IN THE

SUPREME COURT OF THE UNITED STATES

INDEX TO APPENDICES

(Signature)

APP. A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14212-F

DERRICK KNIGHT,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

Before: TJOFLAT and MARCUS, Circuit Judges.

BY THE COURT:

Derrick Knight filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 7, 2018, order denying a certificate of appealability, in order to appeal the denial of his 28 U.S.C. § 2254 petition and motion to proceed *in forma pauperis*. Upon review, Knight's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APP. B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 16-21302-CIV-KING/TORRES

DERRICK KNIGHT,

Petitioner,

v.

JULIE JONES, Secretary, Florida Department of corrections,

Respondent.
_____/

FINAL ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon the July 19, 2017, Report & Recommendation (R&R) (DE 16) of Magistrate Judge Edwin G. Torres, recommending denial of Petitioner's Petition for Writ of Habeas Corpus (DE 1). The Court has additionally reviewed Petitioner's Objections (DE 18), and Respondent's Response thereto (DE 19).

After a thorough review of the R&R and consideration of the record, the Court concludes that the R&R is well-reasoned and accurately states the law of the case. Accordingly, it is **ORDERED, ADJUDGED**, and **DECREED** as follows:

1. Magistrate Judge Edwin G. Torres' July 19, 2017, Report & Recommendation **(DE 16)** be, and the same is, hereby **AFFIRMED** and **ADOPTED** as an Order of this Court.

2. Petitioner's Petition for Writ of Habeas Corpus (**DE 1**) be, and the same is hereby, **DENIED.**

3. All pending motions are **DENIED** as **MOOT.**

4. The Clerk of the Court shall **CLOSE** this case.

DONE and **ORDERED** in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 3rd day of August, 2017.

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc:
Magistrate Judge Edwin G. Torres

All counsel of record

APP. C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 08, 2018

Derrick Knight
Apalachee CI, West Unit - Inmate Legal Mail
52 WEST UNIT DR
F2 155-S
SNEADS, FL 32460-4162

Appeal Number: 17-14212-F
Case Style: Derrick Knight v. Secretary, Florida Department, et al
District Court Docket No: 1:16-cv-21302-JLK

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Dionne S. Young, F
Phone #: (404) 335-6224

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14212-F

DERRICK KNIGHT,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

ORDER:

Derrick Knight's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). His motion for leave to proceed *in forma pauperis* is DENIED as MOOT.

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

APP. D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21302-Civ-KING/TORRES

DERRICK KNIGHT,

Petitioner,

v.

JULIE L. JONES, Secretary of the Florida Department of Corrections,

Respondent.
_____/

REPORT AND RECOMMENDATION ON PETITION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO 28 U.S.C. § 2254

This matter is before the Court on a petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 on April 21, 2016 by Derrick Knight ("Petitioner"). Knight, sentenced to a prison term of forty (40) years after being found guilty for manslaughter, aggravated battery with discharge of a firearm causing great bodily harm, shooting a deadly missile, and possession of cocaine, alleges that he was deprived of his Sixth Amendment right to effective appellate counsel and that prosecutors failed to disclose favorable evidence prior to trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Having reviewed the Petition [D.E. 1], the Response to the Order to Show Cause [D.E. 12], the record, and the relevant authorities, we hereby **RECOMMEND** that the Petition be **DENIED.**

I. FACTUAL BACKGROUND

On October 3, 2007, a jury sitting in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida returned a verdict finding Petitioner guilty of manslaughter, aggravated battery, shooting a deadly missile into a vehicle, possession of cocaine, and possession of drug paraphernalia. [D.E. 13-10, pp. 124 – 125]. The trial judge sentenced Petitioner to 15 years in prison as to the manslaughter charge and 25 years in prison as to the aggravated battery charge, to be served consecutively. [D.E. 12-8, p. 121]. He also received a sentence of 15 years each for shooting a deadly missile and possession of cocaine, to be served concurrently with the other sentences. *Id.*, pp. 121-122.

The facts presented at trial showed that on October 7, 2003, Christopher Marson, Luis Romero and Jonathan Ramesar drove to Petitioner's home around midnight. The reason for their visit was unclear: certain witnesses indicated that they drove to the home to buy drugs, while other testimony indicated they intended to rob Petitioner. Nevertheless, at some point after exiting the vehicle, Romero and Petitioner exchanged gunfire. Romero fired from a .357 Glock pistol; Petitioner allegedly fired at least nine rounds from an AK-47, which was recovered by police after the incident. When police arrived on scene, Romero and Marson were wounded; Marson later died.

Lijia Loria, one of the witnesses present at the time of the incident, gave a statement after the shooting indicating that Romero fired the first shot. She also stated that she entered Petitioner's home and told him about Romero after the

latter opened fire. According to the statement, Loria witnessed Petitioner retrieve an AK-47 from behind a dresser in his bedroom and began walking towards the door leading outside to where Romero allegedly fired the gun. The statement also included a report from Loria that Petitioner pointed the AK-47 in Romero's direction. At trial, Loria testified that she could not recall the details in her statement or the incident in question. The jury nevertheless heard the 2003 statement after prosecutors, seeking to refresh Loria's memory, read that statement aloud during cross-examination.

Following his conviction, Petitioner embarked on a long crusade to have the conviction overturned and his sentence vacated, both through his initial direct appeal as well as multiple post-judgment challenges to his conviction and his sentence. Although a recitation of the individual arguments advanced and the dates of filing on each petition is unnecessary, Florida's Third District Court of Appeals denied Petitioner's direct appeal of the conviction and sentence on August 12, 2009. The appeal addressed largely evidentiary challenges Petitioner raised to evidence that allegedly tainted the jury's perception of the Petitioner.

