

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO: 2013-CF-000510

v.

JAMES MATHEW MCDEVITT,

Defendant.

_____ /

**INTERIM ORDER DENYING SECOND AMENDED MOTION
FOR POSTCONVICTION RELIEF IN PART
AND ORDERING STATE RESPONSE IN PART**

THIS MATTER came before the Court upon Defendant's Second Amended Motion for Postconviction Relief, filed by counsel pursuant to Florida Rule of Criminal Procedure 3.850. The Court having reviewed the motion, and being otherwise fully apprised in the premises, finds as follows:

Procedural History

Defendant entered an open plea of guilty to Sexual Battery by Force, and on May 29, 2015, he was sentenced to 40 years' incarceration followed by 20 years' probation/community control. No appeal was taken. On May 26, 2017, Defendant timely filed his first motion for postconviction relief. An Order dismissing the motion and granting leave to amend was entered on June 22, 2017. Defendant requested and was granted an extension of time, and timely filed an Amended Motion for Postconviction Relief on August 21, 2017. Grounds I and II of the Amended Motion were stayed and Grounds III and IV of the Amended Motion were stricken with leave to amend by Order dated April 20, 2018. Defendant timely filed the instant Second Amended Motion for Postconviction Relief on June 20, 2018.

Legal Analysis

To establish a claim of ineffective assistance of counsel, a defendant must show: (i) that his counsel's performance fell below that of reasonably competent counsel; and (ii) that there is a reasonable likelihood that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052 (1984). To satisfy the deficient-performance prong of the *Strickland* test, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690, 104 S.Ct. 2052. The prejudice prong of the *Strickland* test requires a defendant to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. In the context of a guilty plea, the prejudice prong requires the defendant to 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." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366 (1985); *see also Grosvenor v. State*, 874 So.2d 1176, 1179 (Fla. 2004). "[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000).

Ground I

In Ground I, Defendant claims that his first trial counsel was ineffective for failing to adequately explain the State's initial plea offer, failing to inform the Defendant of the maximum penalty and probation he faced, and failing to review discovery so that Defendant could make an informed decision on the State's initial plea offer.

The Office of the State Attorney shall respond in writing to Ground I of Defendant's Second Amended Motion for Postconviction Relief within sixty (60) days from the date of this Order.

Ground II

In Ground II, Defendant alleges that his second trial counsel was ineffective (1) because he failed to properly advise Defendant of the maximum consequences of an open plea to the Court, and (2) that subsequent to Defendant's sentencing and on Defendant's request, he failed to file a motion to withdraw Defendant's plea and for a modification of sentence.

Defendant claims that his plea was involuntary because his trial counsel erroneously advised him that he would face a maximum of only 12-15 years in prison and that the Court would be lenient based upon Defendant's age. Defendant cites to *Childers v. State*, 782 So.2d 513, 517 (Fla. 1st DCA 2001), that allegations concerning misadvice about how much time a defendant could serve in prison "automatically constitute a sufficient claim of ineffective assistance of counsel." However, *Childers* goes on to hold that this allegation "combined with the allegation that the appellant would not have pled had he been correctly informed, *is enough to require either attachment of those portions of the record conclusively refuting the allegations or an evidentiary hearing.*" *Id.* (emphasis added). *Childers* was remanded because the trial court had failed to attach any portion of the record refuting the appellant's claims. *Id.* at 517-518.

Here, the claim is fully refuted by the attached record. On April 15, 2015, Defendant signed a written Petition to Enter a Plea of Guilty. Each page of the Petition is initialed at the bottom by Defendant. Page 1 of the Petition provides:

4. I understand that the offense of Sexual Battery – Force is a life felony punishable by *up to Life prison*.

Page 7 of the Petition provides that Defendant:

1. Will enter a plea of guilty, feeling it is in my best interest to do so, to the single count in the Second Amended Information, Sexual Battery – Force, in violation of F.S. §794.011(3) and §775.087(1), *a life felony*.
2. He will be adjudged guilty and scores 10.5 years under the sentencing guidelines *up to life in prison*.

See Petition to Enter a Plea of Guilty (Exhibit “A”) (emphasis added). Further, during the plea colloquy the Court established that Defendant clearly understood the maximum penalty he faced:

THE COURT: Did you go over [the Petition to Enter a Plea of Guilty] with Mr. Lambert?

THE DEFENDANT: Yes, sir.

THE COURT: And Mr. Lambert... [has] answered all your questions?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, Mr. McDevitt, the offense with which you are charged... is charged as a life felony, meaning that your sentence could be anywhere from the guidelines sentence that was noted on the guidelines up to life in prison. Do you understand the potential sentence there?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, the Court has now been presented with what’s called an open plea, which means that you are agreeing to enter this plea and leave it up to me, as the Judge, to decide your sentence at a future date. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, there’s no agreement with the State as to what your sentence will be at this time.

THE DEFENDANT: Yes, sir.

See Plea Hearing Transcript, Pages 9-10 (Exhibit “B”). The plea colloquy demonstrates that Defendant fully understood the maximum he was facing. Even if trial counsel’s prediction was

incorrect, Defendant suffered no prejudice because he had actual knowledge that he could serve up to life in prison. *See Hoskins v. State*, 713 So.2d 1127 (Fla. 3rd DCA 1998). Finally, the sentence (40 years) was less than the maximum sentence allowable (life), and there would have been no prejudice even if the defendant was not advised of the maximum penalty. *See State v. Fox*, 659 So.2d 1324 (Fla. 3rd DCA 1995), *citing to Baker v. State*, 344 So.2d 597, 598 (Fla. 1st DCA 1977) (“[I]t appears that defendant received less than the maximum sentence. What difference would it have made if he had known what the maximum sentence was?”).

