IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

RONALD ELLIS,

Petitioner,

-against- **Civil Action No:_____**

SHANNON VARNES,
Warden Taylor Correctional (Annex), and

PAM BONDI,
ATTORNEY GENERAL STATE OF FLORIDA,

Respondents.
_____/

VERIFIED PETITION FOR A FLORIDA WRIT OF HABEUS CORPUS
BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2254

COMES NOW the Petitioner, Ronald Ellis (DC#C08923), by and through undersigned counsel, and hereby submits a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 because he is confined under a prison sentence which violates his Sixth Amendment right to effective assistance of counsel.

JURISDICTION AND VENUE

Petitioner seeks relief from a Judgment of the Circuit Court of the Ninth Judicial Circuit of Florida entered June 3, 2014, convicting him of two counts of § 794.011(2)(1) capital sexual battery. Petitioner was sentenced by the Trial Court to concurrent mandatory sentences of life imprisonment. Petitioner is currently in the custody of Taylor Annex pursuant to the aforementioned Judgment of Conviction. The Warden is Shannon Varnes at 8501 Hampton Springs Road, Perry, FL 32348.

This Petition is brought pursuant to 28 U.S.C. § 2254 and Article I, § 9, Clause 2 of the Constitution, and federal question jurisdiction pursuant to 28 U.S.C. § 1331. The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, authorizes declaratory relief. Ellis is currently incarcerated in the jurisdiction and venue of the Northern District of Florida.

Thus, venue is proper in the United States District Court for the Northern District of Florida.

Mr. Ellis' petition is timely. Mr. Ellis was convicted and sentenced. He then filed a timely appeal which was denied on May 29, 2015. On September 8, 2015, Mr. Ellis filed his initial post-conviction motion in state court under Rule 3.850. His Rule 3.850 motion was summarily denied on December 19, 2017. Mr. Ellis then filed a direct appeal of the summary denial which was denied by written order on April 24, 2018. Mr. Ellis files this petition pursuant to 28 U.S.C. § 2254 within the one-year time limitation under federal law.

No prior petition seeking this relief has been filed in this Court or any other court of competent jurisdiction.

STATEMENT OF THE CASE[1]

Exhibits Attached to this Petition

- Appeal Decision, Ellis v. State, 164 So.3d 789 (Fla. 5th DCA 2015).
- Record on Appeal (Case No. 2012-CF-4035).
- Order Denying Post Conviction dated December 19, 2017.

[1] Citations to the Record on Appeal will be referred to by the letter "R." followed by the appropriate page number(s).

Statement of the Facts

Petitioner, Mr. Ellis, was arrested and charged in 2012 with two counts of capital sexual battery occurring between March 1, 1983 and December 5, 1987 in violation of Florida Statutes § 794.011(2)(1). (R. 188-191)[2]. Prior to trial, at the request of Mr. Ellis' trial counsel, the Trial Court ordered three experts to determine whether Mr. Ellis was competent to stand trial. (R. 143-47, 165-67).

The first expert, Dr. Jeffrey A. Danziger, concluded that Mr. Ellis was in fact "not competent to proceed" to trial. (R. 544-547). Dr. Danziger explained that while Mr. Ellis had a basic factual understanding of the court system, the stroke he suffered in 2009 damaged his "ability to produce coherent speech and to communicate in a reasonable and rational fashion" and "properly communicate what he is thinking either in speech or in writing." *Id.* Dr. Danziger's report concluded that Mr. Ellis' current condition would prevent "him from testifying in relevant fashion" and "from consulting with his attorney and relating relevant facts to counsel." *Id.* Dr. Danziger believed that Mr. Ellis did not meet the criteria for involuntary placement and his incompetency would likely be of a permanent nature. (R. 547).

While the remaining court-appointed experts, Dr. Daniel P. Tressler and Dr. Eric Mings, concluded that Mr. Ellis was competent to proceed, both experts also made several notes concerning Mr. Ellis' inability to understand and communicate. (R. 548-552 and R. 554-557).