The appellate court then denied a rehearing of the petition on September 1, 2009, and mandate issued on September 18, 2009. During and after this time period, Petitioner continued to move on a *pro se* basis to vacate, modify or reduce his sentence pursuant to Rules 3.800 and 3.850 of the Florida Rules of Criminal Procedure. Each request was denied, including his claim that the sentence imposed was vindictive. The state courts rejected that claim because the trial court was

justified in imposing the 40 year sentence, which consisted of the minimum mandatory twenty-five year sentence for aggravated battery that ran consecutively to a fifteen-year sentence for manslaughter. Under Florida law, such a consecutive sentence was appropriate.[1]

Petitioner then initiated these proceedings on April 12, 2016, seeking federal habeas relief pursuant to 28 U.S.C. § 2254. [D.E. 1]. Petitioner raises the following four issues to support his argument that his petition should be granted:

> ISSUE 1: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN APPELLATE COUNSEL FAILED TO RAISE AN ISSUE OF TRIAL COURT ERROR FOR FAILURE TO GRANT A MOTION FOR JUDGEMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL.
>
> ISSUE 2: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE AN ISSUE OF JUROR TAMPERING ON APPEAL.
>
> ISSUE 3: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE AN ISSUE OF VINDICTIVE SENTENCING ON APPEAL.
>
> ISSUE 4: PETITIONER'S CONVICTIONS WERE OBTAINED BY A *BRADY* VIOLATION WHEN THE STATE WITHHELD IMPEACHMENT EVIDENCE FROM THE DEFENSE.

[D.E. 1]. The State responded to the petition on November 11, 2016, and the matter is now ripe for adjudication. For the reasons discussed herein, we recommend that the petition be denied.

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1 *See, e.g., Knight v. State,* 159 So. 2d 943, 944 (Fla. 3d DCA 2015).

II. LEGAL STANDARD

A. The Antiterrorism and Effective Death Penalty Act

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the authority of the federal courts to consider applications for writs of habeas corpus submitted by state prisoners. 28 U.S.C. § 2254. The AEDPA provides very limited circumstances for federal habeas claims, with Section 2254(d) governing a federal court's review of claims that have already arisen in state court. *See Perry v. Johnson*, 532 U.S. 782, 792 (2001); *Henderson v. Campbell*, 353 F.3d 880, 890 (11th Cir. 2003) (finding that the AEDPA places constraints on a federal court's power to grant an application for writ of habeas corpus and establishes a deferential standard in reviewing state court judgments). Section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The AEDPA also makes clear that substantial deference should be given to a state court's findings of fact, providing that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Petitioner must rebut this presumption of correctness with clear and convincing evidence. *Id.*

The "contrary to" and "unreasonable application" clauses set forth in the AEDPA are different bases for reviewing a state court's decision. *Putnam v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (citing *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000)). The "contrary to" clause applies if the state court (1) ruled in contradiction to governing law set forth by the Supreme Court, or (2) arrived at a result different than that reached by the Supreme Court case with materially indistinguishable facts. *Putnam*, 268 F.3d at 1241. The "unreasonable application" clause applies when "the state court correctly identifies the governing legal principle...but unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694 (2002). An "unreasonable" application of federal law is different from an "incorrect" application of federal law, *Williams v. Taylor*, 529 U.S. 362, 410 (2000), and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). As such, a state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair minded jurists could disagree on the correctness of the state court's decision." *Id.* at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

B. The Strickland Test: Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. amend VI. In *Strickland v. Washington*, the United States Supreme Court set forth the two-prong test that a convicted

defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. *Strickland v. Washington*, 466 U.S. 668 (1984). To obtain relief under such a claim, Petitioner bears the burden of demonstrating that (1) his counsel's representation fell below an objective standard of reasonableness; and (2) a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Id.* at 689. The test for ineffectiveness is not "whether counsel could have done more," and perfection is not required. *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995). Instead, the test is whether some reasonable attorney could have acted, under the same circumstances, within the "wide range of reasonable professional assistance." *Id.* (quoting *Strickland*, 466 U.S. at 689).

The Eleventh Circuit determines the reasonableness of a counsel's performance using a deferential standard of review, looking at the totality of circumstances from the perspective of counsel at the time of the alleged errors. *Baldwin v. Johnson*, 152 F.3d 1304, 1311 (11th Cir. 1998). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Because of the inherent difficulties in evaluating counsel's decisions and choices after-the-fact, courts must give a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Given the strong presumption in favor of competence, the Petitioner's

burden of persuasion is "a heavy one," although not insurmountable. *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc); *Terrell*, 744 F.3d at 1261 ("[Petitioner's] burden to establish a claim of ineffective assistance of counsel is onerous."). Further, failure to establish deficient performance *or* prejudice is fatal to a *Strickland* claim; we need not address, therefore, both *Strickland* prongs if Petitioner fails to establish either one. *Pope v. Secretary for Dept. of Corrections*, 680 F.3d 1271, 1284 (11th Cir. 2012).

In evaluating counsel's performance, we must not apply "fixed or rigid rules." *Harvey v. Warden, Union Correctional Institution*, 629 F.3d 1228, 1239 (11th Cir. 2011). Rather, ineffective assistance occurs when the presumption falls below an objective standard of reasonableness, *Strickland*, 466 U.S. at 688. Put another way, "trial counsel's error must be so egregious that no reasonably competent attorney would have acted similarly." *Harvey*, 629 F.3d at 1239; *Wood v. Allen*, 542 F.3d 1281, 1309 (11th Cir. 2008).