Next, Defendant claims that he was rendered ineffective assistance of counsel when his trial counsel failed to file a motion to withdraw his plea and a modification of sentence subsequent to his sentencing. Rule 3.170(*l*) applies to motions to withdraw filed after sentencing, and allows withdrawal of a plea only on the limited grounds listed in Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii)(a)-(e). Such grounds include lack of subject matter jurisdiction, violation of the plea agreement, and involuntariness of the plea. In order to withdraw a plea after sentencing, a defendant must show a manifest injustice. *See Williams v. State*, 316 So.2d 267 (Fla. 1975); *Lopez v. State*, 536 So.2d 226, 229 (Fla. 1988). A motion to withdraw plea after sentencing involves a more stringent standard than a motion to withdraw a plea filed before sentencing; the burden falls on the defendant to prove that withdrawal is necessary to correct the manifest injustice. *Hamil v. State*, 106 So.3d 495 (Fla. 4th DCA 2013). Defendant has failed to establish that the actions of his trial counsel rendered his plea involuntary. The record establishes that Defendant’s plea was voluntarily, knowingly, and intelligently entered. *See Plea Hearing Transcript* (Exhibit “B”). There is little probability that a motion to withdraw the plea or modify the sentence would have succeeded. Trial counsel cannot be found deficient for failing to file a meritless motion.

Ground II of Defendant's Second Amended Motion for Postconviction Relief is summarily denied.

Ground III

In Ground III, Defendant claims that trial counsel rendered ineffective assistance by failing to advise Defendant of a potential conflict of interest between trial counsel and the sentencing Court. Defendant asserts that had he been aware of the "falling out" between trial counsel and the Court, he would not have entered an open plea while represented by that trial counsel, and would have asked trial counsel to seek a different judge, or sought new counsel.

Defendant has failed to adequately explain how he was prejudiced as a result of his trial counsel's alleged ineffectiveness. The purported incidents of animosity are tied to nothing in the record. Defendant simply claims that as a result of his counsel's ineffectiveness, he was subject to sentencing by a biased judge who bore animosity towards his counsel. *See Wheeler v. State*, 214 So.3d 764 (Fla. 5th DCA 2017):

A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different—that is, a probability sufficient to undermine confidence in the outcome.

Id. at 766, citing to *Jones v. State*, 998 So.2d 573, 584 (Fla. 2008). Notably, the issue in *Wheeler* was essentially the same as that in the case at hand, but there the Court remanded in part because the defendant had not been afforded an opportunity to amend his motion. Here, Defendant was afforded two opportunities to amend his motion for postconviction relief on this ground to sufficiently demonstrate prejudice. *See* Orders dated June 22, 2017 and April 20, 2018 (Exhibits "C" and "D").

Moreover, Defendant acknowledges in his motion that he was aware of the “falling out” prior to entering his open plea; he asked his counsel about the matter and was advised that everything was “fine.” Clearly, neither trial counsel nor the trial judge were concerned about any potential conflict. See *Florida Code of Judicial Conduct, Canon 3E(1)* (providing that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”). Defendant has demonstrated neither deficient performance nor prejudice on this ground.

Ground III of Defendant’s Second Amended Motion for Postconviction Relief is summarily denied.

Ground IV

In Ground IV, Defendant claims that trial counsel rendered ineffective assistance by failing to adequately review discovery and depositions with Defendant, including potential defenses.

The Office of the State Attorney shall respond in writing to Ground I of Defendant’s Second Amended Motion for Postconviction Relief within sixty (60) days from the date of this Order.

Conclusion

Based upon the foregoing, it is:

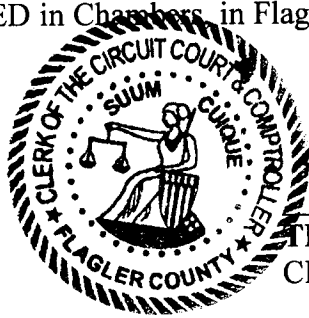
ORDERED AND ADJUDGED that:

- 1) The Office of the State Attorney shall respond in writing to Grounds I and IV of Defendant’s Second Amended Motion for Postconviction Relief filed on June 20, 2018, within sixty (60) days from the date of this order, by filing the original response with the Clerk of Court and providing a copy to the Defendant and the Court;

2) Grounds II and III of Defendant's Second Amended Motion for Postconviction Relief are summarily DENIED.

This order is a nonfinal, nonappealable order; Defendant has no right to appeal the order until entry of the final order.

DONE AND ORDERED in Chambers in Flagler County, Bunnell, Florida, this 3 day of July, 2018.



[Handwritten Signature]
TERENCE R. PERKINS
CIRCUIT JUDGE

cc: The Office of the State Attorney, Post-Conviction Division

Daniel P. Hyndman, Esq., 500 Australian Avenue South, Suite 600, West Palm Beach, FL 33401

James Mathew McDevitt, #V47864, Hamilton Correctional institution (Annex), 10650 SW 46th Street, Jasper, Florida 32052-1360

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **JAMES MATHEW MCDEVITT** by ()

delivery mail () facsimile on 7/3/18.

[Handwritten Signature]
DEPUTY CLERK



EXHIBIT “A”

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

CASE NO.: 13-510-CFFA

STATE OF FLORIDA

vs.

JAMES MCDEVITT,
Defendant.

