinion is based solely on the results of a neuropsychological evaluation he administered. See Petition at 26.

To the extent Petitioner may have demonstrated cognitive impairments or limitations at the time Dr. Ginart examined him, there is nothing in the record to demonstrate Petitioner was incompetent under the Dusky standard at or near the time he entered his plea. See Wright, 278 F.3d at 1259

counter the best evidence of what his mental condition was at the only time that counts, against him). Upon review of the plea transcript, Petitioner lawyer . . . [and] he had a rational as well as factual

Id. at 1257 (quoting Dusky, 362 U.S. at 402).

11 The date of the neurological examination and the date on which Dr. Ginart rendered his opinion are unknown because Dr. examination was conducted after the plea hearing and in aid of Petiti See Petition at 10; Ex. D-5.

request a competency hearing requires a petitioner to demonstrate both deficient performance and prejudice under the Strickland standard. As with other Strickland representation fell below an objective standard or

, 700 F.3d 464, 477 (11th Cir. 2012) (quoting Strickland, 466 U.S. at 688).

was a reasonable probability that he would have received a competency hearing and been found incompetent had counsel Id. at 479 (emphasis in original). Under this standard, the prejudice prong of the ineffective assistance claim demands the same showing as that under a substantive competency claim. Under both claims, a petitioner must demonstrate he was actually incompetent at the time of the plea. Id. As such, the evidence supporting a substantive competency analysis is - assistance-of-counsel analysis. Id. at 481-82.

Even when a defendant exhibits some questionable behavior during the proceedings and has a history of mental issues, a trial Id. at 477-78. For

instance, in Lawrence

eaded guilty. The court accepted his guilty plea after counsel represented the defendant understood the proceedings. Id. at 467. During the penalty phase, the defendant reported having flashbacks and asked to be excused from the courtroom during certain testimony. Id. at 469.

competency hearing was reasonable even though trial counsel admitted at the postconviction evidentiary hearing that, in hindsight, she erred by not requesting a competency evaluation of her client. Id. after-the-fact self- critique carried little weight. Id. The court found significant that trial counsel did not state communicate with [her Id.

Additionally, after the defendant reported hallucinating, the trial court engaged the defendant in a lengthy discussion, after which trial counsel concluded the defendant was simply having a . Id. Accordingly, the court held trial fall below an objectively reasonable standard of performance. Id.

at 478-79. With respect to the prejudice (actual incompetency) prong,

unreasonable application of Strickland, even though two mental

health experts testified at the postconviction evidentiary hearing (five years after the plea) that the defendant was incompetent at the time of his plea and during the penalty phase. Id. at 472, 479, 480. The court reasoned, in part, that the plea colloquy with the defendant and trial counsel demonstrated the defendant understood the proceedings and entered his plea willingly. Id. at 479. The court held as follows:

While the state trial court did not make a detailed colloquy, [the] rational and consistent responses to the trial findings that [the] guilty plea was knowing and voluntary nonetheless support the reasonableness of the Florida Supreme Strickland prejudice. Id.

Here, Petitioner fails to demonstrate his counsel performed deficiently. Petitioner offers no evidence to show a reasonably competent attorney would have questioned his competence to enter a plea. Indeed, nothing in the record even hints at a possible competency issue before or at the time Petitioner entered his plea. The first time a competency issue arose postconviction proceedings when Dr. Ginart evaluated him. There is no indication defense counsel knew Petitioner sustained a head injury when he was a child or functioned at a low level of intellectual ability. Even if counsel had known as much, these conditions do not speak to incompetency at the relevant time, which

was when Petitioner entered his plea. See, e.g., Lawrence, 700 F.3d at 478-79.