III. ANALYSIS

Petitioner contends that he received ineffective assistance from his appellate counsel in the proceedings that followed his conviction. Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland. Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009); *Shere v. Sec'y, Fla. Dept. of Corr.*, 537 F.3d 1304, 1310 (11th Cir. 2008) ("A defendant can establish ineffective assistance of appellate counsel by showing: (1) appellate counsel's performance was deficient, and (2) but for counsel's deficient

performance he would have prevailed on appeal."). The law also requires that appellate counsel "must be available to assist in preparing and submitting a brief to the appellate court," and must also "play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). Appellate counsel, however, "need not advance *every* argument, regardless of merit, urged by the appellant." *Id.*; *see also Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991) (stating that a neglected claim satisfies test for ineffective assistance only if claim would have had "a reasonable probability of success on appeal").

Petitioner attacks counsel's performance on three separate grounds, stating that assistance was ineffective for (1) failing to raise the issue that the trial court erred by not granting defense counsel's motion for judgment of acquittal and motion for a new trial; (2) choosing not to raise an issue concerning potential jury tampering; and (3) failing to argue that the trial court engaged in vindictive sentencing. As an additional ground for habeas relief, Petitioner contends that prosecutors failed to disclose impeachment evidence prior to trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). We address each argument in turn.[2]

1. Judgment of Acquittal and New Trial

Petitioner's first argument stems from what he claims is a lack of evidence at the trial court level concerning his possession and firing of the AK-47 on the night

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2 The Government contends that the petition is untimely. [D.E. 12, p. 15 – 19]. Because we deny Petitioner's requested habeas relief on the merits, an analysis concerning this issue is unnecessary.

the alleged criminal acts took place. [D.E. 1, p. 7]. Petitioner contends that "no substantive evidence was produced by the State to show that Mr. Knight possessed or fired a gun on the night of the incident," and that the only evidence submitted concerning the weapon "was the impeachment evidence of an out of court statement by Lijia Loria." *Id.* After the trial court denied trial counsel's motions for judgment of acquittal and for a new trial, Petitioner takes issue with his appellate counsel's failure to recognize "the viable and significant issues related to the denial" of those motions, and he believes that his counsel should have raised those issues to the appellate court. *Id.* According to Petitioner, "there is a high probability that the appellate court would have remanded the case...had the issue been raised[.]" *Id.*

We disagree. Petitioner fails to meet his burden in demonstrating deficient performance by his appellate counsel as required by *Strickland.* When a party moves for a judgment of acquittal at trial, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." *Beasley v. State*, 774 So. 2d 649, 657 (Fla. 2000) (quoting *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974)). As Florida's Third District Court of Appeal stated succinctly in its denial of Petitioner's conviction and sentence, the "uncontroverted" physical evidence presented at trial included "nine spent casings matching the rounds fired from [Petitioner's] AK-47," which were found by police on Petitioner's lawn. *Knight v. State*, 15 So.3d 936, 937 (Fla. 3d DCA 2009). Additional evidence at trial showed that police found "Marson [] mortally wounded," and the victims' car "riddled with

multiple gunshots." *Id.* The evidence also showed that police located the AK-47 concealed in the insulation of Petitioner's attic after performing a consensual search of the home. [D.E. 13-3, p. 78].

Thus, in moving for acquittal following the presentation of the prosecution's case, Defendant agreed to admit every conclusion a jury could reasonably infer from this evidence. *See Beasley*, 774 So.3d at 657. Appellate counsel, confronted with the evidence presented by the State, could have reasonably concluded that the evidence was more than sufficient for the jury to find Petitioner guilty of the crimes associated with the firing of the weapon and chose not to raise that issue on appeal. His decision not to do so did not constitute ineffective assistance because it almost certainly would have been viewed as meritless. *See Diaz v. Sec. for the Dept. of Corrections*, 402 F.3d 1136, 1142 (11th Cir. 2005) (appellate counsel "is not ineffective for failure to raise a meritless argument."); *Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991) (neglected claim satisfies test for ineffective assistance of appellate counsel only if claim had "a reasonable probability of success on appeal").

Petitioner's reliance on *Oliver v. State* is misguided. In that case, the trial court allowed a prosecutor to impeach a court witness using prior inconsistent statements given by the witness in a statement made prior to trial. *Oliver v. State*, 239 So. 2d 637, 640 (Fla. 1st DCA 1970). When the prosecution attempted to elicit testimony from the witness that the appellant partook in the crime charged, she refused to give such testimony. *Id.* As the First District Court of Appeals explained:

> When it became apparent that the witness insisted she knew nothing about appellant [one of the defendant's] participation in the alleged offense, the state attorney announced he wished to try to refresh the witness' memory by reading to her questions propounded and sworn answers given by her prior to the trial. Objection to this procedure was made by appellant's counsel on the ground that the State was attempting to introduce in the record substantive evidence against appellant under the guise of seeking to impeach the witness' testimony prior to the time the witness had made any statements adverse to the prosecution or in favor of appellant. This objection was overruled and the state attorney was permitted to read to the witness a series of questions asked her at an interview long prior to the trial, and the answers which she purportedly gave at that time. Such answers given in the prior interview incriminated appellant as a participant in the crime and were damaging to his defense.

Id. at 640-41. The appellate court held that defense counsel's objection should have been sustained. *Id.* at 641.