The Trial Court orally adjudicated Mr. Ellis competent to stand trial at a hearing on May 31, 2013, but never entered a written order. (R. 491). The "hearing" to determine Mr. Ellis' competency only occupies two pages of transcripts because neither the Trial Court, trial counsel, nor the State sought to present the testimony of the experts. (R. 490-91). Accordingly, the Trial

[2] Case number 2012-CF-00435-A-O.

Court determined Mr. Ellis competent because the vote was two against on in favor of a finding of competency.

On June 2, 2014, one year after the "hearing," Mr. Ellis' case proceeded to trial. Just before jury selection began, Mr. Ellis' trial counsel again raised concerns to the Trial Court regarding Mr. Ellis' mental state. (R. 251). Trial counsel noted that one expert found Mr. Ellis incompetent and stated for the record that, in the course of representing him, Mr. Ellis "has said things to [trial counsel] that made no sense at all." (R. 251-252). Trial counsel stated that Mr. Ellis "gets tongue-tied" and "has difficulty expressing himself." *Id.* Trial counsel went on to add that Mr. Ellis "says one thing when he means another" and sought to make the Trial Court aware that Mr. Ellis' incapacity "could be an issue." (R. 251). However, despite Dr. Danziger's finding that Mr. Ellis was in fact not competent to stand trial, the other court-appointed experts' notes regarding Mr. Ellis' inability to understand and communicate, and his own doubts as to Mr. Ellis' competency, trial counsel never asked the Trial Court for Mr. Ellis to be re-evaluated.

During jury selection, a discussion arose about the required number of jurors for the trial. (R. 28). Both Trial Counsel and the Trial Court agreed that Mr. Ellis was entitled to twelve jurors. *Id.* However, upon insistence by the State that the requirement was only six jurors, the Trial Court changed its position and agreed to a six-person jury. *Id.* Despite his belief that Mr. Ellis was entitled to twelve jurors, Trial Counsel did not object. *Id.* At no time was Mr. Ellis consulted by either the Trial Court or Trial counsel about waiving a 12-person jury. *Id.*

On June 3, 2014, one year after his "competency hearing," a six-person jury found Mr. Ellis guilty of both counts, and he was accordingly sentenced and convicted. (R. 143-148).

Procedural History

The Circuit Court of the Ninth Judicial Circuit of Florida convicted Mr. Ellis of two counts of § 794.011(2)(1) capital sexual battery on June 3, 2014, and sentenced him to concurrent mandatory sentences of life imprisonment. (R. 197-204). On September 8, 2015, Mr. Ellis filed a motion for post-conviction relief. (R. 3-32). He filed a second motion for post-conviction relief amending the previous motion on October 6, 2017. (R. 44-59). Mr. Ellis' relief was denied by order of the Post-Conviction Court on December 19, 2017. (R. 595-600).

The Post-Conviction Court's order granted Mr. Ellis' claim as to Ground II, but denied the claims set forth in Ground I. (R. 595-600). Mr. Ellis subsequently appealed the Post-Conviction Court's denial of Count I of his Amended Motion for Post-Conviction Relief on January 16, 2018 in the Florida Fifth District Court of Appeal.[3] On April 24, 2018, a two-judge panel for the Florida Fifth District Court of Appeal issued a per curiam decision affirming the Post-Conviction Court, thereby denying Mr. Ellis' appeal. 164 So. 3d 789, 789 (Fla. 5th DCA 2015). This appeal follows.

[3] Case No. 5D18-188

GROUNDS OF UNCONSTUTIONALITY OF PETITIONER'S CONVICTION AND SENTENCE

I. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE PETITIONER'S COMPETENCY TO PROCEED TO TRIAL AND IMPROPERLY WAIVED THE REQUIRED NUMBER OF JURORS IN A TRIAL FOR A CAPITAL CRIME.