Regardless of Pe - plea neuropsychological examination conducted by Dr. Ginart, the plea colloquy demonstrates a reasonably competent attorney would have had no reason to question whether

Petitioner had a rational, as well as factual understanding of his criminal proceedings. D spent time speaking with Petitioner, who counsel described as a

good person, articulate, and educated, and the trial judge noted on the reco , 24, 34. There is nothing to indicate

Petitioner struggled to comprehend the proceedings or had difficulty communicating or understanding, which would have put his attorney on notice of a competency concern. Defense counsel

- plead guilty rather than have his attorney take depositions. Id.

at 24, 25. 12

12 It is worth highlighting Petitioner received an extremely lenient sentence as a result of his guilty plea. The judge sentenced him to six months in jail followed by three years of probation. Ex. A at 78. At the plea proceedings, counsel expressed the strength of the s Petitioner. Id. at 6. If convicted, Petitioner faced a minimum of 84 months in prison. Id. at 78. Not only did Petitioner receive a much lighter sentence than the minimum under the sentencing

Even assuming counsel acted deficiently, Petitioner cannot meet the high threshold of prejudice because he fails to demonstrate he was incompetent when he entered his plea, as analyzed in detail above. Petitioner does not allege he suffered from mental conditions or illnesses that are associated with Dusky; he offers no evidence of a history of mental illness or documentation of such; and there is no evidence Petitioner was receiving or had received treatment for a mental illness. Indeed, at the plea hearing, Petitioner denied ever having

Ex. A at 10.

In sum, considering the totality of the circumstances surrounding plea, Petitioner fails to carry his heavy burden to demonstrate he was actually incompetent at the time he entered his guilty plea. As such, he concomitantly fails to demonstrat defense.

B. Ground Two In ground two, Petitioner claims his counsel was ineffective for his failure to move to dismiss the attempted lewd or lascivious battery charge (count four). Petition at 17. Petitioner contends an element of that offense requires the victim be of a certain

scoresheet, but the sentence was even lower than what the state had offered Petitioner, which was a prison sentence. Id. at 17.

age, and the victim was undisputedly outside the statutory age- range. Id. Respondents argue

Petitioner cannot demonstrate deficient performance because Petitioner was charged with attempt, not a completed offense. Response at 22-23. Additionally, Respondents maintain, Petitioner cannot demonstrate prejudice

his plea agreement. Id. at 23-24.

Petitioner exhausted this claim in ground two of his postconviction motion, Ex. D-5 at 8, and by appealing the trial

DCA affirm Under Wilson, this Court presumes the Fifth DCA adopted the reasoning of the trial court, and the state has not attempted to rebut this presumption. See 138 S. Ct. at 1192. As such, the Court

Id.

relief, the trial court set forth the applicable two-prong

Strickland test. Ex. D-3 at 3, 5-6. In denying ground two of , the trial court found the primary authority upon which Petitioner relied was inapposite. Id. at 5 (citing Pamblanco v. State, 111 So. 3d 249, 252 (Fla. 5th DCA 2013)). The trial court recognized Pamblanco stands for the

offense of solicitation of a child under the age of sixteen to commit lewd or lascivious

D-3 at 5. The trial court also acknowledged the victim in actually an undercover officer and therefore over the age of sixteen. Id. However, the court continued,

and Pamblanco makes clear that the holding does not apply to . Id. The trial court further . . . is eventually vacated as illegal, there is no showing that confidence in the outcome, based Id. at 5-6.

Upon review, the record demonstrates the trial court properly applied the Strickland standard and found no deficient performance

As such, Petitioner is unable to establish the state decision is inconsistent with Supreme Court precedent, including Strickland, or is based on an unreasonable determination of the facts. U Petitioner is not entitled to habeas relief on ground two.

C. Ground Three In ground three, Petitioner asserts his convictions on an Information charging subsections of Florida Statutes section 847.0135 (subsections

(3)(a) and (4)(a)) violate double jeopardy because those charges were based on the same conduct. Petition at 18-19. Petitioner states ground, has since been rejected by the Second DCA in Shelley v.