Petitioner's argument, although well taken, does not carry the day. *Oliver*'s holding might support his argument if the impeachment evidence elicited from Ms. Loria had been the *only* evidence presented by the State concerning Petitioner's alleged firing of the AK-47. As discussed above, however, other evidence was more than sufficient for a reasonable jury to determine that Petitioner fired the weapon on the day in question, even if Ms. Loria's statements had been excluded. *See id.* ("[I]n view of the totality of the evidence clearly establishing appellant's guilt of the offense with which he was charged, the inadmissible evidence introduced by the State under the guise of refreshing the witness' memory or for the announced purpose of impeachment would not have changed the result of the trial and must therefore be considered harmless error.").

Accordingly, we find that Petitioner failed to demonstrate any "deficient performance" by his appellate counsel. When viewing the evidence presented by the prosecution, a reasonable appellate attorney would have concluded that there was little (or no) chance for this argument to succeed on direct appeal. We must provide "a deferential review of counsel's conduct" and "indulge a strong presumption that [the attorney's] conduct falls within the ride range of professional assistance." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011). *See Gissendaner v. Seaboldt*, 735 F.3d 1311, 1323 (11th Cir. 2013) (recognizing that all that is required under *Strickland* to withstand constitutional scrutiny is a showing that "some reasonable lawyer" could have pursued appellate counsel's challenged course of conduct). Because Petitioner cannot show that appellate counsel's actions "fell below an objective standard of reasonableness in light of prevailing professional norms," *Reed v. Sec'y, Fla. Dept. of Corrections*, 593 F.3d 1217, 1240 (11th Cir. 2010), he fails to meet his initial burden under *Strickland*. Pursuant to 28 U.S.C. § 2254(d), this claim is denied.

2. Jury Tampering

In Petitioner's next claim, he asserts that his appellate counsel was ineffective for failing to raise an issue of potential juror tampering. [D.E. 1-1, p. 31]. Specifically, Petitioner states that he requested a new trial on August 8, 2007 because his "[t]rial counsel received an email from juror Carmen Flores" that indicated she felt "coerced in the vote that she had taken." *Id.*, p. 32. Flores's communication also indicated that she "felt under some physical danger based upon

what some of the other jurors were doing or saying." *Id.* Petitioner contends that "the trial judge denied [defense counsel's] motion for new trial without ever interviewing Flores to determine the threats that were made against her and whether external coercion was the reason she voted to find [Petitioner] guilty." *Id.*, p. 33. He argues that appellate counsel "should have recognized the trial court's clear abuse of discretion in failing to even inquire in the very troubling accusations of juror tampering," and in failing to do so rendered ineffective assistance. *Id.*, p. 33-34.

Under Florida law, and in order to obtain post-trial interviews with jurors, Petitioner needed to present "*sworn* allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001) (emphasis added). Juror interviews are not, however, permitted relative to any matter that inheres in the verdict itself and relates to a jury's deliberations. *See* Fla. Stat. § 90.607(2)(b) ("Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment."); *Johnson v. State*, 593 So. 2d 206, 210 (Fla. 1992) ("[A] verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations.") (quoting *Mitchell v. State*, 527 So. 2d 179, 181 (Fla. 1988)); *Maler v. Baptist Hosp. of Miami, Inc.*, 559 So. 2d 1157, 1159 (Fla. 3d DCA 1989) ("The jury's reasoning process or motivation in arriving at a verdict, even if erroneous or improper, is a matter which traditionally inheres

within the jury verdict; it can form no basis for upsetting the verdict after the jury has returned and assented to it in open court.") (collecting cases). Thus, the testimony of jurors concerning the "motives and influences by which their deliberations were governed should not be received after the verdict is given." *State v. Ramirez*, 73 So. 2d 218, 219 (Fla. 1954).

Consistent with this guidance, Florida courts "have been vigilant in prohibiting inquiry into jury deliberations of matters necessarily rising out of the trial." *Devoney v. State*, 717 So. 2d 501, 502 (Fla. 1998). This follows express guidance from the United States Supreme Court, which stressed the importance of preserving the sanctity of jury deliberations as far back as 1915. *See McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) ("But let it be once established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding...If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."); *Tanner v. United States*, 483 U.S. 107, 120-21 (1987) ("Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time...after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the

decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror misconduct.").

Nevertheless, courts have permitted jurors to testify about "overt acts which might have prejudicially affected the jury in reaching their own verdict." *State v. Hamilton,* 574 So. 2d 124, 128 (Fla. 1991). Cases in which an attack on a jury's verdict is permitted require "allegations which involve an overt prejudicial act or external influence, such as a juror receiving prejudicial non-record evidence or an actual, express agreement between two or more jurors to disregard their juror oaths and instructions." *Reaves v. State*, 826 So. 2d 932, 943 (Fla. 2002); *see also Russ v. State*, 95 So. 2d 594 (Fla. 1957) (juror related personal knowledge of non-record facts to the jury); *Carcasses v. Julien*, 616 So. 2d 486 (Fla. 3d DCA 1993) (assertion that juror received information from outside the courtroom).

