APPENDIX

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16755
Non-Argument Calendar

D.C. Docket No. 0:13-cv-61149-DPG

MARTIN DIEZ,

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

(January 8, 2020)

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before WILSON, JILL PRYOR, and JULIE CARNES, Circuit Judges.

PER CURIAM:

This appeal is on remand from the Supreme Court of the United States for us to reconsider the denial of Martin Diez's petition for writ of habeas corpus, 28 U.S.C. § 2254. In his petition, Diez argues that (1) counsel was ineffective for failing to request Venezuelan custody documents for use at trial, and (2) the state committed a *Brady*[1] violation by withholding those documents from Diez. In our prior opinion, we decided that the relevant decision on the merits for our review was the Florida appellate court's decision affirming, without further explanation, the state trial court's denial of Diez's post-conviction motion. Because the state appellate court did not state its reasoning, we determined that Diez had to show that there was no reasonable basis for the state court's denial of relief, citing *Harrington v. Richter*, 562 U.S. 86, 102 (2011). We then affirmed the district court's denial of Diez's § 2254 petition, concluding that Diez's claims failed because he could not establish prejudice for his ineffective-assistance-of-counsel claim, given the substantial evidence presented at trial supporting his convictions. We concluded that Diez's *Brady* claim failed for the same reasons, noting that the prejudice analysis is the same for both ineffective-assistance-of-counsel claims and *Brady*-violation claims. *See Brown v. Head*, 272 F.3d 1308, 1316 (11th Cir. 2001).

The Supreme Court granted Diez's petition for writ of *certiorari*, vacated our decision, and remanded for us consider to Diez's petition in light of *Wilson v.*

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Sellers, 584 U.S. ___, 138 S. Ct. 1188 (2018) (holding that when the relevant state court decision on the merits does not state the reasons for its decision, a federal habeas court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale.").

Therefore, we must "look through" the Florida appellate court's decision to the Florida trial court's decision denying Diez's motion for post-conviction relief. The state trial court determined that counsel's failure to obtain Venezuelan custody documents did not prejudice Diez "to the extent that the result of the trial was rendered unreliable and there [was] no reasonable probability of a different result had the alleged deficiency or omission not occurred."

A federal court may only grant habeas relief on a claim adjudicated on the merits in state court if the state court proceedings "(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). In our earlier decision, under a de novo review looking for any reasonable basis to support the state court's decision, we denied Diez's habeas petition because he failed to establish prejudice. The state trial court denied Diez's post-conviction motion based on the same reasoning, and that same reasoning

supports our denial of Diez's habeas petition today. And although Diez argues that the state trial court's decision was silent as to his *Brady* claim, the state court specifically found that Diez was not prejudiced by counsel's failure to obtain the custody documents, and, as we noted in our prior opinion, the analysis for prejudice is the same for ineffective-assistance-of-counsel and *Brady*-violation claims. Therefore, we conclude that the state trial court's decision was not contrary to, or an unreasonable application of, clearly established federal law, and it was not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). Accordingly, we affirm.

AFFIRMED.

A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16755-AA

MARTIN DIEZ,

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: WILSON, JULIE CARNES, and JILL PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Martin Diez is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

A-3

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16755
Non-Argument Calendar

D.C. Docket No. 0:13-cv-61149-DPG

MARTIN DIEZ,

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

(November 29, 2017)

Before WILSON, JULIE CARNES, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Martin Diez appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We granted Diez a certificate of appealability

on two issues: (1) whether trial counsel was ineffective for failing to obtain Venezuelan custody documents for use at trial; and (2) whether the State committed a *Brady*[1] violation by withholding the Venezuelan custody documents from Diez. After careful consideration of the parties' briefs and the record, we affirm.

I.

In June 2004, Diez met with Edgar and Alicia Lopez to discuss their desire to bring their granddaughter, Elizabeth, back to Venezuela from the United States. The Lopezes told Diez that: (1) they had raised Elizabeth from her birth in Venezuela in 1999 until 2003, when they returned her to her mother, Eunice, in the United States; (2) they were concerned for Elizabeth's safety; (3) they had legal custody of Elizabeth; and (4) all legal means of retrieving Elizabeth had failed, including contacting the Venezuelan consulate, the Florida Department of Children and Families, and the local police. Diez claims the Lopezes showed him Venezuelan custody documents indicating that they had lawful custody of Elizabeth. The Lopezes asked Diez if he could find someone with authority to "go to Eunice's apartment and scare her into returning Elizabeth."

Diez took matters into his own hands. He went to Eunice's apartment dressed as a police officer. He presented a fake search warrant, forcefully entered

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)

the apartment, and led Eunice—at gunpoint—from room to room looking for Elizabeth's passport. Diez searched Eunice's bag, removing her driver's license and cell phone. He told her not to call the police and threatened to shoot her if she moved. He then took Elizabeth to the Lopezes' apartment. The next day, he surrendered himself to the Federal Bureau of Investigation.

Diez was found guilty of armed kidnapping of a child under the age of thirteen years with intent to commit interference with child custody (Count 1), armed kidnapping with intent to commit interference with child custody (Count 2), armed burglary (Count 3), and interfering with child custody (Count 5). He was sentenced to three concurrent terms of 20 years for Counts 1–3 and was sentenced to a concurrent term of four years for Count 5.

II.

We review de novo a district court's denial of a § 2254 habeas corpus petition. *Bester v. Warden*, 836 F.3d 1331, 1336 (11th Cir. 2016). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established Federal 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 State court proceeding." 28 U.S.C. § 2254(d). Under the "unreasonable application" prong, relief is appropriate only if the state court's

application of clearly established federal law is "objectively unreasonable," not simply incorrect. *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002).

To establish an ineffective-assistance claim, Diez must show that his "counsel's performance was deficient" and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). If he makes an insufficient showing on either prong, we need not address the other prong. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

For counsel's performance to be deficient, it must fall "below an objective standard of reasonableness." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). It is presumed that counsel's conduct fell within the range of reasonable professional assistance. *Johnson v. Sec'y, Dep't of Corrs.*, 643 F.3d 907, 928 (11th Cir. 2011). To overcome that presumption, Diez "must show that no competent counsel would have taken the action that his counsel did take." *Id.* (internal quotation marks omitted).

To establish prejudice, "a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Harrington*, 562 U.S. at 104,

131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052). The likelihood of a different outcome must be substantial, not just conceivable. *See id.*

When the standards created by *Strickland* and § 2254(d) apply in tandem, our review is doubly deferential as to the performance prong. *Id.* at 105, 131 S. Ct. 787. "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Because of this double deference, "it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Evans v. Sec'y, Florida Dep't of Corrs.*, 699 F.3d 1249, 1268 (11th Cir. 2012) (internal quotations omitted). The Florida appellate court denied Diez's claims without explanation. Because we interpret that decision as a denial on the merits, it is entitled to deference under § 2254(d). *See Wright v. Sec'y for Dep't of Corrs.*, 278 F.3d 1245, 1254 (11th Cir. 2002) (concluding that a state court's summary denial of a claim is considered an adjudication on the merits for purposes of § 2254(d)(1)). Thus, Diez must show that there was no reasonable basis for the state court's denial of relief. *See Harrington*, 562 U.S. at 102, 131 S. Ct. at 786.

III.

Diez first alleges that trial counsel was ineffective for failing to acquire a copy of the Venezuelan custody documents, which could have shown that he had a good-faith belief that he was returning the child to her legal custodians, rather than

interfering with child custody.[2] He argues that because Counts 1, 2, 3, and 5 all included intent to commit interference with child custody as an element of the offense, the custody documents could have been used to negate the required intent for those offenses.[3]

Even if his counsel was ineffective, Diez cannot show prejudice. Although the documents could have supported his testimony that he believed the Lopezes were Elizabeth's custodians, there was still a significant amount of evidence the jury could have used to find intent to interfere with child custody. Diez knew several crucial facts: the Lopezes left Elizabeth in the care of her biological mother, Eunice; all *legal* means of getting Elizabeth back had been exhausted; authorities representing both Venezuela and Florida refused to act on the Lopezes' claims; and the Lopezes asked Diez to "scare" Eunice into giving Elizabeth back. Clearly, even with the custody document, a jury could have been convinced that Diez's decision to "spook" Eunice into giving up custody showed the requisite intent. The likelihood of a different outcome is not substantial. Accordingly, Diez has failed to overcome the deference afforded to state court decisions.[4]

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[2] Interference with child custody occurs when someone "without lawful authority, *knowingly* or *recklessly* takes or entices . . . any minor . . . from the custody of the minor's . . . parent, his or her guardian . . . or any other lawful custodian commits the offense of interference with custody and commits a felony of the third degree . . . ." Fla. Sta. § 787.03(1) (2004) (emphasis added).

[3] Count 3, Diez's armed burglary charge, included "the intent to commit the offense of Kidnapping and/or Interference with Custody" as an element of the offense.

[4] For the same reasons, the district court did not abuse its discretion in denying Diez's request for

IV.

Diez also alleges that the State committed a *Brady* violation by withholding the Venezuelan custody documents from him. A *Brady* claim has three parts: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the defendant incurred prejudice. *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999). The prejudice prong is met when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565 (1995). The crucial question on that point is "whether the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." *Allen v. Sec'y, Fla. Dep't of Corrs.*, 611 F.3d 740, 746 (11th Cir. 2010). The prejudice showing for a *Strickland* claim is the same as required for a *Brady* claim. *Brown v. Head*, 272 F.3d 1308, 1316 (11th Cir. 2001).

Here, as previously discussed, Diez cannot demonstrate prejudice. Even if the State possessed the documents and had disclosed them, the jury would still have convicted him of the four crimes that it did. Because the prejudice analysis is

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an evidentiary hearing on this claim. Diez cannot show that failure to obtain the documents prejudiced him, and thus any evidence to explain counsel's efforts to obtain them would not have assisted the resolution of his claim. *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir. 2002).

the same for *Brady* as it is for *Strickland*, Diez cannot show a *Brady* violation even if he proved that the state knowingly withheld the documents from him. Thus, Diez is not entitled to relief or an evidentiary hearing on his *Brady* claim. Accordingly, we affirm.

AFFIRMED.

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No: 13-61149-CIV-GAYLES/WHITE

MARTIN DIEZ,

Petitioner,

vs.

MICHAEL D. CREWS,

Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE came before the Court on Martin Diez's ("Petitioner") Petition for Writ of Habeas Corpus [ECF. No. 1]. The Court referred the matter to Magistrate Judge White for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). On September 9, 2014, following an evidentiary hearing, Judge White issued his Report recommending the Court deny the Petition [ECF No. 51]. Petitioner has objected to the Report [ECF No. 55]. The Court has reviewed the Petition, the Report, the Objections, and the record and is otherwise fully advised. Based thereon, the Court denies the Petition as detailed below.

I. BACKGROUND

A. Factual Background[1]

In June 2004, Petitioner met with Edgar and Alicia Lopez (the "Lopezes") to discuss their desire to bring their granddaughter, Elizabeth, back to Venezuela from the United States. The Lopezes told Petitioner that (1) they had raised Elizabeth from her birth in Venezuela in 1999 until 2003, when they returned her to her mother, Eunice, in the United States; (2) they were

[1] The Court adopts Judge White's comprehensive recitation of the facts adduced at trial and the procedural background and only highlights those facts relevant to its analysis.

concerned for Elizabeth's safety; (3) they had legal custody of Elizabeth; and (4) they were having difficulty getting Elizabeth back from her mother. Petitioner claims the Lopezes showed him Venezuelan custody documents indicating that they had lawful custody of Elizabeth.

Petitioner decided to take matters into his own hands to help the Lopezes. Petitioner went to Eunice's apartment dressed as a police officer. He presented a fake search warrant, forcefully entered the apartment, and led Eunice from room to room looking for Elizabeth's passport at gunpoint. Petitioner then took Elizabeth from Eunice and brought her to the Lopezes' apartment. The next day, Petitioner surrendered himself to the Federal Bureau of Investigations.

B. State Court Proceedings

Petitioner was charged with armed kidnapping of a child under the age of thirteen years with intent to commit interference with child custody ("Count I"), armed kidnapping with intent to commit interference with child custody ("Count II"), armed burglary ("Count III"), impersonation of a police officer ("Count IV"), and interfering with child custody ("Count V"). The trial court granted Petitioner's motion for judgment of acquittal as to Count IV, and the jury found him guilty on the four remaining counts. Petitioner was sentenced to three concurrent terms of twenty years for Counts I-III and was sentenced to a concurrent term of four years for Count V. Though Petitioner's counsel asserted Petitioner's reliance on the custody documents as a defense at trial, he failed to acquire the custody documents until several weeks after Petitioner had been found guilty.

Petitioner appealed, but his convictions and sentence were affirmed by the state appellate court. Petitioner filed several motions for extensions of time to file a motion for rehearing and/or to stay issuance of the mandate, all of which were also denied by the state appellate court.

On October 27, 2008, Petitioner filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Petitioner filed numerous piecemeal amendments to his Rule 3.850 motion. On October 21, 2009, the trial court entered an order denying the 3.850 motion, stating it had reviewed Petitioner's original 3.850 motion, the state's response, Petitioner's reply to response, and the trial transcripts. The trial court made no mention of Petitioner's numerous amendments.

