MACKENZIE V. SECRETARY, FLA. DEPARTMENT OF CORRECTIONS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

INDEX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14809-E

THOMAS W. MACKENZIE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Thomas Mackenzie is a Florida prisoner serving a 20-year sentence after a jury found him guilty of home-invasion robbery and he pled no contest to use or possession of drug paraphernalia. Proceeding pro se, he filed a motion under 28 U.S.C. § 2254, which the District Court denied. The court also denied a certificate of appealability ("COA"). He now moves this Court for a COA as well as leave to proceed in forma pauperis ("IFP").

I.

A. TRIAL AND DIRECT APPEAL

Before Mr. Mackenzie's trial on the home-invasion robbery charge, the State offered him a 15-year prison term in exchange for a guilty plea to burglary of a dwelling and possession of drug paraphernalia. The State later filed a new information, adding a home-invasion robbery charge. The State revoked the previous plea offer and made a new offer for a 25-year prison term in exchange for a guilty plea. Mr. Mackenzie pled no contest to the possession charge and proceeded to trial on the home-invasion robbery charge.

At Mr. Mackenzie's trial, Carol Emmons testified that, on March 10, 2010, she got home at 10:30 p.m. Because her smoke alarm was beeping, she went to sleep in her guest bedroom. She later awoke and saw someone in the bedroom doorway. The man told her that he was not there to hurt her and to "just give me what you got." Ms. Emmons stated that she took that to mean that he wanted money and she got up. She did not believe the man when he said that he was not there to hurt her, and she was "scared to death." As they walked into the hallway and then the kitchen, she turned on the light and the man screamed at her to turn it off. Ms. Emmons said that she needed the light to find her purse, and the man allowed it to stay on. She realized that she had left her purse in her bedroom, so they both went into the bedroom and she sat on the bed facing the man six to seven

feet away. Ms. Emmons testified that she saw the man. She gave the man around $40 in small bills and her cell phone, and he left through the garage.

Ms. Emmons noted that it was 4:01 a.m. and she went across the street to her son's house and called the police. Ms. Emmons told police that the man was five foot nine inches tall with a sandy beard and sandy hair. She also said he wore a blue T-shirt and blue jeans. The police asked her if anything was missing from her refrigerator, and she found that two beers were missing. She thought that they were either Heineken or Becks beers.

Corporal Oscar Dominguez was on patrol the morning of the home invasion. He saw Mr. Mackenzie riding a bike without a light and stopped him at 4:08 a.m. Mr. Mackenzie had a wet spot and bulge on the left pocket of his jeans, so Corporal Dominguez asked Mr. Mackenzie for permission to search his person. Mr. Mackenzie consented, and Corporal Dominguez discovered small bills in Mr. Mackenzie's pockets as well as a sealed Heineken beer. During this time, Corporal Dominguez received a "be on the lookout" alert for a man matching Mr. Mackenzie. Corporal Dominguez thus held Mr. Mackenzie so that another officer could bring Ms. Emmons out for a possible identification. Ms. Emmons identified Mr. Mackenzie as the man who had robbed her.

An empty Heineken beer bottle was also found on the side of the road. A DNA test ran on it matched Mr. Mackenzie. Police found Ms. Emmons's cell

phone's battery on a garage shelf. The garage had a broken window. Tiny slivers of glass were found on Mr. Mackenzie's shirt when he was arrested.

Defense counsel did not present any witnesses, and Mr. Mackenzie did not testify. Counsel moved for judgment of acquittal on the home-invasion robbery, arguing that the state had presented no evidence that Mr. Mackenzie intended to rob anyone inside the house at the time that he entered it, and the State had only proven a burglary of an occupied dwelling charge. Counsel also argued that the state had not proven that Mr. Mackenzie intended to put Ms. Emmons in fear or that he otherwise forced or assaulted her. The trial court denied the motion. The jury found him guilty of home-invasion robbery.

The State nolle prossed the remaining burglary charge and Mr. Mackenzie was sentenced to 20 years in prison.