Here, Petitioner fails to provide sufficient evidence to support a conclusion that the alleged juror interference "would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson*, 804 So. 2d at 1225. Petitioner's only support for this contention involves a single, unsworn electronic correspondence sent from a single juror to his own counsel. Even if we assume the contentions raised in the juror's e-mail are true, the document fails to allege anything that would allow for the juror to testify concerning those contentions; defense counsel did not seek to have the juror provide a sworn statement concerning the alleged conduct at issue, nor was any such document ever submitted to the trial judge. As Petitioner's Motion does not

contain any allegations concerning overt prejudicial acts or external influences that would warrant inquiry into the jury's verdict, the juror would not be competent to testify regarding the alleged misconduct she discussed in her e-mail because it is a matter that essentially inheres in the verdict. *See* Fla. Stat. § 90.607(2)(b); *Reaves*, 826 So. 2d at 943 (juror interviews were not permissible based upon defendant's assertion that juror attempted to discuss guilt prematurely, given that defendant's assertion went to matter that inhered in verdict itself); *Woodruff v. State*, 208 So. 2d 1265, 1266-67 (Fla. 3d DCA 2017) (new trial was not warranted when one of the jurors, during a post-trial interview, indicated that he did not believe the State had proven the charge of lewd or lascivious molestation for which defendant was found guilty and juror said he came to this realization during the reading of the jury's verdict in open court; claim involved matters that essentially inhered in the verdict itself, and could not serve as a basis for attacking its validity).

The Florida Supreme Court's decision in *Mitchell v. State* is directly on point. In that case, on direct appeal of his first-degree felony murder conviction and death sentence, Mitchell argued, *inter alia*, that he should be granted a new trial because one of his jurors averred that she was pressured into returning a verdict of guilty by one of the other jurors and that other jurors had placed the burden on Mitchell to prove his innocence. *Mitchell*, 527 So. 2d at 181. The Florida Supreme Court declined to grant Mitchell a new trial, recognizing:

> It is a well settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations...Consequently, we cannot consider the juror's

> comments as requiring a new trial because all of the activities mentioned involve the jury's deliberations and inhere in the verdict.

Id. at 181-82. Thus, the highest court in the State of Florida confronted a challenge almost identical to the claims raised by Petitioner here and rejected same. Diligent appellate counsel, after performing a cursory review of Florida case law on the issue – including the decision in *Mitchell* – would have instantly recognized that raising any such argument on direct appeal would have been as meritless. *See also Simpson v. State*, 3 So.3d 1135, 1143 (Fla. 2009) (juror's concern that she had relied on misinformation from other jurors in reaching guilty verdicts in guilt phase of capital murder prosecution could not be subject of jury interview, where such concerns arose from matters which inhered in verdict itself); *Foster v. State*, 132 So. 2d 40, 66-67 (Fla. 2013) (rule prohibiting post-trial juror interviews concerning matters that inhere in the verdict and relate to the jury's deliberations extends even to allegations that jurors improperly considered a defendant's failure to testify, which is a matter that inheres in the verdict itself). As such, Petitioner fails to demonstrate that his counsel's performance was ineffective.

In sum, Petitioner's argument that appellate counsel was ineffective for failing to raise this issue on direct appeal is without merit, and a reasonable attorney acting in his place would have reached the same conclusion. Accordingly, his request for habeas relief on this ground is denied.[3]

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[3] Moreover, Petitioner has not shown how the trial court's response to the juror note violated any clearly established federal right. To the contrary, federal caselaw fully supports the trial court's handling of the issue and certainly does not support habeas relief in these circumstances. *See Mahoney v. Vondergritt,* 938 F.2d 1490,

3. Vindictive Sentencing

In the third issue raised in his petition, Petitioner argues that he received ineffective assistance because his appellate counsel failed to argue that the trial judge engaged in vindictive sentencing. Petitioner argues his sentence is vindictive because he rejected a five-year plea offer, but received a sentence of forty years after the jury returned its verdict. [D.E. 1-1, p. 37-38]. According to Petitioner, "there is no explanation in the record as to the disparity [between] the judge's willingness to impose a 5-year sentence and the 40-year sentence [the] judge ultimately imposed." *Id.*, p. 37. Petitioner states that "the additional thirty-five years was imposed as punishment for Mr. Knight's decision to reject the plea offer." *Id.* We disagree.

(a) No Vindictiveness Has Been Shown

Due process forbids entry of a vindictive sentence that arises when a judge increases a defendant's sentence because the defendant exercises some constitutional right. *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). But the

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1491 (1st Cir. 1991) (juror's allegation that "she, and at least one other juror, had been 'pressured' and 'badgered' into finding guilt" was "simply part-and-parcel of the jury system, and provide[s] neither a basis for inquiry nor grounds for undermining a verdict"); *Jacobson v. Henderson,* 765 F.2d 12, 14 (2d Cir. 1985) (affirming denial of habeas relief under section 2254 where "there was screaming, hysterical crying, fist banging, name calling, and the use of obscene language" in the jury room, and "one of the jurors allegedly threw a chair at another, then broke down, crying and claiming that he was a sick man"); *United States v. Grieco,* 261 F.2d 414, 414 (2d Cir. 1958) (denying relief where a juror stated "she had wished to vote for acquittal, but being the only juror who did, another juror, a man, was 'very abusive,' so much so that she was 'shaking and crying' when she finally agreed to concur with the rest, and that she now wished 'to retract.' "); *see also Goode v. Mazzuca,* 2004 WL 1794508, at *6 (S.D.N.Y. Aug. 11, 2004) ("Allegations of verbal intimidations among jurors, even to the point of screaming and abusive language, do not rise to the level of clear and strong evidence necessary to warrant habeas relief.").

Supreme Court later limited the scope of that ruling at least in situations where a defendant is given a harsher sentence after trial than was imposed upon a prior guilty plea because "the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after trial." *Alabama v. Smith,* 490 U.S. 794, 801 (1989) (noting that vindictiveness cannot be presumed "[e]ven when the same judge imposes both sentences").