_____ /

Guilty as charged
PETITION TO ENTER PLEA OF ~~NO CONTEST~~

1. My name is James McDevitt and I acknowledge that I am the Defendant charged in the above-styled case.

2. I am represented by attorney Michael H. Lambert, Esquire.

3. I wish to withdraw my previously entered plea of not guilty and enter an open plea of *Guilty as charged* ~~no contest~~, feeling it is my best interest to do so, to the charge in the Second Amended Information, Sexual Battery - Force, in violation of Florida Statute 794.011(3) and 775.087(1), a life felony, with the understanding that this plea resolves the entire criminal episode.

4. I understand that the offense of Sexual Battery – Force is a life felony punishable by up to life prison.

5. I have told my attorney, Michael H. Lambert, all the facts and circumstances about the charge against me. I believe that my lawyer, Michael H. Lambert, is fully informed on all such matters. My lawyer, Michael H. Lambert, has counseled and advised me on the nature of the charge; on any and all lesser included charges; on possible defenses I might have in this cause; and on all the penalties that might be imposed if convicted.

6. I understand that I may plead not guilty to any offense charged against me. If I choose to plead not guilty, the Constitution guarantees me the right to maintain that plea and (a) the right to a speedy and public trial by a jury; (b) the right to see, hear and face in open Court all witnesses called to testify against me, and to cross-examine those witnesses; (c) the right to use the power and process of the Court to compel the production of evidence, including the attendance of witnesses in my favor; (d) the right to have the assistance of an attorney at all stages of the proceedings and to have one appointed for me if necessary; and (e) also the right to take the witness stand solely at my option; and, if I do not take the witness stand, I understand the jury, at my request, will be told that this may not be held against me.

7. I also understand that by pleading no contest, and agreeing that the State could establish a factual basis for the charge of Sexual Battery – Force against me, I am waiving all of the rights referred to in the above paragraph and the Court may impose the same punishment as if I had plead not guilty, stood trial, and been convicted. I know that if I plead no contest, there will be no further trial of any kind, which means that by pleading no contest, I waive my right to a trial.

8. I am 22 years of age and I have had 13 years of education. I am not under the influence of any alcoholic beverage, drug or medicine at the time I sign this plea. My physical and mental health are satisfactory.

9. No one has made me any promise, assurance or guarantee that I would receive any consideration in exchange for pleading ~~no contest~~ *guilty n gm*.

10. I declare that no one has subjected me to any force, violence, threats, duress, intimidation or pressure to compel or induce me to enter a plea of no contest.

11. I believe that my lawyer, Michael H. Lambert, has done all that a competent attorney could to counsel and assist me. He has answered all of my questions about this case to my satisfaction and I am satisfied with the advice and help he has provided to me.

12. I understand that if I am not a citizen of the United States, this criminal proceeding could cause me to be deported to the country of my origin.

13. I understand that if I fail to pay any fines or costs as ordered by this Court, there will be a lien placed against me and I may be required to participate in a collection court.

14. I understand that I waive my right to appeal any rulings the Court has previously made in my case.

15. I understand I have the right to appeal the judgment and sentence of the Court within thirty (30) days from the date of the imposition of my sentence. I understand that any appeal must occur in writing. I understand that if I wish to take an appeal and I cannot afford an attorney to help me with that appeal, the Court will appoint an attorney to represent me for that purpose, but only if I have timely notified the Court of that need.

16. I request the Court to accept my plea, knowing that upon it being accepted by the Court that nothing will remain to be done in my case except for the Court to enter its judgment and sentence. I stipulate and agree that the State can present a prima facie case of guilt against me for the charge to which I am entering my plea, and that the affidavits, police reports, and other documents filed in the court file, or a factual recitation of facts made by the State constitute that factual basis to support the Court's acceptance of my plea.

17. I offer my plea freely and voluntarily and of my own accord. I do so with the full understanding that all the matters set forth in the Information and in this Petition, the Certificate of my lawyer, Michael H. Lambert.

18. I understand that as a result of the entry of this plea, the Court would order a Presentence Investigation Report and schedule a separate sentencing hearing where I would argue for a specific sentence, the State of Florida would argue for a specific sentence, and the Court could impose any sentence authorized by law.

19. Though I may have been assisted by my lawyer, Michael H. Lambert, I hereby certify that the statements and representations I am making herein are made on my own, and have not been suggested either directly or indirectly by my attorney, or anyone else. Further, that the decision to plead no contest was made by me, and me alone. I further represent that my attorney, Michael H. Lambert, has advised me of considerations bearing on the choice of which plea to enter, the pros and cons of such a plea, the likely results thereof, as well as any possible alternative which may be open to me.

CERTIFICATE OF COUNSEL

I, Michael H. Lambert, as attorney and counselor for the Defendant, James McDevitt, hereby certify that:

1. To the best of my knowledge and belief, the statements, representations and declarations made by the Defendant, James McDevitt, in this petition are voluntary and in all respects accurate and true. He fully understands them.

2. I have read and fully explained to the Defendant, James McDevitt, the allegations contained in the Second Amended Information, as well as the maximum and minimum penalties.

3. I have read and fully explained to the Defendant, James McDevitt, the allegations of the offense of Sexual Battery - Force, as well as the maximum penalties authorized by law to that offense.

4. I have explained to the Defendant, James McDevitt, that if he were placed on probation and were to violate his probation in a willful and substantial way, he could be sentenced up to life in prison.

5. I have gone over all of the conditions of sex offender probation with the Defendant, James McDevitt, and attached those conditions hereto as they are initialed by myself and James McDevitt. I have answered all of his questions regarding sex offender probation.

6. I have explained the Jimmy Ryce Act to James McDevitt, how it could apply to him and answered all of his questions.

7. I have conducted a complete and adequate investigation of the facts of this case and I have researched the legal issues presented by this case.