After his conviction, Mr. Mackenzie appealed. A Florida appeals court affirmed his convictions and sentence without a written opinion in October 2012. See Mackenzie v. State, 104 So. 3d 1106 (Fla. 4th DCA 2012) (per curiam) (unpublished).

B. POSTCONVICTION RELIEF

Mr. Mackenzie filed a motion to reduce sentence in the state trial court, which was denied in January 2013. A year later, he filed a counseled motion for

postconviction relief under Florida Rule of Criminal Procedure 3.850. In it, he alleged four claims of ineffective assistance of counsel:

1) counsel failed to advise him to plead guilty despite discovery that the number on the discarded Heineken beer bottle matched two found in Ms. Emmons's home;

2) counsel failed to recognize that Mr. Mackenzie was not eligible to be sentenced as a habitual offender, and therefore, should have advised him to plead guilty;

3) counsel failed to move to suppress the victim's identification testimony;

4) counsel failed to object to comments made by the prosecutor about Mr. Mackenzie's decision not to testify and comments attempting to improperly bolster the testimony of witnesses.

The state habeas court determined an evidentiary hearing was necessary to resolve the first two claims. Before the hearing, the court denied relief on Mr. Mackenzie's third and fourth claim, adopting the State's arguments. In responding to the third claim, the State argued that any motion to suppress the victim's identification would have been without merit under Florida and federal case law. The State's response to the fourth claim argued that the prosecutor did not comment on Mr. Mackenzie's silence, but rather remarked that what the lawyers said was not evidence. The State also argued the prosecutor's comments on the trial testimony was proper for closing arguments and did not constitute improper bolstering.

After the evidentiary hearing, the state postconviction court denied the first claim. It found the evidence of the matching numbers on the discarded Heineken bottle and those found in Ms. Emmons's home to be significant. The court found that defense counsel independently investigated those numbers and discovered they identified the production line. That they matched signified the bottles came from the same production line. There would have been about 2,400 bottles with that number. The court found that defense counsel did not disclose this evidence to the State because he did not intend to offer it at trial and that no evidence related to the significance of these numbers was introduced at trial. The court held that Mr. Mackenzie was thus not prejudiced by the beer bottles.

The court also denied Mr. Mackenzie's second claim after determining that counsel investigated all possible defenses and possible sentences, including Mr. Mackenzie's potential habitual offender status. The court found defense counsel credibly testified that Mr. Mackenzie was "adamant" about having a trial and rejected the first plea with the knowledge that he was not a habitual offender. The court found that defense counsel did not expect the State to amend the charges and add the home-invasion robbery charge, which carried a more significant sentence. Mr. Mackenzie then rejected the new plea offer of 25 years.

Mr. Mackenzie appealed the denial of his Rule 3.850 motion, but it was affirmed and the mandate issued on May 27, 2016.

Mr. Mackenzie then filed this motion under 28 U.S.C. § 2254 in federal district court. He alleged three grounds for relief:

1) counsel failed to recognize that Mr. Mackenzie was not eligible to be sentenced as a habitual offender, and the significance that fact had on plea negotiations;

2) counsel failed to advise Mr. Mackenzie to plead guilty, despite the state's evidence, including the Heineken beer bottle linked to Mr. Mackenzie, which overwhelmingly indicated his guilty;

3) the state failed to prove that Mr. Mackenzie committed home-invasion robbery at trial.

The State filed a response, arguing that all three claims should be denied. The Magistrate Judge issued a report and recommendation ("R&R"), recommending that Mr. Mackenzie's § 2254 motion be denied. The District Court adopted the R&R and denied the § 2254 motion.

II.

To get a COA, a § 2254 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioners can meet this requirement by showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603–04 (2000) (quotation marks omitted).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), when a state court has adjudicated a claim on the merits, a federal court may grant

habeas relief only if the state court decision (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). A federal court must presume the correctness of the state court's factual findings unless the petitioner overcomes them by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). Therefore, while we review de novo the federal district court's decision, we review the state habeas court's decision with deference. Reed v. Sec'y, Fla. Dep't of Corr., 593 F.3d 1217, 1239 (11th Cir. 2010). "AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010) (quotation marks and citations omitted).