The United States guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. *See* U.S. Constit., Amend. VI. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, ineffective assistance of counsel is made out when the defendant shows that (1) the trial counsel's performance was deficient, i.e. that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *Id.* at 687.

A. Trial Counsel's Performance Was Deficient Because He Did Not Request A Re-Evaluation Of Mr. Ellis To Show That He Was Incompetent To Proceed To Trial And Because He Improperly Waived The Required Number of Jurors In A Trial For A Capital Crime.

(1) Failure to request a re-evaluation to show lack of competency.

An attorney's performance is deficient when he fails to reasonably investigate his client's competency and mitigating mental health issues. *Porter v. McCollum*, 558 U.S. 30, 40 (2009). In *Porter*, the trial counsel failed to adequately uncover and present evidence of his client's mental impairment despite indications of defendant's poor mental health that reasonably warranted further investigation. *Id.* The Court noted, for example, that the defendant's court-ordered competency evaluations contained sufficient red flags regarding his mental health as to require counsel to conduct a deeper investigation. *Id.* The Court explained that counsel had effectively "ignored pertinent avenues for investigation of which he should have been aware." *Id.* The Court therefore found deficient performance because counsel's decision not to further investigate his client's mitigating mental health information despite clear signs of potential issues did not reflect reasonable professional judgment. *Id.; see also Wiggins v. Smith*, 539 U.S. 510, 525 (2003) (finding deficient performance when counsel failed to pursue leads that "any reasonably competent attorney would have realized…[were] necessary to making an informed choice among possible defenses")*; Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008) (finding deficient performance when counsel ignored "red flags [that] would have prompted a reasonable attorney to conduct additional investigation").

Here, Trial Counsel's performance was deficient because his failure to further investigate Mr. Ellis's competency by requesting a re-evaluation despite one court-ordered expert finding Mr. Ellis incompetent, all three experts noting Mr. Ellis's inability to understand and

communicate, and Trial Counsel's personal knowledge of Mr. Ellis's incapacity did not reflect reasonable professional judgement. Like the counsel in *Porter*, Trial Counsel failed to adequately uncover and present evidence of Mr. Ellis's mental health by not requesting a second evaluation. Notes in two of the court-ordered evaluations concerning Mr. Ellis's inability to understand and communicate, along with the third expert's conclusion that Mr. Ellis's condition would prevent him from testifying "in relevant fashion" and "from consulting with his attorney and relating relevant facts to counsel," presented sufficient red flags to Trial Counsel, similar to *Porter*, to require a deeper investigation into Mr. Ellis's competency. Moreover, Trial Counsel's admission on the record that, in the course of representing him, Trial Counsel found that Mr. Ellis "has difficulty expressing himself" and "says one thing when he means another," noting that his incapacity "could be an issue," reasonably warranted Trial Counsel to request a re-evaluation. Therefore, Trial Counsel's performance was deficient, like the counsel in *Porter*, because Trial Counsel's actions did not reflect reasonable professional judgment when he failed to reasonably investigate Mr. Ellis's mitigating mental health issues by failing to request a second competency evaluation.[4]

(2) Improper waiver of a twelve-person jury trial for a capital crime.

Counsel is deficient when he involuntary waives his client's right to a twelve-person jury. Florida statutory law provides that a defendant charged with a capital crime is entitled to a twelve-person jury (even when the death penalty is not sought), and may be tried by a jury of six only when the defendant waives that right. *Cabberizia v. Moore*, 217 F.3d 1329, 1333 (11th Cir.

[4] Ellis also argues that the trial court erred by failing to sua sponte order a competency hearing. *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). The Pate court held that once the question of competency is raised, there is a constitutional entitlement to a hearing on the issue of competency. Also, *Pate* established a rebuttable presumption of incompetency upon a showing that the trial court failed to hold a competency hearing despite information raising a bona fide doubt as to the petitioner's competency.