8. Having discussed this matter fully with the Defendant, James McDevitt, it is my opinion that he is mentally and physically competent and possesses no mental or physical

condition which would affect his understanding of these proceedings. James McDevitt has ADD, reads a little but has a difficult time comprehending. I have devoted all the time necessary to answer all of his questions and I believe he understands and appreciates what he is doing. I have also met with and explained the charge to his mother, Lisa McDevitt, and possible defenses, and penalties to her as well. I have no reason to believe that he is under the influence of any drugs or alcohol.

PLEA

The Defendant, James McDevitt:

1. Will enter a plea of ~~no contest~~ ^{guilty to Jim}, feeling it is in my best interest to do so, to the single count in the Second Amended Information, Sexual Battery - Force, in violation of F.S. §794.011(3) and §775.087(1), a life felony.
2. He will be adjudged guilty and scores 10.5 years under the sentencing guidelines up to life in prison.
3. The Defendant, James McDevitt, enters his open plea to the Court.
4. The Defendant, James McDevitt, understands that the Court can sentence him under this plea anywhere from 10.5 years incarceration to life, or any combination of Florida State Prison followed by probation.
5. The Defendant, James McDevitt, understands that the Court will afford onto him a presentence investigation and schedule his sentencing for a later date.
6. The Defendant, James McDevitt, understands he will be designated a sex offender/predator as a result of this plea.
7. The Defendant, James McDevitt, has had all conditions of sex offender probation read to him and understands his obligations thereunder if probation is part of his sentence.
8. The Defendant, James McDevitt, shall pay court costs as directed by the Court.
9. The Defendant, James McDevitt, and his counsel, Michael H. Lambert, understand that Circuit Judge J. David Walsh has the ultimate responsibility for the sentence the Defendant, James McDevitt, will actually receive.

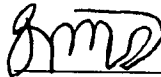
VERIFICATION

I, Michael H. Lambert, as counsel for the Defendant, James McDevitt, have signed this agreement after a full discussion of the content of this petition with him and on the 15th day of April, 2015.



MICHAEL H. LAMBERT, ESQUIRE
Florida Bar Number 0188156
Attorney for Defendant

I, James McDevitt, have signed this Petition and Agreement in the presence of my attorney this 15th day of April, 2015, and I fully understand the consequences thereof.



JAMES MCDEVITT
Defendant

ORDER ACCEPTING PLEA

Based upon the police reports, other information provided in Open Court, and factual information contained in the Court file, the Court finds that the Defendant, James McDevitt's, plea, as outlined herein, was freely, knowingly, and voluntarily entered by him, and further that there exists a sufficient factual basis to support the plea. It is, therefore,

ORDERED AND ADJUDGED that the Defendant, James McDevitt's, plea is accepted, a presentence investigation will be completed and the defendant will be sentenced at a later date.

DONE AND ORDERED in Flagler County, Florida this ____ day of April, A.D., 2015.

HONORABLE J. DAVID WALSH
CIRCUIT JUDGE

cc: Christina Opsahl, Esquire - SAO
Michael H. Lambert, Esquire

EXHIBIT “B”

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

CASE NO.: 2013-CF-510

STATE OF FLORIDA

versus

PLEA

JAMES MCDEVITT,

Defendant.

_____ /

TRANSCRIPT OF PROCEEDINGS

(STENOGRAPHICALLY TRANSCRIBED VIA DIGITAL RECORDING)

DATE: April 16, 2015
TIME: 2:58 p.m. - 3:17 p.m.
PLACE: Kim C. Hammond Justice Center
1769 East Moody Blvd., Bldg. 1
Bunnell, FL 32110
TRANSCRIBED BY: Rhonda Bounds, RPR

The above-styled cause came on to be heard before the
Honorable J. David Walsh , Circuit Judge, at the above time
and place.

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A P P E A R A N C E S

CHRISTINA OPSAHL, ESQUIRE
Assistant State Attorney
1769 East Moody Blvd., Bldg. 1
Bunnell, Florida 32110

Appearing for State of Florida

MICHAEL LAMBERT, ESQUIRE
Michael H. Lambert, P.A.
428 Halifax Avenue
Daytona Beach, Florida 32118

Appearing for Defendant

P R O C E E D I N G S

1
2 THE CLERK: James McDevitt. Mr. Lambert. Page
3 2.

4 MS. OPSAHL: On Mr. McDevitt, Your Honor, I
5 believe there's going to be a plea today. I have --
6 before we do that -- what I filed -- a consolidation
7 of Count II of the Amended Information into Count I of
8 the Second Amended Information. So, basically, Count
9 II is just consolidated into Count I. I have that to
10 file with the clerk. I provided it to Mr. Lambert
11 previously.

12 And then I also have the Second Amended
13 Information to file. It's one count of sexual battery
14 with force, and it is a life felony.

15 As far as potential penalties on that, Your
16 Honor, it's -- the scoresheet -- with one count of
17 sexual battery with force, and one penetration points,
18 he has one prior misdemeanor theft, it will put him at
19 126.15 months, at the bottom of the scoresheet.
20 Divide that by 12, it's roughly 10.5 years.

21 So his exposure, as charged, would be the bottom
22 end of the guidelines, about ten-and-a-half years up
23 to life in prison. There's no minimum mandatory or
24 anything like that.

25 THE COURT: All right. And the State had

1 originally filed an Amended Information with two
2 counts, has now filed a Second Amended Information in
3 Case 2013-CF-510.

4 Mr. Lambert, have you had an opportunity to see
5 the Second Amended Information?

6 MR. LAMBERT: I have, Judge. I had it last
7 night. Went to the jail and met with Mr. McDevitt.
8 Went over that with him. Explained to him that it
9 hadn't been filed yet, but I anticipated it would be
10 filed today, and that that's what we would be entering
11 a plea to.