C. Federal Habeas Petition

Petitioner timely filed the instant petition on May 7, 2013, raising twenty-eight grounds. Grounds one through nineteen all pertain to ineffective assistance of counsel; ground twenty asserts newly discovered evidence would exculpate Petitioner; grounds twenty-one, twenty-two, twenty-four, and twenty-five assert various grievances against the prosecution of Petitioner's state proceedings; ground twenty-three asserts a Miranda violation; and grounds twenty-six through twenty-eight assert various grievances against the Florida appellate court.

On July 8, 2014, Judge White held an evidentiary hearing regarding Petitioner's claim that his counsel failed to convey a plea deal that had been offered by the prosecution.[2] On September 2, 2014, Judge White issued his Report recommending the Court deny the Petition and not grant a certificate of appealability. Petitioner timely filed his objections to the Report, arguing that grounds two and six have merit and that the certificate of appealability should be issued. Petitioner's objections do not address the remaining twenty-six grounds raised in his Petition.

[2] Petitioner also sought an evidentiary hearing to explain why his counsels' failure to obtain the Venezuelan custody documents resulted in ineffective assistance of counsel.

II. STANDARD OF REVIEW FOR WRIT OF HABEAS CORPUS

The instant Petition was filed after 1996; therefore, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs. AEDPA allows a federal court to grant habeas relief from a state court judgment that was adjudicated on the merits only if (1) the state court's decision 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 an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). Indeed, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. "Under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Wetzel v. Lambert*, 132 S. Ct. 1195, 1198 (2012) (*citing Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

A petitioner seeking a federal writ of habeas corpus carries the burden of proof. *Woddford v. Visciotti*, 537 U.S. 19, 24-25 (2002). State court decisions are granted deference, even when the state court adjudicates a petitioner's claim summarily without an accompanying statement of reasons. *Harrington*, 562 U.S. at 98. Pursuant to § 2254(e)(1), Petitioner has "the burden of rebutting the presumption of correctness [of a determination of a factual issue made by the state court] by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. DISCUSSION

A. Procedural Bar

In most instances, an applicant seeking a writ of habeas corpus must have exhausted all available state remedies. § 2254(b)(1)(A). Respondent argues that Petitioner has not fully exhausted many of his claims. While the Court should generally resolve procedural issues first, in certain circumstances judicial economy allows for discussing the merits of a case if it would be easier to resolve the merits as opposed to the complicated procedural bar issues. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (allowing non-procedural question to be answered before more complicated procedural bar question); *cf.* 28 U.S.C. § 2254(b)(2) (allowing for dismissal of habeas petition on merits, notwithstanding the failure of applicant to exhaust remedies available in state court). Because the procedural bar issues in this case are complex, the Court elects to first review the merits of the Petition.

B. Objections to the Report

A district court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). The Court reviews *de novo* the part of the Report to which a petitioner makes specific objections. *See United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report to which no objection is made are reviewed for clear error only. *Macort v. Prem, Inc.*, 208 Fed. Appx. 781, 784 (11th Cir. 2006). Petitioner objects to the Report's findings and conclusions as to grounds two and six, both of which relate to the alleged ineffective assistance of his counsel. Accordingly, these objections are afforded *de novo* review.

C. Ineffective Assistance of Counsel

To prevail on a claim for ineffective assistance of counsel, Petitioner must establish: (1) counsels' performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington*, 562 U.S. at 105. There is a strong presumption that counsel acted effectively. *Strickland*, 466 U.S. at 689. To satisfy the prejudice prong, Petitioner must show that there is a reasonable probability that "but for counsels' unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (*citing Richter*, 562 U.S. at 112). The burden on Petitioner is even greater when combined with the layer of deference § 2254 provides. "[T]he result is double deference and the question becomes whether 'there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.'" *Johnson v. Sec'y, DOC*, 643 F.3d 907, 911 (11th Cir. 2011) (quoting *Harrington*, 562 U.S. at 105). "Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Id.*

Counsel's tactical and strategic choices cannot support a collateral claim of ineffective assistance. *United States v. Costa*, 691 F.2d 1358, 1364 (11th Cir. 1982). Strategic assistance from counsel is deemed ineffective only "if it was so patently unreasonable that no attorney

would have chosen it," *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983), *cert. denied*, 464 U.S. 1063 (1984), or if Petitioner can demonstrate a "reasonable probability that the verdict [otherwise] would have been different . . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

1. Counsels' Failure to Obtain Venezuelan Custody Documents (Ground 2)

In his objections, Petitioner argues that (1) he was prejudiced by counsels' failure to obtain the Venezuelan custody documents because these documents would have bolstered his credibility and (2) Judge White's denial of an evidentiary hearing on the custody documents prohibited Petitioner from presenting testimony to support his claim on this ground. Petitioner argues that an objectively reasonable attorney would have obtained the documents in light of his defense that they induced Petitioner into thinking he was returning Elizabeth to her rightful custodian. Additionally, his counsel relied on the documents in opening and closing statements. When they were not produced at trial, the prosecution called the custody documents, "a figment of [Petitioner's] imagination" and used the failure to exhibit them to call Petitioner's credibility into question.

The Court finds some merit to Petitioner's claim that an objectively reasonable attorney would have obtained the custody documents. Counts I and II both included the intent to commit interference with child custody as an element of the offense. Interference with child custody occurs when someone "without lawful authority, *knowingly* or *recklessly* takes or entices ... any minor or any incompetent person from the custody of the minor's or incompetent person's parent, [or] his or her guardian . . . ." Fla. Sta. § 787.03(1) (2004) (emphasis added). Counsel could have used the documents to argue that Petitioner did not have an intent to interfere with child custody because he thought he was returning Elizabeth to her rightful custodian. The

custody documents might have bolstered Petitioner's credibility and helped his contention that he did not act knowingly. There is nothing in the record to suggest that counsel chose, as part of their strategy, to ignore or not obtain the custody documents. However, due to the double deference afforded to state court decisions, the Court does not find that the state court's resolution of the issue was unreasonable.

The Court also finds that Petitioner has not established that he was prejudiced by counsels' failure to obtain the custody documents because his sentence would have been unaffected. Even if Petitioner had been able to use the documents to negate the intent required for Counts I and II, his conviction on Count III would have resulted in the same twenty year sentence. [3] Petitioner was therefore not prejudiced because his ultimate sentence would not have been altered. *Jones v. White*, 992 F.2d 1548, 1557 (11th Cir. 1993) (defendant could not show prejudice by counsel's advice to plead guilty because he could not show that his sentence would have been any different if convicted at trial). The Petitioner also cannot show prejudice because he did not have lawful authority to impersonate a law enforcement officer and take the child at gunpoint under any circumstance. As a result, it does not matter whether he had the custody documents at trial because they would not support a valid defense. Finally, even if Petitioner had been able to prove some prejudice from his counsels' actions, he has still failed to overcome the deference afforded to state court decisions by § 2254.

Finally, the Magistrate's denial of an evidentiary hearing on this issue was warranted under § 2254(e)(2) because the record, particularly as to the prejudice prong, precludes habeas relief for the reasons listed above. 28 U.S.C. § 2254(e)(2); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

[3] For Counts I, II, and III, the Petitioner was sentenced to concurrent twenty-year sentences.

Accordingly, Petitioner's claim of ineffective assistance of counsel based on trial counsel's failure to acquire the custody documents is denied.

2. Counsels' Failure to Adequately Convey Plea Offer (Ground 6)

Petitioner also argues that his counsel failed to adequately convey a ten-year plea offer. Judge White held an evidentiary hearing on this issue.

The law is clear that defense counsel has an affirmative duty under the Sixth Amendment of the United States Constitution to communicate formal offers from the prosecution. U.S. Const. amend. VI; *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). Allowing an offer to expire without advising the defendant or allowing him to consider the offer is ineffective assistance of counsel. *Frye*, 132 S. Ct. at 1408. To assert ineffective assistance of counsel for allowing a plea offer to lapse, the defendant must prove by a reasonable probability that (1) the defendant would have accepted the offer; (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it; and (3) the end result would have been more favorable by reason of a plea to a lesser charge or sentence of less prison time. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012) (defendant required to prove all three criteria to claim ineffective assistance of counsel after counsel persuaded defendant to reject plea deal and go to trial, causing plea deal to lapse).

Petitioner argues that, despite Judge White's factual findings to the contrary, his counsel failed to convey a ten-year plea offer. In addition, Petitioner argues that his proclamation of innocence cannot be used to conclude that he would not have accepted a plea offer.

Petitioner argues that while there is no direct proof that the government conveyed the ten-year plea offer, it can be deduced by examining the record and testimony of the evidentiary hearing. However, Stacey Honowitz, the Assistant State Attorney, had no record of the alleged

offer. [ECF 54 at 108]. Honowitz noted that it is her practice to record such offers. *Id.* Moreover, neither of the Petitioner's attorneys had any record of a ten-year plea offer and there is no evidence before the Court, other than Petitioner's statements, that a ten-year plea deal was offered. *Id.* at 51, 91. Mr. Contini, one of Petitioner's defense attorneys, was shocked when "everybody was talking ten years but then it jumped to twenty years." *Id.* at 94. But this same attorney later said that "any deal, good or bad, was told to Diez" and he had no recollection of any ten-year plea deal ever being offered. *Id.* at 96, 100. Additionally, Mr. Gelety, Petitioner's other defense attorney, had no note of any ten-year plea deal and Mr. Gelety "memorialized everything." *Id.* 50-52, 57.

Petitioner further argues that a letter sent from Mr. Gelety to Ms. Honowitz that contained possible sentencing guidelines, all well below ten years, further strengthens his argument that a ten-year plea deal was offered. *Id.* at 49, 92-93. However, this is unpersuasive and merely shows that Petitioner's attorneys were attempting to get the best possible outcome for their client.

While not dispositive, the Court does disagree with Judge White's finding of no prejudice because Petitioner maintained his innocence and would therefore not have accepted a plea deal. "Repeated declarations of innocence do not prove . . . that [Petitioner] would not have accepted a guilty plea." *Lalani v. United States*, 315 Fed. Appx. 858, 861 (11th Cir. 2009) (internal quotation marks omitted) (*citing Griffin v. United States*, 330 F.3d 733, 738 (6th Cir. 2003)); *see also Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999) ("insistence on his innocence is a factor relevant to any conclusion as to . . . [whether] he would have pled guilty, it is not dispositive . . . had [defendant] been properly informed . . . [defendant] might well have abandoned his claim of innocence"). Accordingly, Petitioner, despite maintaining his innocence,

might have pleaded guilty if given a plea offer that he found acceptable. However, based on the record before it, this Court finds there is insufficient evidence to conclude that a ten-year plea offer was ever conveyed by the State to Petitioner. Without such evidence, the Court cannot conclude that Petitioner would have accepted it.[4] Accordingly, the Petition is denied on these grounds.

D. Additional Claims

The Petitioner raised many other grounds, all of which Judge White found without merit. Petitioner did not object on these grounds. Where there are no objections, the district court need only review the Report for "clear error." *Macort*, 208 Fed. Appx. at 784. The Court finds no clear error with respect to any of these remaining grounds in the Report. Therefore, Judge White's recommendations are adopted for all other grounds and the Petition is denied.

E. Certificate of Appealability

A certificate of appealability may issue only if Petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). It must be shown "that reasonable jurists could debate whether[,]" or agree that, "the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 473 U.S. at 484 (*citing Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)) (internal quotation marks omitted). The Court finds that Petitioner has not made the requisite showing for a certificate of appealability.

[4] Furthermore, even if this Court found that there was a plea offer that was not conveyed and prejudice to the Petitioner, the Court cannot find that, under double deference guidelines, that the state court's findings were unreasonable.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that Judge White's Report and Recommendation [ECF No. 51] is **AFFIRMED AND ADOPTED**. Petitioner's Petition for Writ of Habeas Corpus [ECF No. 1] is **DENIED.** A certificate of appealability is **DENIED**. It is further

ORDERED AND ADJUDGED that this case is **CLOSED** and all pending motions are **DENIED as MOOT.**

DONE AND ORDERED in Chambers at Miami, Florida this 26th day of August, 2016.

Honorable Darrin P. Gayles
United States District Judge

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-61149-Civ GAYLES
MAGISTRATE JUDGE P. A. WHITE

MARTIN DIEZ,

Petitioner,

v.

MICHAE D. CREWS,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE FOLLOWING
EVIDENTIARY HEARING

I. Introduction

Martin Diez, a state prisoner, currently confined at Martin Correctional Institution, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, challenging the constitutionality of his convictions for armed kidnapping of a child under the age of 13 years with intent to commit interference with child custody, armed kidnapping of the minor's mother, burglary with an assault or while armed, and interfering with child custody, entered following a jury verdict in Broward County Circuit Court, case no. 04-10770CF10A.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

For its consideration of the habeas petition (DE#1) with supporting memorandum of law (DE#12), the Court has the respondent's operative, second supplement response (DE#29) to this court's second supplemental order to show cause with supporting

Appendices (DE#s16,29),[1] containing copies of relevant state court records and transcripts, the petitioner's replies (DE#23,38), and the parties' status reports with attachments (DE#s44-46).