Florida applies these same principles. In Florida, judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other factors, should be considered in determining whether there is a reasonable likelihood that the harsher sentence was imposed in retaliation for the defendant rejecting a plea offer and instead exercising his or her right to proceed to trial. *Wilson v. State*, 951 So. 2d 1039, 1040 (Fla. 3d DCA 2007). Other factors to be considered include:

> [W]hether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; the disparity between the plea offer and the ultimate sentence imposed; and the lack of any facts on the record that explains the reason for the increased sentence other than that the defendant exercised his or her right to a trial.

Wilson v. State, 845 So. 2d 142, 156 (Fla. 2003).

To determine whether a defendant's constitutional right to due process of law was violated by the imposition of an increased sentence after the unsuccessful plea discussions in which the trial judge participated, the court must consider the

totality of the circumstances. *Id.* If the totality of the circumstances gives rise to a presumption of vindictiveness, the burden shifts to the State "to produce affirmative evidence on the record to dispel the presumption." *Id.*

Petitioner's argument is without merit. First, we do not find that the trial court judge initiated plea negotiations prior to trial. The relevant portions of the transcript read as follows:

> **THE COURT:** Has the State made a plea offer in this case?
>
> STATE: We have and it has been rejected.
>
> **THE COURT:** What was that State's offer?
>
> STATE: Five years straight time with no credit for time served.
>
> DEFENSE: There is a little discrepancy of what was made [in the] plea offer. It does not make that much difference at this point because the defendant has rejected it but the State's recollection, my recollection indicated – and it's written in my file [] – was that the State offer came down to three years with credit time served or two years with no credit time served.
>
> **THE COURT:** Nevertheless, at this juncture, the offer that the State recollects is five years. I would like to speak to your client about that for a moment. Mr. Knight, if you could stand up for me please.
>
> ..
>
> **THE COURT:** Mr. Knight, it is my understanding from what the State just informed me that at some point there had been an offer of five years in state prison. Do you have any recollection of that being a plea offer that was made?

DEFENDANT: [My counsel] came to me but it [was] not five years, it was three years or something like that.

THE COURT: Now, are you interested in a plea at all in this case?

DEFENSE: May I respond in that regard? The defendant would seriously consider a plea offer that did not entail him returning to prison[.] He has been on house arrest for the past three or four years with absolutely no problems. He established and runs a business that he was getting going at the time of this incident, when it occurred. He's been quite successful at it. As a matter of fact, he has a new baby that was born the last few months. His life is headed in a good direction and [it] would be [a,] extreme[ly], extreme[ly] difficult thing for him to accept any plea offer that would have him return to prison. However, if there was some plea offer made that possibly had a limited amount of time in jail – whether it was served in the county jail[...] – we would certainly be taking it very seriously because of the risk involved in this case and only because of the risk.

THE COURT: Ms. Weintraub, is the five years still on the table?

STATE: Yes.

THE COURT: Would you contemplate a lesser plea deal?

STATE: No.

DEFENSE: And I brought this up to Ms. Weintraub and she [is] adamantly against it because he's been on house arrest for this period of time and has been in custody of the department of corrections. It is discretionary with the Court whether to award him credit for time served for that time on any sentence. If the Court were amendable to that even though the State is objecting to it, I would seriously talk to him about accepting such an offer.

THE COURT: At this juncture, I will not give him credit for time served[.]...[M]aybe that is something we can talk about later if there is a conviction in this case.

DEFENSE: It will not do any good if he is sentenced to life.

THE COURT: That is the presumption. Are you interested in the five year plea offer that the State is making? I have to ask. Here is what we're doing; this is a technicality[.] [T]his is your trial...this is your life, you know, and now is the time before trial [for me to] get a chance to see how you are doing, [what] your thought process is, because I do not know what can happen later. I mean, you can get a "not guilty" or you can get a conviction, and if you do get a conviction [and] get sentenced to more time, I do not want you to come back and say, "oh my gosh I would have taken five years and I didn't." So, I want you to take a moment. I will ask that your lawyer sit next to you one more time and you two have a conversation for one last time about [the] five years and I want you to tell me what you want to do, ok?

...

THE COURT: I will not get involved in the plea negotiations, so if this is what the offer is you will be entitled to any credit for time served for any time that you did. I do not know if you did any.

[D.E. 13-1, pp. 16-21]. The judge then stated she would give Petitioner credit for the two months served in jail, but not for the time he was placed on house arrest. *Id.*, p. 21. Defendant immediately rejected the offer and stated he wished to go to trial, and acknowledged that sentencing exposure included a 25-year mandatory minimum sentence. *Id.*

An examination of the record convinces us that nothing the state trial judge said or did indicated that she initiated plea discussions with Petitioner. Instead, she asked the parties if there had been a plea deal in place, and counsel informed her that the 5-year offer had been rejected. Further, there is nothing in the record establishing that the judge departed from her role as an impartial arbiter; she did

not urge the defendant to accept a plea (but did warn him of the risks of going to trial), and there is no support that her ultimate sentence would hinge on Petitioner's decision to take the matter to trial. As such, we reject Petitioner's claim that the judge "inserted [herself] into the plea process" and "encouraged" Petitioner to accept the State's plea offer. [D.E. 1-1, p. 38].