12 I did go over with him, Judge, the minimum and
13 maximums, also defenses as they may or may not relate
14 to that -- the new charge.

15 In the paperwork I provided to the Court, with
16 the Petition To Enter A Plea, it indicates that
17 Mr. McDevitt has 13 years of education.
18 Chronologically, he does.

19 He's ADHD. And, additionally, he doesn't read
20 well, and he doesn't comprehend well.

21 My meetings with him normally last anywhere from
22 two-and-a-half to three hours. The jail has been
23 very, very accommodating with me, even on weekends.

24 And as a result, on page 6 of the Petition To
25 Plea, I did put in there that I have devoted the time

1 that I believe is necessary to answer all of his
2 questions, and that he understands everything. This
3 was signed by both of us last night.

4 Additionally, Judge, at the time of the offense
5 Mr. McDevitt had -- was three months -- 21 years of
6 age. So I've also been in contact throughout with his
7 mother, who is here today, and explaining to her
8 throughout what is going on, what the charges are and
9 things of that nature.

10 I do believe that he understands and appreciates
11 what is going on today. I did read every word of the
12 Petition for him to enter a plea -- to him last night.
13 And at the end of each sentence, I asked him if he
14 understood it, if he had any questions. And all
15 questions were -- that were asked were answered. So I
16 do believe he understands and appreciates. I do
17 think, though, that the Court too needs to go over
18 that with him as well just so you are satisfied.

19 THE COURT: Okay. Thank you, Mr. Lambert.

20 Mr. Lambert, did you also go over the civil
21 commitment consequence with him?

22 MR. LAMBERT: I did, Judge. I went over the
23 Jimmy -- what's formally known as Jimmy Ryce. I think
24 they changed it this year because the -- his family
25 didn't like having their named attached to it anymore.

1 But I did go over everything with Mr. McDevitt
2 with regard to that. As a matter of fact, I included
3 in the written plea a copy of all sex offender
4 conditions of probation. I went over each of those
5 word-for-word with Mr. McDevitt as well. Both he and
6 I initialed every page of that.

7 I did also explain to him that if -- depending on
8 the sentence that the Court gave to Mr. McDevitt, if
9 it included some probation, that if he violated that
10 probation in a material and substantial way that the
11 Court could turn around and sentence him to life in
12 prison. And I believe he understands that.

13 He also understands that he would be designated a
14 sex offender immediately as a result of entering this
15 plea.

16 THE COURT: All right. Thank you.

17 And I note that the agreement contemplates a PSI
18 and a sentencing day.

19 MR. LAMBERT: It does, Judge. He has no prior
20 felony. He had a misdemeanor petit theft. But no
21 prior felony offense. And he is entitled to a PSI.
22 And I think it would be in everybody's best interest
23 that that occur as well.

24 THE COURT: All right. Thank you.

25 Give me just a moment, please, to review this.

1 MS. OPSAHL: And the only thing I want to clarify
2 on the record is that the Petition To Enter A Plea
3 originally said no contest. It would be a guilty
4 plea. Mr. Lambert has gone through and corrected
5 that, I believe, in all of the places in the petition
6 that we've seen. But just in case we miss something
7 or gone over it, the intention is that it would be a
8 guilty plea that's entered.

9 THE COURT: Is that right, Mr. Lambert?

10 MR. LAMBERT: That's true, Judge. And where it
11 was corrected, I had Mr. McDevitt and myself initial.

12 THE COURT: Okay. Thank you, Mr. Lambert.

13 All right. Mr. McDevitt, please raise your right
14 hand and be sworn.

15 THE CLERK: Do you solemnly swear or affirm that
16 the testimony you're about to give is the truth, the
17 whole truth and nothing but the truth, so help you
18 God?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Please tell me your name and how old
21 you are.

22 THE DEFENDANT: James McDevitt. I'm 22.

23 THE COURT: And how far have you gone in school,
24 Mr. McDevitt?

25 THE DEFENDANT: All the way through college.

1 THE COURT: How far in college?

2 THE DEFENDANT: About a year.

3 THE COURT: And where was that?

4 THE DEFENDANT: Daytona State.

5 THE COURT: What did you take at Daytona State?

6 THE DEFENDANT: My core classes.

7 THE COURT: And did you pass all your classes?

8 THE DEFENDANT: I was in the middle of actually
9 still doing some classes while this was going on. I
10 was re-signing up for Daytona State for the next year.

11 THE COURT: I see.

12 MR. LAMBERT: And, Judge, when he would -- and I
13 apologize for interrupting.

14 THE COURT: Sure.

15 MR. LAMBERT: When he would be -- but not only in
16 the college courses, but in high school and grade
17 school too, he had a tutor with him the whole time.
18 And when he would be required to take tests, the tutor
19 would take the test with him to explain the questions
20 to him and also explain the answers to him.

21 THE COURT: I see.

22 Was that true in high school also?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Mr. McDevitt, how long have you lived
25 in this area?

1 THE DEFENDANT: My whole life, pretty much.

2 THE COURT: Okay. Mr. McDevitt, have you ever
3 treated with a doctor for a mental illness or mental
4 disorder before?

5 THE DEFENDANT: No, sir.

6 THE COURT: Have you been told that you have any
7 type of learning disability or learning problem?

8 THE DEFENDANT: Other than my comprehension and
9 reading, that's about it.

10 THE COURT: Okay. And so what is your problem in
11 reading?

12 THE DEFENDANT: I struggle with it because of the
13 comprehension.

14 THE COURT: Okay. And Mr. Lambert has gone over
15 some of that with me a moment ago.

16 Did you agree with everything he said,
17 summarizing your history there?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Now, this brings up, then, the
20 document that was prepared by Mr. Lambert. It's a
21 number of pages, and it sets forth all of the rights
22 that you're entitled to and all of the sentencing
23 issues that apply here.