2000). Rule 23(a) of Federal Rules of Criminal Procedure requires that a defendant in a federal court be tried by a jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Fed. R. Crim. P. 23(a). In addition to a written waiver, some circuits require a trial judge to conduct a colloquy with the defendant on the record to ensure that his waiver is made voluntarily, knowingly and intelligently. *Cabberizia,* 217 F.3d at 1333 (citing *United States v. Scott,* 583 F.2d 362, 364 (7th Cir. 1978)). In addition, the Eleventh Circuit has assumed that, for purposes of determining ineffective assistance of counsel, a trial counsel's waiver of the right to a twelve-person jury for "nothing" in return – such as in a bargain for the state to no longer seek the death penalty - is objectively unreasonable. *Chateloin v. Singletary,* 89 F.3d 749, 753 (11th Cir. 1996).

Here, Trial Counsel was deficient because he improperly waived Mr. Ellis's right to a twelve-person jury trial for a capital crime when he neither consulted with nor received an affirmative waiver from Mr. Ellis, and did not receive anything in return for the waiver.[5] In the brief discussion between the Trial Court, the State and Trial Counsel regarding the number of jurors required for Mr. Ellis's trial, Trial Counsel failed to object to the Trial Court's determination that only six jurors were required even though Mr. Ellis was being tried for a capital crime. At no point did Trial Counsel consult Mr. Ellis about waiving his right to a twelve-person trial nor did Trial Counsel bargain with the State to waive Mr. Ellis's right to a twelve-person trial in exchange for any sort of reduced penalty. Therefore, Trial Counsel was deficient because he improperly waived Mr. Ellis's right to a twelve-person trial for a capital crime.

[5] This issue was not raised in Petitioner's state court 3.850 as it was not discovered until appellate counsel's meeting with petitioner in August 2018.

B. Trial Counsel's Deficient Performance Prejudiced Mr. Ellis Enough To Deprive Him of Due Process of Law.

The test for prejudice under the *Strickland* standards is not what would happen at a trial, but rather whether there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694; *see also Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

The trial of an incompetent defendant is per se prejudicial. *James v. Singletary,* 957 F.2d 1562, 1571 (11th Cir. 1992). When assessing ineffective assistance of counsel upon failure to conduct a competency hearing in state court, the federal district court need not decide whether the error influenced the determination of guilt or punishment because a finding of incompetency by the state trial court would have precluded a determination of guilt or innocence; the defendant would not have been tried. *Id.*

Here, Trial Counsel's deficient performance prejudiced Mr. Ellis enough to deprive him of due process of law when Trial Counsel failed to request Mr. Ellis to be re-evaluated for competency and waived Mr. Ellis's right to a twelve-person jury without consulting him or receiving anything in return. Given that one of the three court-ordered expert's found Mr. Ellis incompetent and that the other two experts, along with Trial Counsel, noted that Mr. Ellis had significant difficulty communicating and understanding, it is likely that Mr. Ellis would have been found incompetent upon a second evaluation.[6] Had Mr. Ellis had been re-evaluated and found incompetent, he would not have been tried. Even if Mr. Ellis had been found competent upon re-evaluation, he was still prejudiced under the *Strickland* standard because there is a

[6] *See Dusky v. United States,* 362 U.S. 402, 402 (1960) (holding that a finding of competency requires the defendant to have "sufficient present ability to consult with his lawyer and a reasonable degree of rational understanding).

reasonable probability that having a twelve-person jury would have influenced the verdict in his favor.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, this Court should grant the petition herein in its entirety.

WHEREFORE, Petitioner prays that this Court:

(A) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement upon a personal recognizance bond; or in the alternative,

(B) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement unless the judgment of conviction and sentence are vacated and he be restored to pre-pleading status, or, in the alternative;

(C) Set this matter for an evidentiary hearing on the issue raised herein, and;

(D) Grant such other and further relief as this Court may deem just, proper and equitable.

Dated: August __, 2018