A state court's decision is "contrary to" federal law if "the state court arrives at a conclusion opposite to that reached by [the U.S. Supreme Court] on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412–13, 120 S. Ct. 1495, 1523 (2000). The "unreasonable application" clause allows federal habeas relief if the state court correctly identified the governing legal principle

from Supreme Court precedent, but unreasonably applied that principle to the facts of the petitioner's case. Borden v. Allen, 646 F.3d 785, 817 (11th Cir. 2011). "Importantly, for a federal habeas court to find a state court's application of Supreme Court precedent unreasonable, it is not enough that a state court's adjudication be only incorrect or erroneous; it must have been objectively unreasonable." Id. (quotations omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011) (quotation omitted).

To prove ineffective assistance of counsel, the petitioner must show that his attorney's performance was deficient and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Deficient performance falls below "the range of competence demanded of attorneys in criminal cases." Id. (quotation marks omitted). Courts apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065 (quotation omitted). "When this presumption is combined with § 2254(d), the result is double deference to the state court ruling on counsel's performance." Daniel v. Comm'r, Ala. Dep't of Corr., 822 F.3d 1248, 1262 (11th Cir. 2016). Thus, when analyzing a claim of ineffective assistance under § 2254(d), "the question is not whether counsel's

actions were reasonable [but] . . . whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Harrington, 562 U.S. at 105, 131 S. Ct. at 788. Prejudice means "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

III.

A. FAILURE TO ADVISE ABOUT HABITUAL OFFENDER STATUS

Mr. Mackenzie argued his trial counsel was constitutionally ineffective because he failed to recognize that he was not eligible to be sentenced as a habitual offender. He alleged that, if counsel had recognized that the habitual offender was inapplicable and communicated this fact, he would have accepted the State's first plea offer.

Reasonable jurists would not debate the District Court's denial of this claim. The state habeas court found defense counsel's testimony to be credible and found that defense counsel told Mr. Mackenzie he was not eligible to be sentenced as a habitual offender. The court found Mr. Mackenzie rejected the 15-year plea offer with this knowledge and that the second 25-year plea offer was based on the severe sentence associated with home-invasion robbery, not a habitual offender status. Federal courts must apply a presumption of correctness to state-court findings under AEDPA, and Mr. Mackenzie has not shown these findings were incorrect by

clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Putman, 268 F.3d at 1241. Thus, Mr. Mackenzie cannot show his counsel's performance was deficient. See also Daniel, 822 F.3d at 1262.

B. FAILURE TO ADVISE ABOUT MATCHING NUMBERS ON BEER BOTTLES

Mr. Mackenzie argued that counsel was ineffective because counsel failed to advise him to plead guilty in light of the State's evidence about the matching production line numbers on the beer bottles. He alleged that, had counsel advised him of this evidence, he would have accepted the 15-year plea offer.

The state habeas court's decision misconstrued Mr. Mackenzie's claim and incorrectly held that the fact that the numbers evidence was not introduced at trial was enough to show Mr. Mackenzie was not prejudiced by this evidence. However, Mr. Mackenzie did not claim that defense counsel was ineffective for failing to investigate this evidence or failing to introduce it at trial. Instead, Mr. Mackenzie argued that defense counsel was ineffective for failing to tell Mr. Mackenzie about this evidence so he could consider it when making the decision to accept the State's offer.

Nonetheless, reasonable jurists would not debate the District Court's denial of this claim. The record shows defense counsel did not learn the significance of the numbers until after the first plea offer had been revoked. Mr. Mackenzie thus

cannot show defense counsel's performance was deficient. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

C. SUFFICIENCY OF THE EVIDENCE

Mr. Mackenzie argued the State failed to prove he committed home-invasion robbery. He raised this claim in his direct appeal.