24 Did you go over this with Mr. Lambert?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And, Mr. Lambert I know is quite
2 experienced and thorough on this. I'm sure he's gone
3 over everything in here with you and answered all your
4 questions.

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Now, Mr. McDevitt, the
7 offense with which you're charged in the Second
8 Amended Information was consolidated into two counts
9 in the original Information. Sexual battery with
10 force is charged as a life felony, meaning that your
11 sentence could be anywhere from the guideline sentence
12 that was noted on the guidelines up to life in prison.

13 Do you understand the potential sentence there?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Now, the Court has now
16 been presented with what's called an open plea, which
17 means that you are agreeing to enter this plea and
18 leave it up to me, as the Judge, to decide your
19 sentence at a future date.

20 Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: In other words, there's no agreement
23 with the State on what your sentence will be at this
24 time.

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Now, the -- as noted, the
2 plea agreement that you entered contemplates a plea of
3 guilty as charged.

4 Are you guilty of the offense as set forth?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And you're entering that plea of
7 guilt voluntarily today?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand by entering such a
10 plea you're telling the Court that you do understand
11 these charges, that you believe they could probably be
12 proven against you?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And that you're willing to give up
15 the right to a trial by jury on the charges?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You, of course, are still represented
18 by good counsel. And I would hear from you at a
19 future date from both your counsel and yourself and
20 any witnesses you would like me to hear from regarding
21 a sentence. I would also hear from the State on their
22 position on a sentence. And then decide the sentence.

23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: I have to ask you now, has anybody

1 either forced you to plea or promised you something to
2 make you plea? Or are you pleading in this -- in this
3 instance guilty in order -- voluntarily, I should say,
4 voluntarily today?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Has the State or Defense
7 knowledge of any physical evidence that might result
8 in DNA evidence that might exonerate the defendant of
9 the charges?

10 MR. LAMBERT: Judge, there was some, I think,
11 potential DNA evidence, but nothing would exonerate
12 him.

13 MS. OPSAHL: There was DNA evidence, Your Honor,
14 the defendant's DNA and the victim's DNA. So, no --
15 no exonerating DNA, though.

16 THE COURT: Thank you.

17 Mr. McDevitt, as I know Mr. Lambert told me he
18 went over with you, there is a law in Florida that
19 provides that if a person is convicted of a sexually
20 violent offense, they may, at the end of their
21 sentence, their prison sentence, be subject to a civil
22 petition to transfer them to a treatment facility for
23 sex offenders. As we're all here right now, none of
24 us know if that might happen or not, but it's a
25 possibility. If it were to happen in your case, you

1 would still be entitled to an attorney to represent
2 you in that matter. It's not a prison sentence, but
3 it would require you to be kept in a secure facility
4 until further order of the court.

5 Do you understand that possibility?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And that was explained to you by
8 Mr. Lambert?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Okay. I don't know that it applies
11 to you, Mr. McDevitt. But if you are not a United
12 States citizen, you would be deported from the United
13 States. But I think you told me you've lived here all
14 your life.

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay. All right. And you've
17 understood everything you and I have been talking
18 about?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And with the assistance of your
21 attorney, you've understood everything in this plea
22 agreement?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: All right. And, State, how much time
25 are you suggesting for a plea -- a sentencing hearing

1 at this time?

2 MS. OPSAHL: I know that Mr. Lambert has provided
3 already and previously counsel has provided a lot of
4 letters in mitigation. I'm not sure how much of that
5 would be presented or live witnesses.

6 From the State's perspective, I would say, I
7 don't think we would need more than a half an hour for
8 testimony, and then arguments. So, really, I think
9 it's going to be more the Defense here.

10 THE COURT: How about you, Mr. Lambert?

11 MR. LAMBERT: Judge, I would -- for the
12 presentation of witnesses, I would say about 45
13 minutes to an hour. And then argument, probably about
14 15 minutes.

15 THE COURT: Okay.

16 MS. OPSAHL: So maybe either a morning or an
17 afternoon might -- might suffice.

18 MR. LAMBERT: I agree.

19 THE COURT: Well, with the PSI, Madam Clerk,
20 we're looking at somewhere later in May.

21 THE CLERK: I'm thinking May 26th in the
22 afternoon. You have Snelgrove in the morning.

23 THE COURT: Okay. It's down for most of the day.

24 THE CLERK: Oh, it's most of the day?

25 THE COURT: Yeah.

1 THE CLERK: Oh.

2 THE COURT: I'm afraid it is.

3 THE CLERK: Okay.

4 THE COURT: Let's see here.

5 THE CLERK: Unless you want to go end of June.

6 MS. OPSAHL: Your Honor, on the 29th, I see we
7 have that Maleechi (phonetic) competency status
8 hearing. But I just saw the letter from your office
9 go out. So I don't know if that would be completed by
10 then or not. Do you --

11 THE COURT: It may. It's Dr. Fleischmann.

12 MS. OPSAHL: Okay.

13 THE COURT: And I will be -- he's agreed to see
14 Mr. Maleechi. So we probably would -- would have a
15 hearing that morning.