II. Claims

Construing the arguments liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 419 (1972), the petitioner raises the following 28 grounds for relief:

1. He was denied effective assistance of trial counsel, where his lawyer failed to become aware of the related international and federal law, including the implications and subject matter jurisdiction issues over the offenses, as well as, possible defenses. (DE#1:6; DE#12:7).

2. He was denied effective assistance of counsel, where his lawyer failed to acquire from the Venezuelan court, a copy of the Venezuelan child custody documents in order to impeach the testimony of the minor's mother at trial. (DE#1:8; DE#12:11).

3. He was denied effective assistance of counsel, where his lawyer failed to investigate the only available defense witness, the victim's husband, Jorge Sotomeyer. (DE#1:9; DE#12:12).

4. He was denied effective assistance of counsel, where his lawyer failed to request a Richardson[2] hearing on the state's discovery violation regarding custody documents from Venezuela. (DE#1:11; DE#12:14).

5. He was denied effective assistance of counsel,

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[1]The respondent was ordered to refile the original appendix filed in this matter along with its second supplemental response to this court's order to show cause, but did not do so. Consequently, the undersigned finds it necessary to refer not only to the record contained in DE#16, but also to the supplemental record as contained in DE#29.

[2]Richardson v. State, 246 So.2d 771 (Fla. 1971).

where his lawyer prematurely filed a demand for speedy trial when the defense was not prepared to proceed to trial. (DE#1:17; DE#12:15).

6. He was denied effective assistance of counsel, where his lawyer failed to adequately convey a 10-year plea offer, and for coercing petitioner to reject a 3-year plea, as memorialized in an April 18, 2005 letter to the prosecutor. (DE#1:17; DE#12:16).

7. He was denied effective assistance of counsel, where his lawyer failed to present a voluntary intoxication defense. (DE#1:18; DE#12:17).

8. He was denied effective assistance of counsel, where his lawyer failed to present a temporary insanity defenses based on petitioner's history of mental illness. (DE#1:18; DE#12:18).

9. He was denied effective assistance of counsel, where his lawyer failed to object to the jury instructions and failed to request any special defense instructions. (DE#1:18; DE#12:18).

10. He was denied effective assistance of counsel, where his lawyer failed to present a Brady violation. (DE#1:19; DE#12:19).

11. He was denied effective assistance of counsel, where his lawyer failed to present a Giglio violation. (DE#1:19; DE#12:20).

12. He was denied effective assistance of counsel, where his lawyer failed to file a motion to suppress statements based on a violation of petitioner's Miranda rights, where the statements were coerced and/or otherwise not knowing and voluntary. (DE#1:20; DE#12:21).

13. He was denied effective assistance of counsel, where his lawyer failed to argue that a taser gun is not a firearm. (DE#1:20; DE#12:22).

14. He was denied effective assistance of counsel, where his lawyer failed to raise a double jeopardy violation. (DE#1:20; DE#12:22).

15. He was denied effective assistance of counsel, where his lawyer failed to impeach state witness, Eunice Lopez, with her deposition testimony. (DE#1:21; DE#12:23).

16. He was denied effective assistance of counsel, where his lawyer failed to file a motion to change venue. (DE#1:21; DE#12:24).

17. He was denied effective assistance of counsel, where his lawyer failed to file a motion to suppress a DVD of his post-arrest statement, which was obtained in violation of petitioner's Fifth Amendment rights. (DE#1:21; DE#12:24).

18. He was denied effective assistance of counsel, where his lawyer failed to inform the jury regarding petitioner's substantial assistance in a high profile murder case. (DE#1:22; DE#12:25).

19. He was denied effective assistance of counsel, where his lawyer conceded petitioner's guilt at trial. (DE#1:22; DE#12:26).

20. Newly discovered evidence of scientific value, based on recent studies, reports, and articles, unavailable at the time of petitioner's trial, regarding the serious side effects associated with the medications petitioner was taking warrants vacatur of his convictions. (DE#1:23; DE#12:26).

21. The prosecution committed a Brady violation by withholding the Venezuelan custody documents. (DE#1:23; DE#12:27).

22. The prosecution knowingly committed a Giglio violation by knowingly presenting false testimony at trial. (DE#1:23; DE#12:28).

23. Petitioner's Miranda rights were violated and his consent was not knowing and voluntary because they were the product of police brutality and coercion. (DE#1:24; DE#12:29).

24. The prosecution violated petitioner's right to a fair trial by threatening defense witnesses. (DE#1:24; DE#12:30).

25. The prosecution ignored issues regarding federal subject matter jurisdiction by unconstitutionally applying state law, thereby denying petitioner due process of law. (DE#1:25; DE#12:30).

26. The appellate court erred in determining that kidnaping and interference with child custody were not lesser included offenses, and therefore, his convictions for both violate petitioner's double jeopardy rights. (DE#1:25; DE#12:32).

27. The appellate court erred in affirming the trial court's denial of petitioner's motion for judgment of acquittal. (DE#1:26; DE#12:32).

28. The appellate court erred in determining that there was no prosecutorial misconduct at trial, contrary to the trial transcripts. (DE#1:26; DE#12:32).

III. Procedural History

Petitioner was charged by Amended Information with armed kidnapping of a child under the age of 13 years, with intent to commit interference with child custody (Count 1), armed kidnapping with intent to commit interference with child custody, (Count 2), armed burglary (Count 3), impersonating a police officer (Count 4), and interfering with child custody (Count 5). (DE#16:Ex.A). After the parties engaged in motion practice and discovery, the petitioner proceeded to trial, and at the close of all the evidence, the court granted petitioner's motion for judgment of acquittal as to Count 4, but the petitioner was found guilty of all remaining counts, following a jury verdict. (DE#16:Ex.B; DE#29:Ex.A-State Court Trial Docket). He was adjudicated guilty and sentenced to three concurrent terms of 20 years in prison as to Counts 1, 2, and 3, with a 10-year minimum mandatory term of imprisonment, and a concurrent 4-year term of imprisonment as to Count 5, to be followed by a total of 10 years probation. (DE#16:Exs.C-D).

Petitioner prosecuted a direct appeal, raising four claims of trial court error in: (1) denying judgments of acquittal as to Counts 1 and 2; (2) instructing the jury on voluntary intoxication over defense objection; (3) failing to grant the defense's requested instruction that interference with child custody is a lesser included offense of kidnapping as to Counts 1 and 3; and, (4) denying petitioner's motion for new trial based on the prosecutor's remarks. (DE#16:Ex.E-Petitioner's Initial Brief on Appeal). On **January 2, 2008**, the Fourth District Court of Appeal affirmed the convictions and sentenced in a published opinion. Diez v. State, 970 So.2d 931 (Fla. 4 DCA 2008); (DE#16:Ex.F). No rehearing motion was timely filed, and the mandate issued on January 18, 2008. (DE#16:Ex.F). From January 24, 2008, just six days after the mandate issued, the petitioner filed several motions seeking an extension of time to file rehearing and/or to stay issuance of the mandate, all of which were denied by the appellate court, with the latest order entered on the docket on **May 12, 2011**.[3]

Petitioner did not seek discretionary review with the Florida Supreme Court. Therefore, the time for doing so expired thirty days after the appellate court affirmed petitioner's original judgment, or no later than **February 1, 2008**.[4] Since he did not seek discretionary review to the Florida Supreme Court, he is not entitled to an additional ninety days to file a petition for a writ of certiorari in the United States Supreme Court. Gonzalez v.

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[3]The dates are taken information contained on the on-line direct appeal docket. Thus, the undersigned takes judicial notice of this on-line docket available at the database maintained by the Florida Fourth District Court of Appeal, for direct appeal case no. 4D06-2488, located at www.4dca.org. See Fed.R.Evid. 201.

[4]Pursuant to Fla.R.App.P. 9.120(b), a motion to invoke discretionary review must be filed within 30 days of rendition of the order to be reviewed.

Thaler, ___ U.S. ___, 132 S.Ct. 641, 646 (2012).[5] Therefore, at the earliest, his convictions are final on **February 1, 2008.** However, assuming, without deciding, that petitioner was entitled to seek review to the U.S. Supreme Court, then alternatively, his convictions became final at the latest on **April 1, 2008,** when the 90-day period for seeking discretionary review with the United States Supreme Court expired following affirmance of his convictions on direct appeal.[6] For purposes of this Report, the

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[5]In applying the Supreme Court's Gonzalez opinion to this case, the petitioner here is not entitled to the 90-day period for seeking certiorari review with the United States Supreme Court, because after his judgment was affirmed on direct appeal, petitioner did not attempt to obtain discretionary review by Florida's state court of last resort-the Florida Supreme Court, nor did he seek rehearing with the appellate court. See Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 653-54, 181 L.Ed.2d 619 (2012)(holding that conviction becomes final upon expiration of time for seeking direct review); Jimenez v. Quarterman, 555 U.S. 113, 118-21, 129 S.Ct. 681, 685-86, 172 L.Ed.2d 475 (2009)(explaining the rules for calculating the one-year period under §2244(d)(1)(A)). See also Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003)(holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Chavers v. Secretary, Florida Dept. of Corrections, 468 F.3d 1273 (11th Cir. 2006)(holding that one-year statute of limitations established by AEDPA began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after mandate was issued by that court). In other words, where a state prisoner, who pursues a direct appeal, but does not pursue discretionary review in the state's highest court after the intermediate appellate court affirms his conviction, the conviction becomes final when time for seeking such discretionary review in the state's highest court expires. Gonzalez, __ U.S. ___, 132 S.Ct. 641 (2012).

[6]In Gonzalez v. Thaler, ___ U.S. ___, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012), the Supreme Court resolved a split among the federal circuits, holding that where a state prisoner does not seek review in a state's highest court, the judgment becomes "final" for purposes of §2244(d)(1)(A) on the date that the time for seeking such review expires. The Court rejected the argument that, even where the petitioner does not seek review in the state's highest court, the limitations period does not commence running until the time expires for filing a petition for writ of certiorari. The Court explained that it can review only judgments of a "state court of last resort" or of a lower state court if the "state court of last resort" has denied discretionary review. Id. (citing Supreme Court Rule 13.1 and 28 U.S.C.A. §1257(a)(providing "[F]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under,

undersigned has utilized this later date.

The federal one-year limitations period ran untolled for **209 days**, from the time petitioner's conviction became final on **April 1, 2008** until **October 27, 2008**,[7] when petitioner returned to the trial court filing a motion for postconviction relief, pursuant to Fla.R.Cr.P. 3.850, in narrative form, which was difficult to decipher, and which did not clearly identify the claims being raised.[8] (DE#16:Ex.G). On July 26, 2009,[9] petitioner filed a notice of supplemental legal authority in support of his Rule 3.850 motion. (DE#29:Ex.B). On July 27, 2009, the state filed its response thereto. (DE#16:Ex.G:State's Response; DE#29:Ex.A:7-Trial Court Docket). In fact, from the record, it appears that petitioner sought leave to file and then filed numerous piecemeal amendments to the Rule 3.850 starting on August 3, 2009 through September 2, 2009. (DE#29:Exs.B-Q). On October 21, 2009, the trial court entered an order indicating it had only reviewed the petitioner's motion, the state's response, the petitioner's reply thereto, and the trial transcripts, but makes no mention of any of the numerous addendums or supplements in its brief order. (DE#16:Ex.I). In fact, the trial court only addressed one claim challenging counsel's effectiveness

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the United States.").

[7]The Rule 3.850 motion does not bear the institutional stamp showing when it was provided to prison authorities for mailing. (DE#16:Ex.G). The certificate of service shows it was mailed, at the earliest on October 27, 2008. (DE#16:Ex.G:39).

[8]Prior thereto, it appears from the state trial court's on-line docket that petitioner filed several Rule 3.800 motions to modify or correct sentence pursuant to Fla.R.Cr.P. 3.800, which were denied by the trial court. Rehearing was finally denied on March 13, 2008, and again on March 31, 2008. (DE#29:Ex.A:7).

[9]The notice did not reach the court, and was not docketed until July 29th, 2009, two days after the state filed its response. However, for purposes of filing, the notice is deemed filed the date it handed to prison authorities for mailing.

for failing to seek the Venezuelan custody papers. (DE#16:Ex.I). It denied the sole claim identified as being raised in the Rule 3.850 motion. (Id.). Petitioner sought rehearing, arguing that the court had failed to consider the claims raised in his numerous amendments. (DE#16:Ex.G; DE#29:R). Rehearing was denied by order entered on October 7, 2009. (DE#16:Ex.S). Petitioner appealed, and on December 26, 2012, the Fourth District Court of Appeal *per curiam* affirmed the denial of the Rule 3.850 motion in a decision without written opinion. Diez v. State, 107 So.3d 422 (Fla. 4 DCA 2012)(table); (DE#16:Ex.K). The mandate issued on March 1, 2013. (DE#16:Ex.L). Petitioner's motion for rehearing and to recall the mandate were denied by court order entered on April 11, 2013.[10]

Meanwhile, during the pendency of the above Rule 3.850 proceedings, petitioner next filed a state petition for writ of habeas corpus raising multiple claims challenging counsel's effectiveness on direct appeal. (DE#16:Ex.M). On June 14, 2012, the Fourth District Court of Appeal entered an order denying the petition on the merits. (DE#16:Ex.N). Petitioner's motion for review and/or for reconsideration were denied on July 24, 2012. (Id.).