On a petition for federal habeas corpus relief, the standard for review of the sufficiency of the evidence is whether the evidence presented, viewed in a light most favorable to the state, would have permitted a rational trier of fact to find the petitioner guilty of the crimes charged beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 308–10, 99 S. Ct. 2781, 2784 (1979). The Jackson standard for the sufficiency of the evidence is equally applicable to direct or circumstantial evidence. See United States v. Peddle, 821 F.2d 1521, 1525 (11th Cir. 1987). It is not necessary that the evidence exclude every reasonable hypothesis except that of guilt. See Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 138, 99 L. Ed. 150 (1954). Under Florida law, home invasion robbery means any robbery that occurs when the offender enters a dwelling with the intent to commit a robbery, and does commit a robbery of the occupants therein. See Fla. Stat. § 812.135(1). The State also carries the burden to prove a taking by putting the victim in fear of death or great bodily harm. See Magnotti v. State, 842 So. 2d 963, 964 (Fla. 4th DCA 2003). Florida courts consider both the victim's

subjective testimony as well as whether the "jury could conclude that a reasonable person, under like circumstances, would have felt sufficiently threatened to accede to the robber's demands." Id. at 965.

The District Court denied this claim and reasonable jurists would not debate that denial. The broken window in the garage and the glass slivers on Mr. Mackenzie's shirt suggest he broke into the house. Ms. Emmons's testimony showed that she woke up at about 4:00 a.m. and saw Mr. Mackenzie in the doorway to the guest bedroom where she was sleeping. He immediately demanded money from her. That Mr. Mackenzie broke into the house in the middle of the night suggests he was aware there were likely people to be home and asleep. That he immediately demanded money from Ms. Emmons when she saw him is circumstantial evidence of his intent to commit a robbery.

Although Mr. Mackenzie told Ms. Emmons that he wasn't going to hurt her, a reasonable person under like circumstances could fear death or great bodily harm. Trial evidence showed Ms. Emmons lived alone and Mr. Mackenzie was significantly larger than her. He broke into her house in the middle of the night. Although he said he was not there to hurt her, Ms. Emmons testified she was scared to death. She also testified he told her not to look at his face and screamed at her when she turned the kitchen light on. Mr. Mackenzie took Ms. Emmons's cash and then asked for her cell phone. Although Ms. Emmons begged him not to

take her phone because it was her only method of communication, she nonetheless gave to him. A responding officer testified Ms. Emmons was shaking when she was interviewed. This testimony of Ms. Emmons's subjective fear and the attendant circumstances are enough to satisfy a taking "by putting in fear" under Florida law. See id. at 965–66.

Because Mr. Mackenzie has not shown that reasonable jurists would find the denial of his § 2254 petition debatable, his motion for a COA is DENIED. Additionally, his motion for IFP status is DENIED AS MOOT.

Barry G. Martin
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:16-CV-14169-ROSENBERG/WHITE

THOMAS MACKENZIE,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE 1], which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. *See* DE 3. On August 15, 2017, Magistrate Judge White issued a Report and Recommendation [DE 15] recommending that the Petition be denied. The Court has conducted a *de novo* review of Magistrate Judge White's Report and Recommendation, has reviewed Petitioner's Objections thereto [DE 16], and is otherwise fully advised in the premises.

Upon review, the Court finds Magistrate Judge White's recommendations to be well reasoned and correct. The Court agrees with the analysis in Magistrate Judge White's Report and Recommendation and concludes that the Petition should be denied for the reasons set forth therein.

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation [DE 15] is **ADOPTED**;

2. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE

1] is **DENIED**;

3. A certificate of appealability **SHALL NOT ISSUE**; and

4. The Clerk of Court is directed to **CLOSE THIS CASE**.

DONE AND ORDERED in Chambers, West Palm Beach, Florida, this 31st day of August, 2017.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY
FLORIDA

Case No. 312010CF319A

Judge: Robert L. Pegg

STATE OF FLORIDA

Plaintiff

vs.

THOMAS MACKENZIE

Defendant
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF PURSUANT TO RULE 3.850 FLA. R. CRIM. P.