16 MS. OPSAHL: Okay.

17 THE COURT: But I could put it down for Friday
18 morning. I'm thinking, Madam Clerk, about 10:00.

19 MS. OPSAHL: That should be fine.

20 THE COURT: And the afternoon is pretty well
21 full.

22 But that will be Friday, Mr. Lambert, the 29th of
23 May.

24 We need at least 30 days to get the presentence
25 investigation prepared.

1 MR. LAMBERT: That's fine, Judge.

2 THE COURT: Okay. So, State, if that's
3 acceptable, we'll put it down for May 29, 10:00 for
4 sentencing hearing. And I'll just put it down for an
5 hour and a half, if that sounds about right.

6 MS. OPSAHL: That's fine, Your Honor.

7 THE COURT: All right. Now, Mr. McDevitt, I've
8 gone over with you now the charge that you face. You
9 have gone over the rights and the agreement; and,
10 also, I've gone over those with you. You met with
11 your attorney to answer all of your questions.

12 Do you now still wish to proceed with your plea
13 of guilty?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Thank you.

16 Mr. Lambert, would you be in a position to
17 stipulate to a factual basis for the plea?

18 MR. LAMBERT: I am, Judge.

19 THE COURT: Thank you.

20 Then with that, I'll find the plea of
21 Mr. McDevitt of guilty as charged in the Second
22 Amended Information to be knowing and voluntary,
23 intelligently entered into.

24 The Court specifically is aware of -- for the,
25 record -- that I'm looking at Mr. McDevitt. He is

1 awake, alert. The Court is satisfied he's fully
2 competent and prepared to enter his plea today. So I
3 find that it is intelligently entered into and
4 factually based by stipulation.

5 MR. LAMBERT: And I -- I agree with that as well,
6 Judge.

7 THE COURT: Thank you, Mr. Lambert.

8 MR. LAMBERT: And he understands and comprehends
9 what's going on.

10 THE COURT: And I will therefore accept the plea.
11 I will order a presentence investigation, and set this
12 as a sentencing hearing on May the 29th, Friday,
13 10:00 in the morning.

14 And at which time, again, Mr. McDevitt, I'll hear
15 from you, if you wish to be heard, any witnesses you
16 would like me to hear from, your counsel. I'll hear
17 from the State, any witnesses the State would like me
18 to hear from. And then I will impose the sentence
19 that day. Okay?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you have any questions,
22 Mr. McDevitt?

23 THE DEFENDANT: No, sir.

24 THE COURT: You've understood everything we've
25 been talking about?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay. Mr. Lambert, anything else
3 that we need to cover?

4 MR. LAMBERT: No, sir. Thank you.

5 THE COURT: Okay. Thank you.

6 Ms. Spence, anything else that you need?

7 MS. SPENCE: I just want to talk to Mr. Lambert
8 for a moment.

9 THE COURT: Sure. That will be fine.

10 All right. Then with that, we'll see you back at
11 that time. Thank you.

12 (The proceedings concluded at 3:17 p.m.)

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1 STATE OF FLORIDA)

2 COUNTY OF FLAGLER)

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4 I, Rhonda Bounds, Registered Professional Reporter,
5 Seventh Judicial Circuit of Florida, do HEREBY CERTIFY that
6 I was authorized to and did transcribe the foregoing
7 **digitally recorded proceedings** in the case of State of
8 Florida vs. James McDevitt, Defendant, at the time and
9 place herein set forth, before The Honorable J. David
10 Walsh, Circuit Judge, and that the foregoing transcript is
11 true and accurate to the best of my ability and belief.

12 SIGNED this 24th day of May, 2018.

13

14

15

s/RHONDA BOUNDS
Rhonda Bounds, RPR
Seventh Judicial Circuit of
Florida

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EXHIBIT “C”

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 2013-CF-000510
DIVISION 50: Judge Dennis Craig

v.

JAMES MATHEW MCDEVITT,
Defendant.

**ORDER DISMISSING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
AND GRANTING LEAVE TO AMEND**

THIS MATTER came before the Court for consideration of the Defendant's Motion for Postconviction Relief Pursuant to Rule 3.850, filed by counsel on May 26, 2017. The Court, having reviewed the motion, hereby finds that:

Defendant's motion fails to comply with the procedural requirements in Florida Rule of Criminal Procedure 3.850, and Defendant shall have leave to amend. Fla. R. Crim. P. 3.850(f)(2). The Court will not consider the motion without the proper certification that: "the defendant has read motion or that it has been read to the defendant and that the defendant understands its content; the motion is filed in good faith and with a reasonable belief that it is timely filed, has potential merit, and does not duplicate the previous motions that have been disposed of by the court; and the facts contained in the motion are true and correct." Fla. R. Crim. P. 3.850(n)(1). Defendant must further certify that "the defendant can understand English or, if the defendant cannot understand English, that the defendant has had the motion translated completely into a language that the defendant understands." Fla. R. Crim. P. 3.850(n)(2). The certification does not have to be notarized.

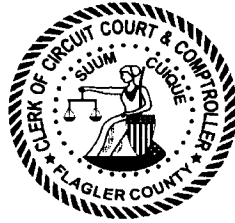
The Court further advises Defendant that his motion is legally insufficient. Fla. R. Crim. P. 3.850(f)(3). Defendant has failed to allege prejudice in Ground I. *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013). Grounds II, III, IV, and V fail to allege sufficient facts to support the allegations contained therein.

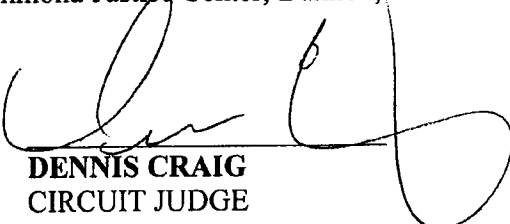
Defendant shall have **sixty (60) days** leave to amend his motion. If the amended motion is still insufficient or if the defendant fails to file an amended motion within the time allowed for such amendment, the Court may enter a final order summarily denying the motion with prejudice.