Also filed by petitioner was a motion to mitigate his sentence, which was dismissed by the trial court by order entered February 15, 2012. (DE#16:Exs.O-P). Petitioner appealed, and the appeal was dismissed by the appellate court by order entered on December 17, 2012. (DE#16:Ex.Q).

Again, while the Rule 3.850 and the above proceedings were

[10]The undersigned takes judicial notice of the on-line docket information available at the database maintained by the Florida Fourth District Court of Appeal, for case no. 4D09-4547, located at www.4dca.org. See Fed.R.Evid. 201.

still pending, petitioner next filed a motion to correct illegal sentence, which was denied by the trial court by order entered on December 14, 2012. (DE#16:Exs.R-S). That denial was subsequently *per curiam* affirmed in a decision without written opinion, Diez v. State, 122 So.3d 378 (Fla. 4 DCA 2013)(table), with the mandate issuing on October 18, 2013.[11]

Before the foregoing appellate proceedings concluded, petitioner then came to this court on May 7, 2013, filing his petition for writ of habeas corpus.[12] (DE#1). On June 18, 2013, the petitioner next filed a supporting memorandum of law, further addressing the claims raised in the initial petition. (DE#12). Consequently, it relates back to the filing of the initial §2254 petition. See Davenport v. United States, 217 F.3d 1341 (11th Cir. 2000). In all, from the record provided by the respondent, it appears that **209 days** expired during which no state postconviction proceedings were pending so as to toll the federal limitations period.

IV. Threshold Issues

A. Statute of Limitations

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[11]The undersigned takes judicial notice of the on-line docket information available at the database maintained by the Florida Fourth District Court of Appeal, for case no. 4D13-1693, located at www.4dca.org. See Fed.R.Evid. 201.

At the time the respondent filed it's response to this court's order to show cause, the appeal from the denial of the Rule 3.800 motion was pending, however, it has since concluded, therefore this federal petition is ripe for review.

[12]See: Adams v. U.S., 173 F.3d 1339 (11 Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing). The undersigned has utilized the date on the petitioner's supporting memorandum (DE#1:Memo:48), filed simultaneously with the initial petition, which was unexecuted and undated (DE#1:24).

In its final response (DE#29) to this court's second supplemental order to show cause, the respondent rightfully does not challenge the timeliness of the initial habeas petition. See 28 U.S.C. §2244(d)(1)-(2). The petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996). Consequently, post-AEDPA law governs this action. Abdul-Kabir v. Quarterman, 550 U.S. 233, 127 S.Ct. 1654, 1664, 167 L.Ed.2d 585 (2007); Penry v. Johnson, 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); Davis v. Jones, 506 F.3d 1325, 1331, n.9 (11 Cir. 2007). As noted previously, less than one year of the federal limitations period ran during which no state court proceedings were pending before petitioner filed his initial habeas petition. Thus, the petition, filed within a year from the time the petitioner's convictions became final, is timely. See Artuz v. Bennett, 531 U.S. 4 (2000) (pendency of properly-filed state postconviction proceedings tolls the AEDPA limitations period).

B. Exhaustion and Procedural Bar

The respondent argues that many of the claims raised herein are unexhausted and prospectively procedurally barred from review in this federal habeas corpus proceeding. (DE#29). It is axiomatic that issues raised in a federal habeas corpus petition must have been fairly presented to the state courts and thereby exhausted prior to their consideration on the merits. Anderson v. Harless, 459 U.S. 4 (1982); Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983). Exhaustion requires that a claim be pursued in the state courts through the appellate process. Leonard v. Wainwright, 601 F.2d 807 (5th Cir. 1979). Both the factual substance of a claim and the federal constitutional issue itself must have been expressly presented to the state courts to achieve exhaustion for purposes of

federal habeas corpus review. Baldwin v. Reese, 541 U.S. 27 (2004); Gray v. Netherlands, 518 U.S. 152 (1996); Duncan v. Henry, 513 U.S. 364 (1995); Picard v. Connor, 404 U.S. 270 (1971). Exhaustion also requires review by the state appellate and post-conviction courts. See Mason v. Allen, 605 F.3d 1114 (11th Cir. 2010), Herring v. Sec'y Dep't of Corr's, 397 F.3d 1338 (11th Cir. 2005).

Specifically, respondent claims many of the claims raised in the Rule 3.850 proceeding were abandoned because petitioner did not challenge their denial on appeal therefrom. Careful review of the state court record shows that in petitioner's Rule 3.850 motion and supplements, he raised all claims, except for 23, 25, 26, 27, and 28. Petitioner did not receive an evidentiary hearing on any of his claims. In such cases, a Rule 3.850 petitioner is not required to file an appellate brief in order to receive appellate review of his claims. See Fla.R.App.P. 9.141(b)(2).

Further, the Eleventh Circuit has determined, albeit in an unpublished opinion, that when a Florida defendant does not receive an evidentiary hearing in his Rule 3.850 proceeding and appeals the circuit court's decision denying his motion, he satisfies the federal exhaustion requirement as to all claims raised in his Rule 3.850 motion, even if he files a brief and fails to address each issue in his appellate brief. See Cortes v. Gladish, 216 Fed. Appx. 897, 899-900, 2007 WL 412484, at *2 (11th Cir. 2007). The Florida case upon which the Eleventh Circuit relied, Webb v. State, 757 So.2d 608 (Fla. 5th DCA 2000), has since been receded from by the Florida courts. See Walton v. State, 58 So.3d 887, 888 (Fla. 2d DCA 2011); Vars v. State, 50 So.3d 1202, 1203 (Fla. 4th DCA 2010); Ward v. State, 19 So.3d 1060, 1061 (Fla. 5th DCA 2009); Watson v. State, 975 So.2d 572, 573 (Fla. 1st DCA 2008). However, it cannot be said, that at the time petitioner filed his post-conviction appeal,

October 2009, the state of the law was such that he was required to raise and fully address all issues in his appellate brief to obtain appellate review of the federal claims raised in the state Rule 3.850 proceeding and summarily denied by the trial court. Regardless, respondent acknowledges that the arguments posited here, although set forth more clearly than in the state forum, many, if not all, have been presented in the Rule 3.850 proceeding or on direct appeal.

Although this Court acknowledges that the exhaustion and procedural bar issues raised by the respondent should ordinarily be resolved first, judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated. See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best."). As will be discussed in more detail below, since the petitioner cannot prevail on the merits of his claims, there is no need to belabor the procedural exhaustion and bar issue, and therefore all claims will be addressed on the merits.[13]

Further, the state now recognizes that petitioner filed

[13]Even if certain claims are technically unexhausted, this Court will exercise the discretion now afforded by Section 2254, as amended by the AEDPA, which permits a federal court to deny on the merits a habeas corpus application containing unexhausted claims. See Johnson v. Scully, 967 F.Supp. 113 (S.D.N.Y. 1996); Walker v. Miller, 959 F.Supp. 638 (S.D. N.Y. 1997; Duarte v. Miller, 947 F.Supp. 146 (D.N.J. 1996).

numerous supplements and amendments prior to the court's order on his Rule 3.850, and prior to the 2013 amendment to Fla.R.Cr.P. 3.850 requiring petitioners to seek leave before filing amendments. See Brooks v. State, 2013 WL 6081760 (Fla. 4 DCA 2013); Jackson v. State, 2013 WL 5925081 (Fla. 4 DCA 2013). Thus, it appears as if the petitioner did, in fact, seek to exhaust his claims in the Rule 3.850 proceeding.

V. Facts Adduced at Trial

The facts adduced at trial, as succinctly set forth by the Third District Court of Appeal, in its published decision affirming petitioner's convictions, is as follows:

> Diez committed the offenses in an effort to forcefully remove E.L., age five, from her mother's (Eunice's) care in Broward County and take E.L. to her grandparents, who are from another country, but were temporarily staying in South Florida.
>
> Diez arrived at Eunice's apartment, showed her a fake badge, a search warrant, and a silver gun with a black handle, told Eunice he was a police officer, and asked her to open the door. As Eunice opened the door, Diez pushed her against the wall, then to the floor, handcuffing her from behind. E.L. came out crying. Grabbing [her, he] handcuffed Eunice by the arms and pointing the gun at her, Diez took Eunice from room to room through the apartment in search of E.L.'s passport and other documents.
>
> Diez also searched Eunice's bag, removing her driver's license and cell phone, the only phone in the apartment. Leaving with E.L., Diez removed Eunice's handcuffs, pointed the gun at her, told her not to call the police and that he would shoot her if she moved. Diez then drove E.L. to her grandparents in Miami.

Diez v. State, 970 So.2d 931 (Fla. 4 DCA 2008); (DE#16:Ex.F).

Nevertheless, given the multitude of claims raised herein, a detailed recitation of the facts adduced at trial follows. In 1999, Eunice Lopez, one of the victims, left the United States, traveling to Venezuela, where she gave birth to her daughter, Elizabeth.[14] (T.319). A few months later, Eunice returned to the United States, leaving her daughter Elizabeth with her parents, Alicia and Edgar Lopez, Sr. (jointly the "Lopez"), until such time as she could get re-established and be able to properly care for her daughter. (T.320-325).

Several years later, in November 2003, Alicia brought her granddaughter, the minor Elizabeth, to the United States to visit Eunice, the child's mother, for two weeks. (T.322,353). At the end of the two weeks, Alicia reluctantly left the minor, Elizabeth, with Eunice, to see how they would get along. (T.322,353). Before leaving, Alicia gave Eunice Elizabeth's passport, school papers, etc., with the understanding that if Elizabeth was unable to get along with Eunice, that Eunice would permit the child's return to Venezuela to continue being raised by her maternal grandparents. (T.353).

While Elizabeth was residing with Eunice, Eunice separated from her husband, Jorge Soto. (T.317). She then began working as a stripper, and moved into an apartment with Jose Requena. (T.317). Meanwhile, in January 2004, Eunice's parents returned to South Florida, and stayed at Eunice's apartment. (T.324,355). During their stay, arguments constantly ensued over Elizabeth. (T.324,355). Eunice's parents left, but returned again, in March and June 2004, to see how Elizabeth was getting along with her mother. (T.324,355).

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[14]Elizabeth's father abandoned Eunice when she was 7 months pregnant. (T.319).

During their June 2004 visit, Edgar Sr. advised Eunice that one way or another, he was taking Elizabeth back to Venezuela. (T.325). At the time, Eunice's parents were staying with Eunice's ex-husband, Jorge Soto, in Miami Beach. (T.953). Meanwhile, Monica, the petitioner's girlfriend, upset with the situation her friend Gaby's in-laws, the Lopez' were facing, complained to petitioner that no one was doing anything to protect the minor Elizabeth. (T.932). At Monica's request, petitioner agreed to meet with the Lopez' for dinner, to see if there were some way he could assist them in regaining custody of Elizabeth. (T.933).

On June 19th, 2004, petitioner[15] met with the Lopez', at which time he was shown photo albums depicting the last five years of Elizabeth's life with them, along with Venezuelan documents establishing that they had custody of Elizabeth, including Elizabeth's new passport issued by the Venezuelan consulate.[16] (T.944-46, 951-52). At that time, both Alicia and Edgar Sr. explained how Eunice had agreed to leave Elizabeth with them until such time as she matured and got her act together in the United States. (T.945). Petitioner was told that, since Eunice was in the United States illegally, she did not return to Venezuela to see her daughter for approximately four and a half years. (T.946). Next, he was advised how Elizabeth was being abused by Eunice's boyfriend, and the police refused to do anything. (T.947-948). Eventually, the grandparents showed up at Eunice's apartment unannounced, and an argument ensued with their daughter, during which they claimed she grabbed a knife and chased them out of the apartment. (T.949-950). The Lopez' asked petitioner if he could get someone with authority

[15]Petitioner testified on his own behalf at trial.

[16]Elizabeth's mother, Eunice, still retained Elizabeth's old passport. (T.952).

to go over to their daughter's apartment and scare her into returning Elizabeth. (T.955,957-1159-60). At the conclusion of the meeting with the Lopez', petitioner was convinced they had exhausted every avenue available to obtain custody of Elizabeth. (T.957,959). Petitioner promised them he would think about how he could help them, but later decided to take action on his own. (T.959).

Sheldon York ("York"), Eunice's neighbor, testified that on the night of the kidnaping, he was in the lobby of Eunice's apartment building when he observed the petitioner, whom he thought was a police officer, knocking on the locked lobby door. (T.611). York recalled petitioner had a badge, along with a holster on his hip. (T.612,614). According to York, petitioner appeared surly and aggressive, stating he was there to execute a warrant on someone in the building. (T.612-615).