This cause came on to be heard upon the defendant's Motion for Post Conviction Relief pursuant to Rule 3.850 Fla. R. Crim. P.. The court has considered the testimony of the witnesses, the evidence presented, the argument of counsel, and has taken judicial notice of the contents of the court file, and finds as follows:

Testimony was taken from Marra Mackenzie, Regina Mackenzie, the defendant, Thomas Mackenzie, and trial counsel, R. Blake Smith, Esq. Only the testimony of Thomas Mackenzie and R. Blake Smith were of any evidentiary value whatsoever.

The defendant attempts to raise the claim of ineffective assistance of counsel in two separate claims which required an evidentiary hearing, to wit:

1 .**Failure of defense counsel to advise the defendant of the significance of the label numbers on the bottles of Heineken beer that were part of the evidence in the case.**

The evidence concerning the bottles of Heineken beer was significant. The numbers on the label of a bottle allegedly consumed and discarded by the defendant near the scene of the crime was identical to the Heineken bottle found in the possession of the defendant. Mr. Smith conducted an independent investigation on his own regarding the significance of those numbers. The manufacturer reported that the numbers identified the production line. All containers of any type from that production line would have identical numbers. There would have been over 2,400 bottles with that number.

This information was not disclosed to the state because Mr. Smith did not intend to offer this fact in evidence at the trial. In fact, no evidence of the numbers on any beer bottle were admitted at the trial. The defendant was not prejudiced in any way by the numbers on the beer bottles. It was to his advantage that the jury did not hear any evidence regarding this fact.

2. **Failure of defense counsel to recognize that the defendant was not eligible to be sentenced as a Habitual Offender, and the significance that fact had on any plea negotiations.**

The testimony of Blake Smith was very compelling regarding the acceptance of the tendered plea offer of fifteen years to the charge of Burglary. The defendant was adamant about having a trial. I am convinced from the

evidence presented that the defendant was made aware of the plea offer and rejected it outright.

Although the state of Florida initially believed that the defendant was HO eligible, Mr. Smith was certain as of September 15, 2010, that he was not. He communicated that information to the defendant.

What neither the defendant or trial counsel could have predicted is that the state would amend the information to reflect a charge of Home Invasion Robbery. A conviction on this charge could carry a much more severe sentence. After this charge was filed, the new plea offer was significantly higher (25 years), and was rejected.

I find the testimony of R. Blake Smith, trial counsel, to be truthful, compelling and accurate. He clearly had the defendant's best interest as a priority and did an excellent job of investigating all possible defenses and giving him excellent representation, both before and during the trial. The defendant is simply not happy with the result.

DISCUSSION

A party seeking post conviction relief based on ineffective assistance of counsel must show (1) counsel's specific acts or omissions were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668,687, 694 (1984); *Armstrong v. State*, 862 So.2d 705, 711 (Fla. 2003). "The

benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Rutherford v. State*, 727 So.2d 216, 219 (Fla. 1998) (quoting *Strickland* 466 U.S. at 686).

The defendant has failed to meet his burden to show entitlement to any relief.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1. The defendant's Motion for Post Conviction Relief be and the same is hereby **DENIED**.

2. The defendant has thirty (30) days to appeal this ruling.

DONE AND ORDERED this 7th day of July, 2015, in Vero Beach, Indian River County, Florida.

ROBERT L. PEGG
Circuit Judge

cc: Gray Proctor, Esq.
Nikki Robinson, ASA

FILED FOR RECORD
FELONY DIVISION
2015 JUL -8 PM 4:27
JEFFREY R. SMITH
CLERK OF CIRCUIT COURT
INDIAN RIVER COUNTY, FL
BY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above order, including any attachments referenced in the order, have been sent to the following addressees by U.S. Mail, postage prepaid or by courthouse box delivery where indicated, to the following persons, this 8th day of July, 2015.