State, 134 So. 3d 1138, 1141-42 (Fla. 2d DCA 2014). 13

Respondents contend

Petitioner exhausted this claim in ground three of his postconviction motion, Ex. D-5 at 10, and by appealing the trial Fifth DCA, Ex. H at 1; Ex. I at 12. The Fifth In

14 the trial court subsection[s] (3)(a) and (3)(b) were for separate offenses; thus, -4. The record shows the Fifth DCA affirmed the decision of the trial court in denying this ground. Ex. M. Under Wilson, this Court presumes the

13 Significantly, the Shelley opinion was decided in 2014, after Petitioner was charged (July 16, 2012) and after he entered his plea (August 19, 2013).

14 The trial court addressed the double jeopardy claim in its irecting the state to respond to the issue. Ex. D-2. initial order addressed his alternative ground for relief, ineffective assistance of counsel for failure to move to dismiss the duplicative count in the Information. Ex. D-5 at 10. Petitioner has not asserted ineffective assistance of counsel in ground three in his Petition before this Court.

Fifth DCA adopted the reasoning of the trial court, and the state has not attempted to rebut this presumption. See 138 S. Ct. at 1192.

Id.

After a review of the record and the applicable law, the Court

contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Thus, Petitioner is not entitled to relief on this claim.

Even if the state court finding is not entitled to deference, The Supreme Court makes clear that a

to criminal charges waives his right to contest the conviction on double jeopardy grounds. United States v. Broce, 488 U.S. 563, 569 (1989).

A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily whether the underlying plea was both counseled and voluntary.

Id. A guilty plea is not only a confession but a recognition that the defendant committed the substantive crimes in the charging document. Id. at 570. In Broce, the defendants argued their convictions violated double jeopardy because they engaged in only one conspiracy but entered guilty pleas to two separate charges of conspiracy, as alleged in the indictment. Id. at 565, 570. The Court held their pleas resulted in a waiver of such a collateral attack even though their attorney did not discuss double jeopardy issues with them beforehand. Id. at 572, 573. While the defendants

entered voluntarily and freely and with the advice of counsel. Id. the right to object on double jeopardy grounds] derives not from any inquiry into a defenses, but from the admissions necessarily made upon entry of

Id. at 573-74.

Upon review of the applicable law and the record, the Court finds Plaintiff freely and voluntarily entered his plea with the assistance of competent counsel, thus waiving his right to collaterally attack his conviction on double jeopardy grounds. See id. at 565, 570. Importantly, Petitioner does not contest the voluntariness of his plea, and the plea colloquy demonstrates his plea was in fact voluntarily entered. Petitioner specifically acknowledged he was waiving certain rights, which were explained

by his attorney and the judge; he confirmed he wished to proceed with the plea under the factual predicate provided by the judge

the consequences of his plea; he acknowledged his plea would result in his being labeled a sexual offender and could subject him to deportation; he agreed his attorney answered all his questions; and he affirmed he was not under the influence of any intoxicants at the time. Ex. A at 9-10, 14, 15. declarations in court carry a strong presumption of truth. Blackledge v. Allison, 431 U.S. 63, 74 (1977); see also Winthrop- Redin v. United States, 767 F.3d 1210, 1217 (11th Cir. 2014) (recognizing statements made under oath at a plea colloquy are presumed true). Thus, representations that he understood the plea agreement and the rights he was giving up

Blackledge, 431 U.S. at 73-74.

The Broce Court acknowledged an exception to the general rule applies when a presiding trial judge should have determined the

charge, on the face of the charging document, was not one the state could constitutionally prosecute. 488 U.S. at 574, 575. In Broce, the exception did not apply because the defendants pleaded guilty Id. at 576. See also Dermota v. United States, 895

voluntary and counseled guilty plea waived a double jeopardy challenge because the indictment

described separate offenses and

s both charges may have violated double jeopardy).

The exception to the general rule of waiver recognized by the Broce Court does not apply here. There is no indication on the face of the Information the charges were not ones the state could constitutionally prosecute. 488 U.S. at 575. The Information charged separate offenses against Petitioner. Ex. A at 38. Count ion 847.0135(3) and count three charged

Each charge named a seemingly different victim: count one referenced a victim named referenced a victim named Id.