Petitioner testified, however, that on that date, he took extra Clonopin for his anxiety before driving over to Eunice's apartment to "spook her." (T.960-61). He also took Effexor ER, Prozac, and Oxycontin for his back problems. (T.960). He then got dressed, and since he had a concealed firearms permit, he was wearing his taser, concealed in its holster. (T.933-936,961-962). When he arrived at Eunice's apartment, the smell of marijuana was emanating from the apartment. (T.963-64). As he stood by the door, he heard Eunice and Elizabeth arguing. (T.963-64). When he heard Elizabeth start crying, petitioner pounded on the door and shouted, "open up police." (T.965).

Through the door's peep hole, he showed Eunice his badge and a fake search warrant he had copied from the internet. (T.965-67). Eunice testified, however, that when she looked through the peep

hole, petitioner was holding a gun pointed at her while he displayed his badge. (T.327). When Eunice opened the door, he entered, pushed her up against the wall, then onto the floor, where he handcuffed her. (T.328). Eunice testified that petitioner asked whether her boyfriend was there, and then demanded that she give him Elizabeth's passport and other documents.[17] (T.327-328). He then grabbed Eunice by the arm, searching throughout the house for Elizabeth's documents. (T.329-30). As he searched her purse, Eunice claimed he held a gun pointed at her. (T.332).

However, petitioner testified he demanded that Eunice show him were the "drugs" were stashed, and when she did not, they went looking for the drugs in the kitchen and bedroom, where petitioner states he discovered marijuana and cocaine. (T.971-973). Petitioner then told Eunice she had a choice, to-wit, either to go to jail or let Elizabeth return to Venezuela with her grandparents. (T.973). Eunice agreed to the later. (T.973). As a result, the petitioner uncuffed Eunice, told her he was going to take Elizabeth to her grandparents, and then placed a signed receipt for the child on the dining room table. (T.976-979).

During this time, Eunice testified that her daughter, Elizabeth, began screaming, telling petitioner that she wanted to stay with her mother. (T.332). Eunice did not deny that petitioner informed her he was returning Elizabeth to her grandparents, nor did she deny that he handed her a receipt acknowledging he was taking Elizabeth. (T.332-334). Before leaving the apartment, petitioner removed Eunice's handcuffs, but instructed her not to call police or move, because if she did, he would shoot her. (T.334). Eunice next testified that once her boyfriend returned

[17]Eunice testified that although the handcuffs hurt, the petitioner never hit or hurt her. (T.366).

home, she called the police to report the incident. (T.342). When asked by police who had custody of Elizabeth, Eunice stated she did not know. (T.360-363).

After leaving the apartment with Elizabeth, petitioner testified that she sat in the back of the vehicle talking with Monica. (T.977). When he returned Elizabeth to her grandparents, petitioner stated his girlfriend accompanied him, staying in the car. (T.977). Petitioner testified that a happy reunion ensued between Elizabeth and her grandparents, and after showing the grandparents the drugs recovered from Eunice's apartment, he threw them in a dumpster located in the alley in the back of the apartment complex. (T.980-81).

The minor, Elizabeth, recalled that, at the time the petitioner came into the apartment, he was facing her mother and carrying a big, black gun. (T.590,594). She observed petitioner put handcuffs on her mother, and as a result, her mother was unable to move her arms. (T.591). Elizabeth also testified that the petitioner then took her to her grandparent's apartment. (T.593). She testified that upon their arrival, her grandparents thanked the petitioner, and he responded, "You're welcome." (T.593).

After leaving Elizabeth, as petitioner was on his way home, he was contacted by Alicia, who advised that the police were on their way to where the Lopez' were staying. (T.988-89,452). As a result, once petitioner arrived home, he threw the clothes, badge, handcuffs, and taser he used during the kidnaping into a nearby lake. (T.990).

The following morning, petitioner retained an attorney and surrendered himself to the Federal Bureau of Investigation in

Miami, where he was then transported to the Hollywood Police Department. (T.496,991-93). After arriving at the Hollywood Police Department, petitioner learned that the Lopez', accompanied by their attorney, had left Elizabeth at the police station. (T.493-494). That same afternoon, Eunice returned to the police department, where she was reunited with her daughter. (T.343-346,495). As a result, petitioner gave police a videotaped statement wherein he explained that Elizabeth was in a dangerous environment. (T.910-913,993-1019,1035-1134). The videotape statement was played for the jury. (Id.). In that statement, however, petitioner claimed that information regarding Elizabeth's abuse came to him in a psychic dream, but he later admitted to fabricating the psychic dream story in order to protect his girlfriend and the Lopez' from being arrested. (T.1156).

Petitioner also consented to a search of his vehicle and apartment. (T.500,883-884). Police recovered an unloaded, .45 caliber Colt, semiautomatic pistol from the apartment. (T.340-41,465,488,562). No attempts to lift fingerprints from the gun were done, nor did police run the serial numbers run to ascertain the firearm's owner. (T.489,491). According to petitioner, the firearm, registered to Robert Armstrong ("Armstrong"), was given to him as collateral for a $15,000 loan. (T.939). However, after Armstrong paid off the debt, he let petitioner keep the firearm. (T.939-40). Petitioner denied ever using the firearm during the offenses and stated it just sat in a box in his closet. (T.939-940). Petitioner further denied being paid by the Lopez' to recover their granddaughter, Elizabeth, and return her to them. (T.1156).

VI. Standard of Review

Since this case was filed long-after April 24, 1996, this

Court's review of Petitioner's claims is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996). See Abdul-Kabir v. Quarterman, 530 U.S. 233, 246, 127 S.Ct. 1654, 1664 (2007); Davis v. Jones, 506 F.3d 1325, 1331, n.9. (11th Cir. 2007). Under §2254(d), as Amended by the AEDPA, a federal court may grant habeas relief from a state court judgment only if the state court's decision on the merits of the issue was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) 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); Evans v. Sec'y Dep't of Corr's, 703 F.3d 1316 (11th Cir. 2013)(citing Johnson v. Upton, 615 F.3d 1318, 1329 (11th Cir. 2010)(quoting Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250, 2259, 176 L.Ed.2d 1098 (2010)).

"Under §2254(d), a habeas court must determine what arguments or theories supported ... the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Wetzel v. Lambert, ____ U.S. ____, 132 S.Ct. 1195, 1198, 182 L.Ed.2d 35 (2012)(citing Harrington v. Richter, ___ U.S. ___, ___, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011)). "[A]n *unreasonable* application of federal law is different from an incorrect application of federal law. Indeed, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Renico v. Lett, 559 U.S. 766, 130 S.Ct. 1855, 1862 (2010)(emphasis supplied)(quotation marks omitted).

As the Supreme Court has explained, the statutory phrase "clearly established Federal law" refers only to Supreme Court decisions issued at the time the state court decision was rendered. Greene v. Fisher, ___ U.S. ___, 132 S.Ct. 38, 45, 181 L.Ed.2d 336 (2011)(a Supreme Court decision issued three months after the last state court decision on the merits of a federal constitutional issue cannot be considered in determining clearly established federal law for §2254(d)(1) purposes); Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1399, 179 L.Ed.2d 557 (2011)("State-court decisions are measured against [the Supreme] Court's precedents as of the time the state court renders its decision.")(quotation marks omitted); Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S.Ct. 1166, 1172, 155 L.Ed.2d 144 (2003)(explaining that "clearly established Federal law under §2254(d)(1)" is measured "at the time the state court renders its decision")(quotation marks omitted). "[A]n unreasonable application of federal law is different from an incorrect application of federal law. Indeed, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Renico V. Lett, 559 U.S. 766, 130 S.Ct. 1855, 1862 (2010)(quotation marks omitted).

The Supreme Court repeatedly has admonished that "[t]he petitioner carries the burden of proof" and that the §2254(d)(1) standard is a high hurdle to overcome. See Bobby v. Dixon, 565 U.S. ___, 132 S.Ct. 26, 27, 181 L.Ed.2d 328 (2011)("Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility

for fairminded disagreement.")(*quoting* Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770, 786-87 (2011))(quotation marks omitted). See also Cullen, 131 S.Ct. at 1398 (acknowledging that §2254(d) places a difficult burden of proof on the petitioner); Renico, 130 S.Ct. at 1866 ("AEDPA prevents defendants-and federal courts-from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts."); Woodford v. Visciotti, 537 U.S. 19, 24 (2002)(Section 2254(d) "demands that state-court decisions be given the benefit of the doubt.").

It is noted that the state court is not required to cite, or even have an awareness of, governing Supreme Court precedent, "so long as neither the reasoning nor the result of [its] decision contradicts them." Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002); *cf.* Harrington, 131 S.Ct. at 785 (reconfirming that "§2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'" and entitled to deference); Mitchell v. Esparza, 540 U.S. 12, 16 (2003)("[A] state court's decision is not 'contrary to ... clearly established Federal law' simply because the court did not cite [Supreme Court] opinions.... [A] state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'")(quoting Early v. Packer, 537 U.S. at 7-8).

Thus, state court decisions are afforded a strong presumption of deference, even when the state court adjudicates a petitioner's claim summarily—without an accompanying statement of reasons. Harrington, 131 S.Ct. at 780-84 (concluding that the summary nature of a state court's decision does not lessen the deference that it is due); Gill v. Mecusker, 633 F.3d 1272, 1288 (11th Cir. 2011)(acknowledging the well-settled principle that summary

affirmances are presumed adjudicated on the merits and warrant deference, citing Harrington, 131 S.Ct. at 784-85 and Wright v. Sec'y for the Dep't of Corr's, 278 F.3d 1245, 1254 (11th Cir. 2002)). See also Renico, 130 S.Ct. at 1862 ("AEDPA ... imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt." (citations and internal quotation marks omitted)). However, this deference applies to the state court's decision of the claim, not necessarily to its analysis.

To the extent that petitioner's claims were adjudicated on the merits in the state courts, they must be evaluated under §2254(d) and the Supreme Court has held that review "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen, 131 S.Ct. at 1398. Consequently, this Court is limited to reviewing only the record that was before the state courts at the time the courts rendered its order and decisions. Id. Finally, 28 U.S.C. §2254(e)(1) dictates that for a writ to issue because the state court made an "unreasonable determination of the facts," the petitioner must rebut "the presumption of correctness [of a state court's factual findings] by clear and convincing evidence." 28 U.S.C. §2254(e)(1). See Ward v. Hall, 592 F.3d 1144, 1155-56 (11th Cir. 2010), cert. den'd, ___ U.S. ___, 131 S.Ct. 647, 178 L.Ed.2d 513 (2010). Because of the presumption under §2254(e)(1) that state court findings of fact are correct, "where factual findings underlie the state court's legal ruling, the Court's already deferential review [under §2254(d)] becomes doubly so." Childers v. Floyd, 642 F.3d 953, 972 (11th Cir. 2011)(*en banc*).

Legal Standard-Ineffective Assistance of Counsel

In this habeas proceeding, the petitioner also challenges

counsel's effectiveness, which is subject to the two-part test enunciated in Strickland v. Washington, 466 U.S. 668 (1994), which is not a favorable standard. See Massaro v. United States, 538 U.S. 500, 505 (2003); Gomez-Diaz v. United States, 433 F.3d 788, 791 (11th Cir. 2005). To prevail on a claim of ineffective assistance, a petitioner must demonstrate both that (1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. Chandler v. United States, 218 F.3d 1305, 1312-13 (11th Cir. 2000)(*en banc*), cert. denied, 531 U.S. 1204 (2001); Strickland v. Washington, 466 U.S. 668 (1984). The standard is the same for claims challenging counsel's effectiveness on direct appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987).

Moreover, a habeas court's review of a claim under the Strickland standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 120, 129 S.Ct. 1411, 1418 (2009). There is a strong presumption that counsel acted effectively. Id. at 690. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284, 297 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689-690, 104 S.Ct. 2052.

Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. "It is all too tempting for

a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. See also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838 (1993). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Harrington, 131 S.Ct. at 778. A habeas court's review of a claim under the Strickland standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 356, 371, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009) (citing Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)(per curiam)).

The relevant question "is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable-a substantially higher threshold." Knowles, 129 S.Ct. at 1420. (citations omitted). "[B]ecause the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Id.

However, it is also well settled that tactical or strategic choices by counsel cannot support a collateral claim of ineffective assistance. United States v. Costa, 691 F.2d 1358 (11th Cir. 1982); Coco v. United States, 569 F.2d 367 (5th Cir. 1978). Even if such a decision in retrospect appears incorrect, it can constitute ineffective assistance only "if it was so patently unreasonable that no attorney would have chosen it," Adams v. Wainwright, 709

F.2d 1443, 1445 (11th Cir.), cert. den'd, 464 U.S. 1063 (1984), or if the petitioner can demonstrate a "reasonable probability that the verdict [otherwise] would have been different." Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

Decisions whether to call a particular witness or cross-examine certain witnesses are generally questions of trial strategy. See United States v. Costa, 691 F.2d 1358 (11th Cir. 1982). However, where counsel failed to investigate and interview promising witnesses, and therefore "ha[s] no reason to believe they would not be valuable in securing [defendant's] release," counsel's inaction constitutes negligence, not trial strategy. Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992)(quoting United States ex rel. Cosey v. Wolff, 727 F.2d 656, 658 n.3 (7th Cir. 1984)). Nevertheless, strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Strickland v. Washington, 466 U.S. at 690-91.