Copies to:

Nikki Robinson, ASA
Gray Proctor, Esq.
Thomas Mackenzie

Office of the State Attorney
By Courthouse Box email

Jeffrey Smith
CLERK OF THE COURT

By: Stewart
Deputy Clerk

STATE OF FLORIDA
19th Judicial Circuit Public Defender's Office
Serving Indian River, St Lucie, Martin And Okeechobee Counties

REPORT OF INVESTIGATION

DATE OF REPORT: November 9, 2010

FILE NO: 10-648-09-VB

REFERENCE/FILE: State of Florida v. Thomas Mackenzie

CASE NO: 312010CF000319A

COUNTY: Indian River

ATTORNEY: **R.** Blake Smith, Assistant Public Defender

INVESTIGATOR: Allison W. Matsik, PDI

ATTACHMENTS:

Email from Thomas Fabbri
Heineken Production Decoding Card

MATTERS INVESTIGATED:

Pursuant to the request of R. Blake Smith, APD, an investigation was performed, to wit: determine whether or not the codes on a Heineken bottle are unique to each six-pack.

RESULTS OF INVESTIGATION:

PDI Matsik conducted a case review and analysis of the case file including the Discovery documents. The video from 7-11 was not viewed .Some points for consideration and inconsistencies in the Discovery are enumerated in a separate document.

It was learned from several store managers/clerks that beer and alcohol sales are prohibited in Indian River County (including City of Vero Beach) between 1:00 am and 7:00 am, 7 days a week.

At the time of the defendant's arrest the police collected a Heineken bottle with a code on the side in a white box as follows: **9069528G0155**. Two other bottles with this code were

9 - 069 - 528 - G - 0155

photographed at the victim's home. A fourth bottle with the code was collected from a grassy area in the 2300 block of Pine Avenue.

It was determined from internet research and conversations with convenience stores in the area that the sole distributor for Heineken on the Treasure Coast is J.J. Taylor Companies in Ft. Pierce, FL. (3021 Crossroads Parkway, Ft. Pierce, FL 34945; phone 772-219-1374). This company is the second largest beer distributor in Florida and operates distribution centers in Ft. Pierce, Tampa, Ft. Myers and Minneapolis, MN.

In conversations with Thomas Fabbri, Manager, on 10/11/10, 10/29/10 and 11/9/10, PDI Matsik learned the following:

The beer is brewed and bottled (filled) in The Netherlands. They have 180 days from the brew date to the consumption date before the product must be "pulled" or in other words removed from retail sale for expired shelf life. For American brews the pull date is 120 days.

The beer comes into the port in Tampa from The Netherlands. Depending on how much time the shipment spends on the docks it could take several weeks to get to JJ Taylor's distribution center in Ft. Pierce.

JJ Taylor exclusively supplies Heineken to every sales outlet on the Treasure Coast from small mom-and-pop stores to major grocery chains like Publix and Albertsons.

Most stores have a once per week delivery with some others more frequently depending on the sales volume. Some stores stock up and receive a discount meaning they could have a few months' supply in the back.

More 12 packs are sold than 6 packs.

Most of the time all of the deliveries on a given day in town would tend to have the same codes on the bottles because the trucks would be filled with pallets containing product received around the same time. It is possible that the delivery trucks could contain a few pallets of product with codes left over from another recent day.

Codes are printed on a bottle in order to identify it and enable the company to isolate it and track it back in the event of a problem.

The Area Sales Manager, Tim Snell, in Tampa provided Heineken's Production Decoding Card. It outlines the code for date, place and time of packaging. See attached email.

DECODING THE BOTTLES IN QUESTION

9069528G0155

9 = 2009 (last digit of production year)
069 = March 10 (69th day of the year of production)
528 = The Netherlands (country of origin)
G = Zoeterwoude 52 (brewery and line)
0155 = time of packaging

SAMPLING OF AREA STORES

On the following dates and times PDI Matsik visited area stores and recorded codes on at least 3 six packs of Heineken beer at each location except as otherwise noted.

10/13/10
10:30 am
Harbor Shell, 5325 US 1, Vero Beach, FL
0188528F1809
0188528F1808
0188528F1808
Manager Fred Khatibi indicates that he stocks up and is supplied by JJ Taylor. They sell singles too.

10/23/10
11:00 am
Chevron "Country Corner", North US 1 , Vero Beach, FL
0197528G1544
0197528G1545
0197528G1545
0200528G0646 (6 single beers in cooler)
Ray Holkom, the clerk, stated that the store receives delivery once per week. The store closes at 10:00 pm in the winter and spring and closes at 11:00 pm in the summer. They sell singles and are supplied by JJ Taylor.