It is **ORDERED and ADJUDGED** that Defendant's Motion for Postconviction Relief Pursuant to Rule 3.850 is **DISMISSED WITHOUT PREJUDICE**.

This is a nonfinal, nonappealable order. Defendant has no right to appeal the order until entry of the final order.

DONE and ORDERED in Chambers, Kim C. Hammond Justice Center, Bunnell, Florida this 22^d day of June, 2017.




DENNIS CRAIG
CIRCUIT JUDGE

Copies To:
Office of the State Attorney

Daniel P. Hyndman, Esq., 500 Australian Ave. South, Suite 600, West Palm Beach, Florida 33401. E-mail: dan@danielhyndman.com

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e-Signed 6/22/2017 3:19 PM 2013 CF
000518

EXHIBIT “D”

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO: 2013-CF-000510

v.

JAMES MATHEW MCDEVITT,

Defendant.
_____ /

INTERIM ORDER ON AMENDED MOTION FOR POST-CONVICTION RELIEF

THIS MATTER came before the Court upon Defendant's Amended Motion for Post-Conviction Relief, filed by counsel pursuant to Fla. R. Crim. P. 3.850. The Court having reviewed the motion, and being otherwise fully apprised of the premises, finds as follows:

Procedural History

On May 29, 2015, Defendant entered a plea of guilty to Sexual Battery by Force, and he was sentenced to forty years' imprisonment followed by 20 years' probation/community control. No appeal was taken. On May 26, 2017, Defendant timely filed his first motion for postconviction relief. An Order dismissing the motion and granting leave to amend was entered on June 22, 2017. A Motion for Extension of Time was filed by Defendant on August 16, 2017, and an Order granting the extension was entered on August 21, 2017. Defendant filed the instant Amended Motion for Postconviction Relief on August 21, 2017, all premised on allegations of ineffective assistance of counsel.

Conclusions of Law

To establish a claim of ineffective assistance of counsel, a defendant must show: (i) that his counsel's performance fell below that of reasonably competent counsel; and (ii) that there is a reasonable likelihood that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). To satisfy the deficient-performance

prong of the *Strickland* test, a defendant “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Id.* at 690, 104 S.Ct. 2052. The prejudice prong of the *Strickland* test requires a defendant to show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S.Ct. 2052. In the context of a guilty plea, the prejudice prong requires the defendant to 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.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *see also Grosvenor v. State*, 874 So.2d 1176, 1179 (Fla. 2004). “[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient.” *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000).

Grounds I and II

In Ground I, Defendant maintains that trial counsel was ineffective for failing to adequately explain the State’s initial plea offer and failing to inform the Defendant of the maximum penalty he faced. In Ground II, Defendant alleges that trial counsel was ineffective because (1) he failed to properly and adequately advise Defendant of the maximum consequences of an open plea to the Court, and (2) that subsequent to Defendant’s sentencing and on Defendant’s request, he failed to file a motion to withdraw Defendant’s plea and for a modification of sentence. Grounds I and II are **stayed**.

Grounds III and IV

In Ground III, Defendant claims that trial counsel rendered ineffective assistance by failing to advise Defendant of a potential conflict of interest between trial counsel and the sentencing Court. In Ground IV, Defendant claims that trial counsel rendered ineffective assistance by failing to adequately review discovery and depositions with Defendant, including potential defenses. The Court finds that these claims are legally insufficient. Fla. R. Crim. P. 3.850(f)(3). To satisfy the deficient-performance prong of the *Strickland* test, a defendant “must identify the acts or omissions of counsel that are alleged

not to have been the result of reasonable professional judgment.” *Strickland*, at 690, 104 S.Ct. 2052. Here, Defendant has insufficiently alleged the “deficient performance” prong under *Strickland* as Defendant has not adequately explained his argument and does not include enough facts in support of his claim. As such, Grounds III and IV are **stricken with leave to amend**.

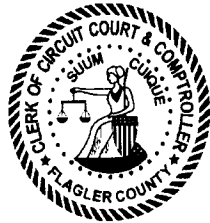
Accordingly, it is:

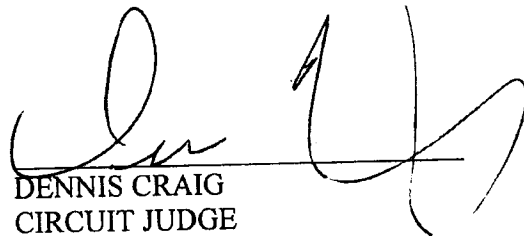
ORDERED AND ADJUDGED that:

- 1) Grounds I and II are **STAYED**;
- 2) Grounds III and IV are **STRICKEN with leave to amend** within **sixty (60)** days, after which no further amendments will be permitted.

This order is a nonfinal, nonappealable order; Defendant has no right to appeal the order until entry of the final order.

DONE AND ORDERED in Chambers, in Flagler County, Bunnell, Florida, this 20th day of April, 2018.




DENNIS CRAIG
CIRCUIT JUDGE

4/20/2018 11:14 AM 2013 CF 000510
e-Signed 4/20/2018 11:14 AM 2013 CF 000510

cc: The Office of the State Attorney, Post-Conviction Division

Daniel P. Hyndman, Esq., 500 Australian Avenue South, Suite 600, West Palm Beach, FL 33401

James Mathew McDevitt, #V47864, Hamilton Correctional institution (Annex), 10650 SW 46th Street, Jasper, Florida 32052-1360