VII. Discussion

A. Preliminary Issue Re Claims

In this habeas proceeding, petitioner challenges counsel's effectiveness for a plethora of reasons. The claims, however, fail to contain citations to the record, showing where the precise claim was raised and exhausted for purposes of federal habeas review. His state court Rule 3.850 is a convoluted narrative, supported by multiple supplements and amendments, in which the claims are not clearly identified or delineated as set forth herein. Moreover, in this habeas proceeding, petitioner has not identified where the precise arguments were exhausted. The law is clear that a petitioner must not only argue his claims, Fils v. City of

Aventura,[18] 647 F.3d 1272, 1284 (11th Cir. 2011), but he must also insure that his claims contain citations to the record, in order to ferret out where the claim(s) were raised in the state forum. See Chavez v. Sec'y Fla. Dep't of Corrs., 647 F.3d 1057, 1059-60 (11th Cir. 2011). Courts are not required to mine through the record, digging through volumes of documents and transcripts. See Chavez v. Sec'y Fla. Dep't of Corrs., 647 F.3d 1057, 1059-60 (11th Cir. 2011)(citing, Adler v. Duval County School Board, 112 F.3d 1475, 1481 n. 12 (11th Cir. 1997) (noting in a civil case that, absent plain error, "it is not our place as an appellate court to second guess the litigants before us and grant them relief ... based on facts they did not relate."); Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1373 (11th Cir. 1997) ("[W]e are not obligated to lcull the record ourselves in search of facts not included in the statements of fact.")).

Notwithstanding, petitioner suggests that the trial court did not cull through the state court record because it failed to make any mention it had reviewed petitioner's numerous amendments in its order denying the Rule 3.850 motion. Review of the court's order reveals it acknowledged review of petitioner's motion and traverse, as well as, the trial transcripts, when determining the claim raised by petitioner in his initial Rule 3.850 motion, finding it to be legally sufficient, but refuted by the record. (DE#16:Ex.I). Citing appropriate federal constitutional principles, the court further found that petitioner had failed to demonstrate counsel's deficient performance, much less prejudice under Strickland.

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[18]In Fils, it was held that district courts "may not, however, act as a plaintiff's lawyer and construct the party's theory of liability from facts never alleged, alluded to, or mentioned during the litigation." Id.

While it is true that the court's order is silent on whether it reviewed petitioner's numerous amendments and supplements, the order denying relief was filed after all of the petitioner's supplements had been made part of the record. It is possible that the court did not review the amendments, but it is also plausible that they were considered and tacitly found to be without merit, warranting no discussion.

Section 2254(d) does not require a state court to give reasons before its decision can be deemed to have been "adjudicated on the merits." See Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770, 784, 178 L.Ed.2d 624 (2011)). When a state court issues an order that summarily rejects without discussion all the claims raised by a petitioner, including a federal claim that the petitioner then raises in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits in the absence of any indication or state-law procedural principles to the contrary. Id. at 784-85. The presumption may be overcome when there is a reason to think some other explanation for the state court's decision is more likely. Id. at 785. In the instant case, there has been no showing that the trial court rejected all of the petitioner's claims on a state law procedural principle. Further, there is nothing to suggest that the court recognized the many claims raised in the numerous amendments, and notices before it summarily denied the original motion. However, as will be demonstrated below, petitioner is entitled to no relief on the claims.

B. Evidentiary Hearing Claim

(Misadvice Regarding Pleading Guilty versus Trial)

In **claim 6**, petitioner asserts he was denied effective

assistance of counsel, where his lawyer failed to: (1) adequately convey a 10-year plea offer, extended prior to petitioner while providing substantial assistance cooperation; and, (2) for coercing petitioner to reject a plea to a 3-year sentence, as memorialized in an April 18, 2005 letter to the prosecutor. (DE#1:17; DE#12:16). In support thereof, petitioner states that prior to the conveyance of the 10-year plea offer, he took polygraph exams, and then became "heavily involved" in providing substantial assistance to the state prosecutor, as well as, the United States Drug Enforcement Administration ("DEA"). (DE#1:17; DE#12:16). Petitioner maintains counsel "guaranteed" petitioner that he could obtain a "3 year" plea, and advised him to reject the state's 10-year plea offer. (Id.). Petitioner states that but for counsel's unequivocal guarantee, he would have accepted the a plea involving a 10-year sentence, and never have proceeded to trial. (Id.).

The claim was not conclusively refuted by the record, and warranted an evidentiary hearing. See DE#32. This is so because the claim was raised by petitioner in his Rule 3.850 proceeding, but he did not receive an evidentiary hearing there. Instead, since the trial court entered a general, nonspecific summary denial of all claims, then it "was bound to assume that the allegations in petitioner's 3.850 motion were true." Jacobs v. State, 880 So.2d 548, 554 (Fla. 2004)(quoting Ford v. State, 825 So.2d 358, 361 (Fla. 2002). After review of the record here, it was determined that petitioner raised a facially sufficient claim that was not conclusively refuted by the record without holding an evidentiary hearing. See e.g., Skipwith v. McNeil, 2011 WL 1598829 at *5 (S.D. Fla. Apr. 28, 2011) (finding a hearing is necessary "to determine whether the facts alleged [in the state proceeding] were indeed true."); Fanaro v. Pineda, 2012 WL 1854313 at *3 (S.D. Ohio May 21, 2012) (finding a hearing was necessary where the state court failed

to hold a hearing to resolve a credibility determining between competing factual assertions); See Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1412 (2011)(Breyer, Jr., concurring in part and dissenting in part); see also, Morris v. Thaler, 425 Fed.Appx. 415, 422, n.1 (5th Cir. 2011). Given the above circumstances, the Federal Public Defender was appointed and a hearing held in July 2014.

1. The Law Re Advice on Plea Offers

The law is clear that defense counsel has an affirmative duty under the Sixth Amendment of the U.S. Constitution to provide competent advice, and to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to an accused. See Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012); Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). The Supreme Court has indicated that an evidentiary hearing may be conducted to determine whether the movant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. Lafler, supra.

As discussed in detail below, the petitioner cannot prevail on this claim. Although at first blush, the movant's assertions appear to be founded on fact and logic, careful analysis reveals that what is being represented is not candid or forthright. Further, it is the finding of the undersigned that the petitioner, an intelligent and involved defendant, would not have accepted any plea offer, but rather at all times insisted on litigating the charges against him, maintaining he was justified in his actions and that his motivation for kidnaping the minor was to rescue her from imminent danger. In fact, at the evidentiary hearing, movant again maintained his actions were justified.

Notably, "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010). In Missouri v. Frye, ___ U.S. ____, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) the Supreme Court said: "[A]s a general rule, defense counsel has the duty to communicate formal [plea] offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." If an attorney allows such an offer "to expire without advising the defendant or allowing him to consider it, defense counsel d[oes] not render the effective assistance the Constitution requires." Id.

The Strickland framework applies to advice regarding whether to plead guilty. Hill v. Lockhart 474 U.S. 52, 57-59 (1985). See also Premo v. Moore, 562 U.S. 115, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011); Padilla v. Kentucky, 559 U.S. 356, 360-61, 130 S.Ct. 1473, 1480-81 (2010)("Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'") (*quoting* McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

The analysis of Strickland's performance prong is the same, but instead of focusing on the fairness of the trial, the prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59. Thus, when an ineffective assistance of counsel claim concerns the rejection of an offered plea agreement, the defendant "'must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.'" Coulter v. Herring, 60 F.3d 1499, 1504 (11th Cir. 1995)(quoting Hill v.

Lockhart, 474 U.S. at 58, 106 S.Ct. at 370)(alterations in original). In his filing, movant does not assert he would not have insisted on going to trial. To the contrary, the allegations contained in movant's initial filings suggests he would have "considered" pleading guilty, but does not assert he would have, in fact, done so.

Notwithstanding, it is also noted that a defendant has no right to be offered a plea, nor is there any federal right for a judge to accept it. Missouri v. Frye, ___ U.S. ___, ___, 132 S.Ct. 1399, 1410, 182 L.Ed.2d 379 (2012). The Sixth Amendment right to counsel does include effective representation during the plea negotiation process. Padilla v. Kentucky, 559 U.S. at 373. A "critical obligation of counsel [is] to advise the client of 'the advantages and disadvantages of a plea agreement.'" Padilla, 559 U.S. at 370 (quoting Libretti v. United States, 516 U.S. 29, 50-51 (1995)). "Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client...." United States v. McLain, 823 F.2d 1457, 1464 (11th Cir. 1987), overruled on other grounds by United States v. Watson, 866 F.2d 381 (11th Cir. 1989); see Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (stating joint representation of conflicting interests is suspect because it may well preclude defense counsel from exploring possible plea negotiations). Further, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Frye, ___ U.S. at ___, 132 S.Ct. at 1410. When defense counsel allows an offer to expire without advising the defendant or allowing him to consider it, counsel has provided ineffective assistance. Id.

Of course, an attorney has a duty to advise a defendant, who

is considering a guilty plea, of the available options and possible sentencing consequences. Brady v. United States, 397 U.S. 742, 756 (1970). The law requires counsel to research the relevant law and facts and to make informed decisions regarding the fruitfulness of various avenues. United States v. Grammas, 376 F.3d 433, 436 (5th Cir. 2004). When a defendant "'lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to [plead] or take his chances in court.'" Id. (*quoting* Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995)). See also Von Moltke v. Gillies, 332 U.S. 708, 721 (1948)("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman ....").

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or has been rejected because of counsel's deficient advice, defendants must demonstrate:

> a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it.... [and] a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id.; see Lafler v. Cooper, ___ U.S. ___, ___, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012)(same). Strickland's inquiry into whether the result of the proceeding would have been different "requires looking not at whether the defendant would have proceeded to trial

absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." Id.

To be clear, counsel has a responsibility to discuss the advantages and disadvantages of a plea offer with movant so that movant can then decide whether to accept or reject such an offer. Padilla, 559 U.S. at 369-379 (a critical obligation of counsel is to advise the client of the advantages and disadvantages of a plea agreement). Counsel's complete failure to confer with his client about the advantages and disadvantages of a plea offer just before the start of trial is deficient performance. See Padilla, 559 U.S. at 368. However, that does not end the inquiry. The question then becomes whether movant can demonstrate counsel's deficiency prejudiced him.[19] Thus, movant must demonstrate: (1) there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) that the court would have accepted its terms; and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

This court, concerned with movant's claim that his attorneys failed to properly convey and/or otherwise discuss a plea offer extended by the prosecution, as well as, the advantages of accepting the plea versus proceeding to trial, held an evidentiary

[19]Although it appears that movant maintained his innocence during trial, sentencing, and appeal, this does not eliminate his ability to demonstrate prejudice here. See Lalani v. United States, 315 Fed. Appx. 858 (11th Cir. 2009) (an assertion of innocence does not preclude the movant from asserting he was prejudiced by counsel's misadvice regarding pleading guilty or pursuing a plea agreement).

hearing on July 8, 2014. At the evidentiary hearings, testimony was taken from the petitioner, along with petitioner's defense attorneys, Michael Gelety, Esquire and John Contini, Esquire.

2. Testimony at the Hearing

a. Attorney Michael Gelety's Testimony

Attorney Michael Gelety ("Attorney Gelety") first briefly testified that he has been a member of the Florida Bar for over thirty years, and his primary area of practice is state and federal criminal defense and appellate work. Next, he testified generally regarding his conversations with defense clients and negotiating pleas. Specifically, Attorney Gelety testified that he first meets with the client and discusses the facts of the case and what the client is facing in terms of potential incarceration. After he receives discovery and has an opportunity to review it with his client, he then attempts to negotiate a plea. When a plea offer is eventually reduced to writing, he then takes the written plea offer to the client. At that time, he again explains to his client the statutory minimum and maximum terms of imprisonment, along with the guideline sentence exposure. Counsel also explains the pros and cons of the case, including the strength and weakness of the defense's position.

Regarding plea discussions generally, Attorney Gelety testified that he advises clients that the ultimate decision to accept or reject an offer is the client's to make. Oftentimes, however, after receipt of an initial plea offer, Attorney Gelety explained that, depending on the nature of the offer, he would have discussions with the prosecution in an effort to obtain a more favorable plea offer for his client. He was unequivocal that he

never advises a client to reject an initial offer, much less guarantees them that any counteroffer he proposes will be accepted by the prosecution. In fact, Attorney Gelety explained that doing would be unethical, immoral, and foolish.

Specifically as to the petitioner's case, after he was retained by the petitioner, he began his pretrial investigation, obtained discovery from the state, and conducted depositions. He also specifically recalled preparing a packet of materials for the prosecution, Assistant State Attorney Stacey Honowitz ("ASA Honowitz"), to review. Attorney Gelety recalls having many conversations with ASA Honowitz, prior to his April 18th, 2005 letter with enclosed material he mailed to her. A copy of the letter was introduced into evidence at the hearing. (See DE#44:Def.Ex.2).