However, even if we determined that the judge engaged in plea negotiations – which we do not – Petitioner is still not entitled to relief on the merits. The record does not establish that the judge engaged in judicial vindictiveness. *See Creed v. Dept. of Corrections*, 330 F. App'x 771, 773 (11th Cir. 2009) ("The imposition of a longer sentence than a defendant would have received had he pled guilty does not automatically amount to punishment for the defendant's exercising his right to stand trial."). Despite Petitioner's arguments to the contrary, the record sufficiently supports the trial judge's decision to increase the sentence, including the fact that the mandatory minimum term he faced for the discharge of a firearm in connection with his aggravated battery conviction totaled 25 years. *See* Fla. Stat. § 775.087(2)(a). Additionally, Petitioner's argument is significantly undercut by the State requesting a sentence totaling 55 years for a defendant with three separate convictions.[4] And a trial judge does not engage in vindictive sentencing if the increase occurs after trial. At that point in time, the judge has been given the benefit of hearing testimony, becoming aware of the facts of the case, and understanding "the flavor of the event and the impact upon any victims." *Creed*, 330

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[4] *See* D.E. 12-8, p. 114.

F. App'x at 773; *Frank v. Blackburn*, 646 F.2d 873, 885 (5th Cir. 1980) ("We have no reason to attribute [the] increased sentence to anything other than the trial judge's more accurate appraisal of the circumstances after hearing the full disclosure of the facts at trial.").

In light of the record before us, we simply cannot find that Petitioner's appellate counsel offered ineffective assistance. Given the strong presumption that his attorney acted reasonably, *Strickland*, 466 U.S. at 689, Petitioner fails to establish that the decision not to challenge the trial judge's sentence as "vindictive" on appeal "was an act that no competent counsel would have taken" under similar circumstances. *Babb v. Crosby*, 197 F. App'x 885, 887 (11th Cir. 2006). *Strickland* does not punish appellate counsel for failing to raise meritless arguments, *Diaz*, 402 F.3d at 1142, and as such Petitioner's request for habeas relief based on his judicial vindictiveness claim must fail on this basis.

(b) No Violation of Clearly Established Rights

In *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969), the Supreme Court held that it is "patently unconstitutional" to penalize criminal defendants who successfully have a criminal conviction set aside on appeal by imposing a harsher sentence after retrial. As a prophylactic measure "to assure the absence of such a motivation," *Pearce* held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" on the record. *Id.* at 726.

But this case does not involve the procedural posture addressed in *Pearce*. This is a trial-after-rejected-plea situation that the Supreme Court has not addressed. And clearly neither the Supreme Court nor the Eleventh Circuit have held that the *Pearce* presumption of judicial vindictiveness applies when a defendant rejects a judicially-approved plea offer, goes to trial, and receives a harsher sentence after trial than was available to him under the rejected plea offer. To the contrary, our review of the relevant caselaw shows that the overwhelming majority of federal circuit courts, including the Eleventh Circuit, have held that the *Pearce* presumption has *no* application in the plea bargaining context. *See Hitchcock v. Wainwright,* 770 F.2d 1514 (11th Cir. 1985) (holding that the *Pearce* presumption was inapplicable in the plea bargaining context), *reversed on other grounds, sub nom Hitchcock v. Dugger,* 481 U.S. 393 (1987); *Frank v. Blackburn,* 646 F.2d at 875 (holding that *Pearce* did not apply presumption under later Supreme Court precedent that the government is free to encourage guilty pleas by offering substantial benefits and threatening a defendant with more severe punishment), *opinion modified on other grounds,* 646 F.2d 902 (5th Cir. 1981); *Creed,* 330 F. App'x. at 771 ("The imposition of a longer sentence than a defendant would have received had he pleaded guilty does not automatically amount to punishment for the defendant's exercising his right to stand trial. A trial judge may reasonably increase a defendant's sentence after trial because the trial gives the judge the benefit of hearing testimony, becoming aware of the facts of the case, and understanding the flavor of the event and the impact upon any victims." (internal

quotation marks and citations omitted)); *see also United States v. Morrison,* 153 F.3d 34 (2d Cir. 1998) (holding that *Pearce* did not apply where the defendant received a harsher sentence after withdrawing his guilty plea and proceeding to trial); *Waring v. Delo,* 7 F.3d 753 (8th Cir. 1993) (same); *United States v. Lippert,* 740 F.2d 457 (6th Cir. 1984) (rejecting the automatic application of the *Pearce* presumption in the context of plea agreements); *United States v. Taglia,* 925 F.3d 1031 (7th Cir. 1991) (holding that the *Pearce* presumption was inapplicable where the defendant received a harsher sentence on remand after successfully moving to vacate his guilty plea).

Hence, even if Petitioner's conclusion that the trial judge enhanced his sentence as a "trial penalty" was merited by the record, Petitioner would still not be entitled to federal habeas relief on this point. Petitioner has no clearly established right under federal law to undermine his sentence. And that is particularly true here where a minimum-mandatory sentence was imposed after the sentencing judge had a complete record of the relevant facts after a hard-fought trial. Defendant's additional conviction justifiably required an additional consecutive term of imprisonment that the sentencing judge was entitled to impose on the record presented to her. "The *Pearce* presumption was not designed to apply under these circumstances, where the sentencing process dictated by the guidelines undercuts any 'realistic motive for vindictive sentencing' and makes the possibility of such vindictiveness largely 'speculative.'" *United States v. Fowler,* 749 F.3d 1010, 1022 (11th Cir. 2014) (quoting *Texas v. McCullough,* 475 U.S. 134, 139 (1986)).

Accordingly, the state court's rejection of Petitioner's vindictive sentencing claim was not an unreasonable application of federal law.