10/23/10
11:30 am
Publix, Miracle Mile, Vero Beach, FL
Open every day 7:00 am to 10:00 pm
The manager was not interviewed but Tom Fabbri of JJ Taylor stated that they supply the store.
0229528G0120

0229528G0120
0229528G0119

10/23/10
11:45 am
7-11, 2032 US 1, Vero Beach, FL (corner US 1 and Rte. 60/20th Place)
Linda Nile, Manager, stated that the store is open 24 hours. Heineken is not a big seller (1-3 six packs per week). They sell singles. They are supplied by JJ Taylor.
0229528G0117
0229528G0117
0229528G0118

10/23/10
12:45 pm
Country Discount Beverage, 2265.14th Ave., Vero Beach, FL (23rd St. and 14th Ave.)
Open M-Th 8:30 – 8, Fri 8:30-9, Sat 9-8, Sun 10-6
The female manager stated that they only sell whole packs and only rarely at that. In the cooler was 1 six-pack and 1 12- pack. They buy from JJ Taylor.
0075528E0537 (only six pack)

10/14/10
9:10 am
7-11, 2296 N. US1, Vero Beach, FL (corner US1 and 23rd Street)
This is store where law enforcement retrieved video.
Manager Dan Brown stated that the store does not stockpile their Heineken and receives deliveries twice per week from JJ Taylor. He sells about 2-3 cases worth per week
0217528H0547
0217528H1837
0217528H1546
0217528H1637
0210528H1837
0210528H1837
0210528G1545
0210528G1546

PDI Matsik also consulted with George A. Matsik, former President and COO of Ball Corporation, a major beer and beverage packaging manufacturer worldwide. Based on his experience Matsik stated that in a typical 8 hour shift **on a single high speed line** one would expect to have well over one million bottles filled. That would mean however that up to about 2400 bottles would have the same code each minute.

STATUS: Closed pending further request

PREPARED BY:

Allison Matsik, PDI

SmartZone Communications Center

matsik@comcast.ne

+ Font size -

FW: Codes

From : Thomas Fabbri <Thomas_Fabbri@jjtaylor.com> Tue Nov 9 2010 10:13:33 AM
Subject : FW: Codes 5 attachments
To : matsik@comcast.net

From: tsnell@heinekenusa.com [mailto:tsnell@heinekenusa.com]
Sent: Tuesday, November 09, 2010 10:06 AM
To: Thomas Fabbri
Subject: Codes

(See attached file: HUSA Production Decoding Card.pdf)

Hi Tom,

Please see the attached card to explain the entire code:

Position 1: last digit of the production year, e.g. 5=2005, 6=2006.
Pos. 2-4: number of the day of the production year, e.g. 067=March 8
Pos. 5-7: country of origin (528=the Netherlands)
Pos. 8: letter indicating the brewery and packaging line
Pos. 9-12: time of packaging or Pos. 9: letter indicating the hour of packaging

Thanks,

Tim Snell
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11/09/2010 08:46 AM cc

Subject

Tim can you send me an explanation of your code dates on Heineken I know the brew dates but I need a explanation on the other code numbers and what they stand for. Thank you

were a habitual felony offender ("HFO") subject to a 30-year sentence on the original charges. The 15-year offer demonstrated the State's willingness to negotiate. Trial counsel clearly did not realize that Mr. Mackenzie was not an HFO, even after Mr. Mackenzie informed him, until it was to late to negotiate any agreement on that basis.

The petitioner appealed this ground to the highest state court.

This issue was raised through a post conviction motion in a state trial court.

GROUND TWO:

The lower court erred by not finding counsel's performance constitutionally deficient where counsel failed to discover the meaning of the lot numbers on the bottles of Heineken in time to advise Mr. Mackenzie that a plea was in his interest.

SUPPORTING FACTS

Trial counsel unreasonably delayed investigation until after the plea, Mr. Mackenzie had been charged with a felony punishable by life. Although the jury did not hear the exact meaning of the numbers by an expert, they may have