Attorney Gelety could not recall whether he received a 10-year plea offer from the prosecutor. He has searched his memory and his notes, finding an April 6, 2006 note which reflects that there was an offer involving a 20-year sentence with a 10-year minimum mandatory. That note memorialized a meeting with Mark Springer, who, at the time, was the chief assistant, along with the head of homicide, Brian Cavanagh, as well as, an other homicide prosecutor. Attorney Gelety recalled doing everything he could to get the petitioner "off of the 20" so that discussions could be had concerning the 10-year minimum mandatory. However, his notes reflect that as of April 6th, the prosecution was still offering 20 years. Attorney Gelety testified there were no notes in his file concerning a 10-year plea offer, and there was nothing that would refresh his recollection more than his notes, which reveal the only offer was to a plea involving a 20-year sentence, with a 10-year

minimum mandatory.

During cross-examination, Attorney Gelety explained that he got to know the petitioner well over the two years he represented the petitioner, and did not want the petitioner to "get pounded into the ground," but it was a very tough case. According to Attorney Gelety, this was not a case of "who-dun-it," but rather petitioner's ongoing "theme" was that he intended to rescue, not kidnap the minor Elizabeth. Early on, Attorney Gelety recognized that he would be unable to "beat" some of the charges, including the charges for impersonating a police officer and burglary. As a result, counsel advised petition on numerous occasions he was facing up to 25 years in prison on those offenses, if convicted at trial.

After review of his notes, memos, and scribbles, Attorney Gelety testified that the prosecutor's plea offer was always one involving a 20-year sentence. In fact, counsel reiterated he had discussions with both Mark Springer and Brian Cavanagh, to see if they could intervene in an effort to break down the plea. However, the prosecution remained "stuck" on the 20-year plea. Counsel explained that his letter to the prosecution and his efforts regarding plea negotiations were to try to get the state to either dismiss some of the charges or reconfigure the charges in order to avoid the 10-year minimum mandatory on the armed kidnaping in order to get it beneath the 10-20-life statute. Once it became apparent that the prosecution was not overly sympathetic to the petitioner's "superhero defense," without abandoning it completely, they changed the focus of plea negotiations to cooperation on some outstanding homicide cases in an effort to get petitioner below the 10-year minimum mandatory.

Sometime thereafter, before an April 20th, 2006 calendar call, the case was reassigned from ASA Honowitz to ASA Melissa Vaughn. Counsel attempted to continue plea negotiations with ASA Vaughn, who took over the prosecution's case shortly before the May 2006 trial. Attorney Gelety unequivocally testified that the state was always steadfast in that any plea would have to involve a sentence of 20 years.

Counsel also testified that, as a result, petitioner wanted a demand for speedy trial filed. Counsel wrestled with that for a long time, because it tells the court you are ready to go to trial and "chops off" your ability to take further depositions. Because petitioner insisted he wanted a demand for speedy trial filed, counsel prepared the demand, but also prepared for petitioner's signature an acknowledgment of plea offer and negotiation, along with an acknowledgment and approval of trial strategy, of admitting and conceding some points in order to have a change to win the more serious charges. These documents were introduced into evidence at the hearing as Respondent's Exhibits A and B. Counsel then read into the record excerpts from the agreement, which was executed by the petitioner, which states in pertinent part as follows:

> ...I understand and I have actually witnessed my attorneys making extraordinary efforts to negotiate a plea in my case, and they have got me to meet with homicide prosecutors and homicide detectives (both at the State Attorney's Office, with prosecutor Sherry Tate, and actually in the jury room in the courtroom where the prosecutor and detectives have met with me at various times).
>
> I realize that, with the ten (10) year mandatory minimum sentence, unless the supervisors at the State Attorney's Office agree to change the charges and allow the mandatory minimum ten years to be eliminated, that the judge has the option, no discretion and has to give me the mandatory minimum if I am convicted as charged. I

> also acknowledge that my lawyers have actually been able to arrange meetings with ex-DEA supervisor Mike McMannis and he has arranged and continued to meet with currant [sic] DEA agents in other efforts to negotiate this case below the ten year mandatory minimum sentence. In this regard, my lawyers have also been in contact [with] the US Attorney's office, specifically Tom Lanigan trying to negotiate a global resolution in this case and with any further prosecution-that the ten year mandatory minimum sentence has continued to prevent progress in this regard.
>
> Attorneys have taken extraordinary steps to explore every possibility in this case including multiple polygraph examinations (which were successful but unpersuasive to the state) psychological evaluations, personal and emotional pleas (with family pictures, letters, character references, etc) but there has been no success getting around the ten year mandatory minimum sentence....
>
> In this regard, I have demanded that my attorneys file a Demand for Speedy Trial in my case and we have discussed the effects and dangers in filing such a demand for some months before the demand was finally filed with the Court-with my understanding that I was bound my such demand and that I could not get a continuance or have my attorneys do any further work on the case.
>
> * * *
>
> **Knowing all of this and knowing I can receive a sentence up to twenty-five years in prison even if we win virtually all of the case and beat most of the charges against me it is still my choice to <u>reject</u> the State's plea offer of <u>20</u> years in prison and, specifically, it is my choice, even understanding all of this, that I want a trial by jury and that I <u>do not</u> want to accept a plea offer in this case.**

(Respondent's Exhibit A:2-3,4)(emphasis added).

Attorney Gelety confirmed that petitioner signed the foregoing document on May 5, 2006. He explained that it is his practice to prepare similar forms in his other cases, but this one was a bit "unusual," because petitioner's case had been pending a long time,

and then a week or two before the foregoing plea acknowledgment was executed, petitioner sent him a letter indicating he believed his attorneys could negotiate a plea for him where he would serve no more than three years house arrest, followed by ten years probation. The substance of petitioner's letter also precipitated the drafting of the foregoing agreement.

Attorney Gelety further testified that if a 10-year plea had been offered, a similar document would have been prepared reflecting that offer. In fact, he explained that on page four he left a blank line so that the number of years as to the plea extended could be filled in because he had been negotiating and fighting with the prosecutor to get a plea below 20 years.

Next, Attorney Gelety acknowledged that he prepared an acknowledgment of trial strategy for petitioner's signature. That document was introduced into evidence as Respondent's Exhibit B at the evidentiary hearing. He went over the document with the petitioner, who underlined several things, and then initialed and signed the document. In pertinent part, the acknowledgment provided, as follows:

> ...Since I know that I cannot reasonably deny my participation in what I still consider to be a rescue, and since the evidence against me makes it impossible to not only deny, but to gain an acquittal on certain charges, and since my attorneys have honestly and repeatedly told me that I cannot beat certain of these charges-and based on the fact that I do <u>not</u> want to plead guilty to these charges and I <u>do</u> want a trial by jury, I understand and acknowledge the trial strategy of having my attorneys concede some of my actions and by doing so conceding some of the lower less serious charges in order to keep the <u>possibility</u> of beating some of the more serious charges-the charges which carry the ten (10) year mandatory minimum sentence because of the alleged gun, and the charges which have a possible life sentence as

the top or most serious sentence.

(DE#44:Respondent's Exhibit B:1-2).

According to Attorney Gelety, these documents were prepared in order to solidify the fact that petitioner wanted to proceed to trial, to remind petitioner that there are risks associated with a trial, and to memorialize the defenses, if any, that were available to the charges.

Attorney Gelety again reiterated that as to any plea offer, after refreshing his recollection with the sentencing transcript, the offer made prior to trial involved a plea to a 20-year sentence, but after trial, the victim and prosecution were asking that petitioner be sentenced to life in prison. He recalled arguing against a life sentence, stating that the petitioner should not be penalized for proceeding to trial.

Counsel was shown a May 30, 2007, post-conviction letter from the petitioner to him, in which he accused counsel, in pertinent part, as follows:

> I lost the 10 year plea offer because of you giving me false hopes. You owe me the favor of handling the 3.800(c). Had you told me that I could have lost that plea offer I would definitely have taken it and <u>then</u> worked our way down from the 10 years. It should have been done that way and it wasn't!...

(DE#44:Def. Ex.3:5/30/07 Letter to Counsel).

Attorney Gelety stated that the foregoing representation by the petitioner was inaccurate and not true.

b. <u>Attorney John Contini</u>

Next, Attorney John Contini ("Attorney Contini") testified he and Attorney Gelety both represented the petitioner on the criminal charges. Attorney Contini also testified he could not recall whether a 10-year plea offer was ever extended by the prosecution. Attorney Contini recalled they were always trying to get the lowest possible offer from the initial prosecutor, ASA Honowitz, but then there was a change in prosecutors, which was problematical. He further recalled there was a minimum mandatory term of imprisonment involved, and there were grave consequences if petitioner went to trial and was convicted, because the sentence exposure was "staggering." As a result, Attorney Contini recalled the defense team was attempting to negotiate the lowest possible plea. Attorney Contini further testified that it is his practice when conveying plea offers to inform the client of the pros and cons in rejecting or accepting the offer, because to do otherwise would be "mean spirited" and "professional suicide." In this case, he specifically recalls they were trying to obtain a plea offer in the "single digits." Further, Attorney Contini also testified that he would never give a client any guarantees regarding whether or not a prosecutor will accept a counteroffer during plea negotiations.

During cross-examination, Attorney Contini explained that if ASA Honowitz had agreed to go below the 10-year minimum mandatory, they would have been "elated," and sharing that fact with petitioner, as well as, memorializing whatever his decision would have been in that regard. Attorney Contini believed it had been intimated that the court would be amenable to a sentence below the 20-year or life that ASA Vaughn was pushing for. Attorney Contini could not recall why plea negotiations to get it to below the 10-year minimum mandatory broke down, but apparently from Attorney Gelety's notes, he believes that ASA Vaughn had a personal animus

towards Attorney Contini. During cross examination regarding whether a specific 10-year offer was conveyed, Attorney Contini explained it was not memorialized, not put in writing, and not said unequivocally, just "intimated, suggested." In other words, according to Attorney Contini, ASA Honowitz never outright rebuked or rejected the idea, stating that a 10-year sentence was "never going to happen." Attorney Contini further explained that no plea offer was ever extended, but does remember the "spirit" of the ongoing negotiations.

c. Petitioner's Testimony

The petitioner, however, testified at the evidentiary hearing that in June 2004, he turned himself into police, and then two years later, in May 2006, he went to trial, was convicted, and sentenced to 20 years in prison. He stated he retained two attorneys, Attorney Gelety and Attorney Contini, to represent him. He conceded that he had frequent, ongoing discussions with his attorneys regarding pleading guilty until the prosecutor changed and the plea offer doubled. Petitioner further testified that he was amenable to negotiating and entering a guilty plea in his case. He admitted there was no question that he was involved, and further admitted giving a lengthy statement to police concerning his involvement. One of the factors why he was amenable to a plea was because he had given a post-arrest statement.

According to the petitioner, Attorney Gelety handled the majority of the plea negotiations with the prosecution. The first discussion petitioner had regarding plea negotiations with Attorney Gelety was when they prepared the packet which enclosed the results of petitioner's polygraphs, along with domestic violence reports, and a "DCF report" involving the minor urinating on herself as her

mother dragged her across a parking lot.

Petitioner felt optimistic on October 21, 2004, some four months after his arrest, when counsel handed him a note indicating he was making "very good progress" with ASA Honowitz. It also suggested that petitioner "keep the faith." Petitioner testified that once ASA Honowitz received the packet, shortly thereafter she conveyed to counsel and petitioner a 10-year plea offer. Petitioner claims to have "just initially been involved with substantial assistance" with the DEA. According to petitioner, Attorney Gelety visited him in the county jail, and in the attorney visitation area, he conveyed the 10-year plea offer to him. Petitioner claims counsel advised him that it was a "first offer" and that he believed he could do better. This conversation would have occurred sometime in the beginning of 2005. At no time did Attorney Gelety mention that the 10-year plea offer had an expiration date. Petitioner conceded that he was aware there was a 10-year minimum mandatory on the gun offense he was charged with. However, counsel explained to him that the state had offered 10 years, but did not go into any great detail about the specific terms of the plea.

Rather, petitioner testified that counsel indicated it was an initial offer and he was confident that he could get that offer reduced. Plaintiff testified that had he known the offer could have been lost or otherwise expired, he would have accepted it. Petitioner claims he was unaware that acceptance of the offer had to be accomplished by a date certain. As a result, he did not accept the plea.

Petitioner also testified that he provided substantial assistance, working with prosecutors and law enforcement on two murder cases, and in fact, testifying as a state witness in the

prosecution of Eric Patrick. Additionally, petitioner acknowledged that counsel sent the prosecution an April 2005 letter in which he claims petitioner would accept a plea to a 30-month sentence.

At some point, petitioner then recalls being in a conference room with the newly assigned state prosecutor who started talking about a 20-year offer, when petitioner became shocked, and did not understand what was going on. He unequivocally testified he did not accept the 20-year offer and instead, elected to go to trial. Petitioner testified that there was no discussion about "losing" the state's 10-year offer, rather he was lead to believe his attorneys could get him a 36-month plea.