Even though Tiffany Wright and Jenny were in fact references to the same fictitious child, 15

the Information, to which Petitioner pleaded guilty, identified two separate charges against different victims. Id. The victims were not described as the same

15 The record is clear Petitioner believed he was traveling to meet one child, not two. Ex. A at 28-29.

person in the Information. That the trial judge, during the plea colloquy, referenced the victim(s)

referenced the same victim. Ex. A at 12-13. There is also no indication the Information on its face was constitutionally infirm. 16

The state court opinion upon which Petitioner heavily relies does not entitle Petitioner to federal habeas relief. See Shelley v. State, 134 So. 3d 1138, 1141-42 (Fla. 2d DCA 2014). The Shelley court held a conviction under both subsections (3)(a) and (4)(a), when based upon the same transaction, violates double jeopardy:

one criminal transaction or episode violate the prohibition Id. The defendant in Shelley entered a guilty plea, but explicitly reserved his right to, and did, appeal

charges as violating double jeopardy. Id. at 1139. Petitioner here

16 Petitioner seemingly invokes the limited exception recognized by Broce, though he relies upon a Florida Supreme Court decision instead. See Petition at 18 n.12; Reply at 7 (citing Novaton v. State, 634 So. 2d 607 (Fla. 1994)). Petitioner argues he did not waive his right to later object on double jeopardy grounds. The binding precedent does not distinguish between an open or a negotiated plea, however. Broce, 488 U.S. at 574; Dermota, 895 F.2d at 1325. Rather, as the Supreme Court held, the Broce, 488 U.S. at 569. As discussed, lea was both counseled and voluntary.

did no such thing; on the contrary, he explicitly waived his rights when he entered his plea. Ex. A at 9-11, 14-15.

Additionally, the Shelley court acknowledged, for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of computer Shelley, 134 So. 3d at 1142. The record here suggests the prosecutor may have been able to prove of computer devices to solicit, which would have resulted in Id. For instance, the search warrant authorized the search of two mobile phones and a digital storage device, all of which were seized from The trial noted Petitioner used the devices to exchange 117 text messages, 16 phone calls, and numerous emails with the supposed parent of a 13-year- old girl. Ex. G at 3.

Moreover, at the early stage of the proceedings when Petitioner pleaded guilty, the theory was premised, in part, on the solicitation and the traveling offenses occurring on different days, see Ex. K at 15, which could have supported convictions under both subsections of the statute. See Shelley, 134 So. 3d at 1142 (citing with approval cases that held convictions for both soliciting and traveling are lawful if based on conduct that occurred on different dates).

Whether the prosecutor would have been able to prove the separate violations against Petitioner is a different inquiry than whether Petitioner freely and voluntarily entered a plea to the Information, which charged him under both subsections (3)(a) and (4)(a). See Dermota, 895 F.2d at 1325 (distinguishing the case on the facts because in the precedent upon which the defendant relied, the defendant was convicted of the two offenses, which the court held violated double jeopardy, while the defendant in Dermota pleaded guilty).

To the extent the facts were not fully developed when Petitioner entered his plea, he expressly waived his right to object based on double jeopardy principles. Broce, 488 U.S. at 572. [has] discover[ed] . . . that his calculus misapprehended the . . . . [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate Id. at 572. For these reasons, Petitioner is not entitled to relief on ground three.

Accordingly, it is now ORDERED AND ADJUDGED: 1. The Petition (Doc. 1) is DENIED. 2. This action is DISMISSED WITH PREJUDICE.

3. The Clerk shall enter judgment accordingly and close this case. 4. If Petitioner appeals the denial of his Petition, the Court denies a certificate of appealability. 17

The Clerk shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

DONE AND ORDERED at Jacksonville, Florida, this 23rd day of September, 2019.

Jax-6 c: Counsel of Record

17 This Court should issue a certificate of appealability only

substantial showing, Petitioner Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.