4. Brady Violation

As a final attempt to overturn his conviction and sentence, Petitioner contends that prosecutors withheld impeachment evidence from defense counsel in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). A *Brady* violation occurs when the prosecution withholds evidence favorable to an accused upon request, "irrespective of the good or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *Rodriguez v. Sec'y, Florida Dept. of Corrections*, 756 F.3d 1277, 1303 (11th Cir. 2014). There are three components of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, which means it is either exculpatory or impeaching; (2) the evidence must have been willfully or inadvertently suppressed by the prosecution; and (3) the accused must have been prejudiced as a result. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material – i.e., prejudicial – if there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Rodriguez*, 756 F.3d at 1303 ("*Brady* requires a showing that the result *would* have been different had the prosecution disclosed the withheld evidence.") (emphasis in original).

Petitioner's *Brady* claim emphasizes that the prosecution possessed evidence that could have been used to impeach witness Luis Romero, but never disclosed that evidence prior to trial. Specifically, Petitioner argues that the prosecution withheld

evidence "that demonstrated [] Romero did not own the .357 Glock handgun that he was in possession of, and fired multiple times, during the incident in question." [D.E. 1-1, p. 42]. Petitioner also claims that the prosecution knew of this information, yet asked Romero if he "owned" the gun in question on direct examination. *Id.* According to Petitioner, this "leading" question – which Romero answered in the affirmative – misled the jury and suggested that Mr. Romero was in legal possession of the handgun. *Id.*, p. 42-43. The jury's knowledge that Romero did not own the firearm, but instead possessed it after stealing it from its original owner, "could have had a significant effect on the jury because they had already heard [from another witness]...that he wanted to rob [Petitioner]," which Petitioner argues would have provided significant support to the claim that he acted in self-defense. *Id.* at p. 43.

Petitioner is not entitled to relief because we find that no *Brady* violation occurred. A defendant cannot meet the second *Brady* prong – prejudice – when "prior to his trial, he had within his knowledge the information by which he could have ascertained the alleged *Brady* material." *Wright v. Sec'y, Florida Dept. of Corrections*, 761 F.3d 1256, 1278 (11th Cir. 2014) (quoting *Maharaj v. Sec'y for Dept. of Corrections*, 432 F.3d 1292, 1315 (11th Cir. 2005)). The record before us shows that the State disclosed a police report taken on the day of the shooting, which indicated that Romero stated that he had "purchased the firearm from some kid off the street for $150" and that "he did not know the identity of [the seller]." [D.E. 12-4, p. 72]. In our view, this provided enough information about the weapon

for Petitioner to obtain further details about the weapon's true ownership. His failure to reasonably inquire into the ownership after being provided this information does not support a finding that a *Brady* violation occurred, as Petitioner has not demonstrated that the prosecution did, in fact, withhold favorable evidence.

Further, even if we found that the prosecution had withheld the evidence in question, we would still deny Petitioner's request for relief because there is no reasonable probability that the disclosure of the evidence at issue would have changed the result of the proceeding. *See Rodriguez*, 756 F.3d at 1303. Petitioner essentially argues that the jury's knowledge that Romero's handgun had been stolen would have been the deciding factor in determining that Petitioner acted in self-defense. At trial, however, defense counsel presented the jury with considerable evidence that supported the self-defense theory,[5] yet it did not matter, and the jury returned a verdict that effectively rejected this argument. *Cf. United States v. Jordan*, 316 F.3d 1215, 1250-51 (11th Cir. 2003) ("[T]he defendant must show more than that the item bears some abstract logical relationship to the issues in the case. There must be some indication that the pretrial disclosure of the item would enable the defendant significantly to alter the quantum of proof in his favor.") (quoting

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[5] Specifically, defense counsel cross-examined Jonathan Ramesar on the issue, and Ramesar's statement given to police after the incident was read into evidence. [D.E. 13-6, p. 76]. That statement included details that Luis Romero fired the first shot, *id.*, p. 75-76, that Romero intended to rob Petitioner immediately prior to the shooting, and that Romero fired a shot toward Petitioner's home as he returned to the vehicle. *Id.*, p. 75-76, 82-85. Defense counsel also raised self-defense in his closing argument [D.E. 13-19, p. 42-56, 66-67], and the jury received instructions from the judge on this theory. *Id.*, p. 91, 93.

United States v. Buckley, 586 F.2d 498, 506 (5th Cir. 1978) (internal quotations omitted)). The knowledge that Romero did not own the weapon he fired on the night in question would not have impacted the proceedings, and as such Petitioner failed to set forth support that there existed a reasonable probability that the result would have been different had the jury heard about the true ownership of the handgun. *See Tanzi v. Sec'y, Florida Dept. of Corrections*, 772 F.3d 644, 661 (11th Cir. 2014); *United States v. Gonzalez*, 466 F.2d 1286, 1288 (5th Cir. 1972) (under *Brady*, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, [which is] understood as a trial resulting in a verdict worthy of confidence.").

Accordingly, we reject Petitioner's request for habeas relief on grounds that prosecutors committed *Brady* violations prior to trial. This argument is without merit.

IV. CONCLUSION

Based on the foregoing reasons, the undersigned respectfully **RECOMMENDS** that the Petition to Vacate the Judgment and Sentence pursuant to 28 U.S.C. § 2254 be **DENIED.**

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the Honorable James Lawrence King, United States District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue

covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 19th day of July, 2017.

/s/ Edwin G. Torres
EDWIN G. TORRES
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.