Petitioner further testified that some three years after he lost at trial and was sentenced, he wrote a March 13, 2009 letter to Attorney Contini, which stated in pertinent part, as follows:

> ...I've continued as you've recommended to work with Sheri Tate and testified against Patrick. I was hoping that you would had [sic] visited me while I was back in the county. What I wanted to discuss was the fact that I feel that I was played by you, Gelety and Sheri Tate. You and Gelety always had my hopes up that you would get me a 'decent deal' below ten years. You led me to believe that 'it would all workout.' Never did you tell me, nor did I imagine in my wildest dreams that the ten years would end up doubling. As to why that happened to me without any warning is a mystery to me up to this day. I would not have gone through all I did if you both didn't keep telling me it will 'work out.' I wouldn't have risked getting more time had you simply told me that ten years was the best you could do. I would have taken it to protect myself and would have done everything else for the state attorney to work down the ten. Instead sold me a pipe-dream and now I'm still stuck with 17 years in prison. This isn't right and you know it!

(DE#44:Def.Ex.4).

During cross-examination, petitioner acknowledged that plea negotiations were ongoing until ASA Vaughn took over the case. According to petitioner, he recalls a plea involving a 10-year sentence was extended sometime after he received the October 21, 2004 note from Attorney Gelety. He believes it was the beginning of 2005. When asked whether he had rejected this 10-year plea offer, petitioner stated he "wasn't told to accept that offer." He was unequivocal that there was a 10-year plea offer extended by the prosecution and conveyed to him. In the April 18, 2005 letter from Attorney Gelety to ASA Honowitz, however, petitioner acknowledges that the letter does not indicate that there has been any formal plea offer extended nor accepted as of that date. However, once ASA Vaughn was took over as the prosecutor in late 2005, petitioner acknowledged that the only offer available and extended by ASA Vaughn involved a 20-year sentence. According to petitioner, the parties were "stuck at 20."

3. Analysis

After careful consideration of the testimony of the petitioner in the context of this case and close observation of his demeanor, as well as, careful attention to and review of the testimonies of the two prior defense attorneys at the evidentiary hearing, and, taking into account the respective interests of the parties in the outcome of this proceeding, the undersigned finds petitioner's testimony equivocal, inconsistent, and disingenuous.

The undersigned therefore rejects petitioner's testimony insofar as it relates to his claim that both Attorneys Gelety and Contini misadvised him there was a 10-year plea offer extended, much less that it was an initial offer which they could reduce to 36 months. To the contrary, the undersigned credits Attorneys

Gelety's and Contini's testimonies, as corroborated by the Acknowledgment of Plea Offer and Negotiations executed by petitioner, that petitioner was facing a 10-year minimum mandatory term of imprisonment if he pleaded guilty as charged, unless the prosecution agreed to change the charges. (DE#44:Resp. Ex.A:2). The court further finds there was never a plea offer extended by the prosecution which involved a 10-year sentence. To the contrary, the only plea offer extended was one involving a 20-year sentence, with a 10-year minimum mandatory term of imprisonment. Further in the agreement executed by petitioner, he also acknowledged the fact that the only plea offer by the prosecution involved a plea to a term of 20 years in prison, which he was rejecting, even though he faced up to 25 years in prison if convicted at trial. (Id.:4). Moreover, the court credits the testimonies of Attorneys Gelety and Contini that negotiations were constantly ongoing in an attempt to get the prosecution to extend or otherwise accept a plea which would enable petitioner to obtain a sentence below the 10-year minimum mandatory term of imprisonment. However, as conceded by the petitioner, the parties were "stuck" at the 20-year sentence, which this court finds petitioner knowingly and voluntarily rejected.

The court disbelieves and rejects petitioner's alternative argument that he would have accepted the prosecution's 20-year plea offer, and further finds that petitioner's allegation that there was a purported 10-year plea offer to be unsupported by the record at best, and at worst, disingenuous. Although rejected by this court, petitioner may have mistakenly believed that he had been offered a 10-year term of imprisonment because the 20-year plea offer extended by ASA Vaughn required that he serve a 10-year minimum mandatory term of imprisonment. Furthermore, the court rejects petitioner's argument that Attorney Gelety and Contini individually or together coerced petitioner to reject any plea

without petitioner's knowledge or consent.

In conclusion, the court rejects petitioner's self-serving, disingenuous testimony that, but for Attorney Gelety and Contini's failure to properly explain the terms of the state's plea offer, and/or for otherwise failing to communicate an nonexistent 10-year plea, in addition to, failing to explain the strength of the prosecution's case and the sentence exposure he faced if convicted at trial, the petitioner would have accepted an initial, non-existent, 10-year plea offer or otherwise pleaded guilty rather than proceed to trial.

To the contrary, the court finds petitioner has insisted in the past, and continues to maintain today that he is innocent or otherwise had a justifiable defense to the charges. As will be recalled, by his own testimony, petitioner acknowledged that early on the parties were attempting to negotiate a plea. Petitioner does not dispute that once a 20-year plea was, in fact, formalized by ASA Vaughn, that petitioner rejected the offer and insisted on proceeding to trial. The undersigned finds petitioner has not demonstrated that his attorneys were deficient, much less that he was prejudiced as to the advice provided by them regarding accepting the 20-year plea offer, pleading guilty, or proceeding to trial. He is thus entitled to no relief on this basis. In fact, the court finds that petitioner's allegations are clearly refuted by the acknowledgment of plea offer and negotiations he executed shortly before trial on May 5, 2006.

4. No Contest/Alford Plea

By the movant's own admission, he went to trial because he believed in his innocence and that he had a viable defense to the

charged conduct.

The law is clear that when a defendant attempts to plead guilty, while protesting his innocence, a trial judge may accept the plea if the defendant clearly indicates his desire to plead guilty, and a strong factual basis for the plea exists. United States v. Dykes, 244 Fed.Appx. 296, 297-298, 2007 WL 1953538, 1 (11th Cir. 2007), quoting, North Carolina v. Alford, 400 U.S. 25, 31-32, 38 (1970)[20]; United States v. Gamboa, 166 F.3d 1327, 1331 n.4 (11th Cir. 1999)(stating that "[a] court cannot accept a guilty plea unless it is satisfied that the conduct to which the defendant admits constitutes the offense charged"). It is well-settled, however, that a defendant has no absolute right under the United States Constitution to have his guilty plea accepted by the court. United States v. Gomez-Gomez, 822 F.2d 1008, 1010 (11th Cir. 1987); Santobello v. New York, 404 U.S. 257, 262 (1971); North Carolina v. Alford, 400 U.S. 25, 38 n. 11 (1970). When a defendant attempts to couple a guilty plea with an assertion of facts that would negate his guilt, a judge may properly treat this assertion as a protestation of innocence. United States v. Gomez-Gomez, 822 F.2d at 1011. In Gomez, the Eleventh Circuit concluded that when a defendant casts doubts upon the validity of his guilty plea by protesting his innocence or by making exculpatory statements, the court may resolve such doubts against acceptance of the plea. Id. at 1011.

As evident from review of the record in the underlying criminal case, as well as, petitioner's own testimony at the

[20]In Alford, the Supreme Court concluded that a district court does not err by accepting a guilty plea that is accompanied by the defendant's assertion of innocence when the defendant concludes that a guilty plea is in his best interest and there is strong evidence of guilt. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

evidentiary hearing, no showing has been made that the petitioner would have admitted his guilt to the charged offenses. There is no objective evidence, other than the petitioner's own self-serving representations in this proceeding, and then during his testimony that he ever intended to plead guilty. In fact, petitioner continues to maintain here that he had viable defenses at trial since he believed in good faith that he was rescuing the minor child from a bad environment and returning her to her legal guardian, the girl's grandparents. Therefore, the undersigned finds petitioner would not have pleaded guilty, and would have insisted on proceeding to trial, as acknowledged and agreed to by him in the trial strategy form he executed.

Notwithstanding, even if he had been advised by counsel that he could plead to the charges prior to trial, no showing has been made that the court would have accepted such a plea. Even if the court could have accepted the petitioner's guilty plea, it was not required to do so and it was within its discretion to interpret the petitioner's statements as a claim of innocence. Consequently, the petitioner has shown neither deficient performance nor prejudice arising from counsel's failure to advise the petitioner regarding pleading guilty or proceeding to trial. He is thus entitled to no relief on this claim. Strickland v. Washington, 466 U.S. 668 (1984); Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987).

While a defendant's protestations of innocence before and after trial do not in and of themselves prove that a defendant would not have accepted a guilty plea if properly advised, see Lalani v. United States, 315 Fed.Appx. 858, 2009 WL 465989 (11 Cir. 2009), *citing*, Griffin v. United States, 330 F.3d 733, 738 (6 Cir. 2003), it is important to note that the petitioner steadfastly maintained he had a justifiable reason or defense for the charged

criminal activities. Even now in this §2254 proceeding, as is evident from the claims raised herein, the petitioner has not admitted his guilt and continues to maintain he would have succeeded in an acquittal at trial, but for counsel's ineffectiveness.

The movant's postconviction assertion that he would have pled guilty to the indictment is not believable. Now serving a severe sentence, the movant wants to go back in time and accept responsibility in the hopes of obtaining a lesser sentence. But his actions before trial and his refusal to admit guilt even now clearly demonstrate that he would not have pled guilty nor would he have admitted guilt in a change of plea proceeding. The petitioner decided to take his chances at trial in hopes of an acquittal and lost. The petitioner's claim that he would have pled guilty as charged is therefore rejected.

Accordingly, his after the fact assertions concerning his desire to plead guilty to the Information are insufficient to establish prejudice under the Strickland standard. See Diaz, 930 F.2d at 835 ("[A]fter the fact testimony concerning [the] desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, [the defendant] would have accepted the plea offer."). See also Doe v. United States, 2010 WL 1737606, *6-7 (S.D.Ga.2010); Scott v. United States, 325 Fed.Appx. 822, 825, 2009 WL 1143179, *2 (11 Cir. 2009).

Consequently, for this alternative basis, the petitioner cannot satisfy Strickland's prejudice prong, and is thus entitled to no relief on this claim. See Diaz v. United States, 930 F.2d 832, 835 (11th Cir. 1991)("[A]fter the fact testimony concerning [the] desire to plead, without more, is insufficient to establish

that but for counsel's alleged advice or inaction, [the defendant] would have accepted the plea offer."). See also Doe v. United States, 2010 WL 1737606, *6-7 (S.D.Ga.2010); Scott v. United States, 325 Fed.Appx. 822, 825, 2009 WL 1143179, *2 (11 Cir. 2009). In conclusion, the petitioner has failed to demonstrate either deficient performance or prejudice pursuant to Strickland, and is therefore entitled to no relief on this claim.

C. Remaining Claims

In **claim 1**, petitioner asserts he was denied effective assistance of trial counsel, where his lawyer failed to become aware of related international and federal laws and their implications on subject matter jurisdictional issues over the state offenses, as well as, possible defenses. (DE#1:6; DE#12:7). Petitioner suggests counsel should have familiarized himself with applicable federal and international laws, and then argued to the jury that petitioner reasonably believed he needed to intervene in order to secure the safety of the minor child. (DE#12:7). He suggests that counsel failed to "do his homework" and therefore left uncorroborated petitioner's testimony, and further did not clarify for the jury the custody issues. (Id.). He also states he was entitled to have the jury instructed on his theory of defense so long as there was evidence to support it. (DE#12:10). According to petitioner, Venezuelan Child Custody documents surfaced after sentencing confirming that Venezuela had jurisdiction over the minor child. (DE#12:8). Reduced to its essence, petitioner suggests here that counsel had a duty to call attention to those international and federal laws which would have supported the defense that he had the lawful authority to remove the child from the custody of its biological mother, and return it to the maternal grandparents who had international documents demonstrating they had

legal custody of the minor in Venezuela. (Id.:8-10).

As will be recalled, petitioner was not charged with a federal crime, but state laws. In particular, he was charged with and convicted of two counts of kidnapping, in violation of Fla.Stat. §787.01(1) and §775.087(2)(a) (Count 1-2), armed burglary, in violation of Fla.Stat. §810.02(2) and §775.087(2)(A) (Count 3), and interference with custody, in violation of Fla.Stat. §787.03(1)[21] (Count 5), all of which occurred on June 21, 2004, involving Eunice Lopez and her minor daughter, Elizabeth Lopez. (DE#16:Ex.A). Kidnapping is defined in Fla.Stat. §787.01(1)(a) as "forcibly, secretly or by threat confining, abducting or imprisoning another person against his [her] will and without lawful authority, with intent to ... [c]ommit or facilitate commission of any felony." Diez v. State, 970 So.2d 931, 932-33 (Fla. 4 DCA 2008)(quoting Fla.Stat. 787.01(1)).

Further, the Florida Supreme Court, in Faison v. State, 426 So.2d 963 (Fla. 1983), adopted a three-prong test for determining whether the movement or confinement of a victim during the commission of another felony is sufficient to support an additional conviction for kidnapping. Under the Faison test, the movement or confinement "(a) Must not be slight, inconsequential and merely incidental to the other crime; (b) Must not be of the kind inherent in the nature of the other crime; and (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially

[21]In pertinent part, the statute provides that "(1) Whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any minor or any incompetent person from the custody of the minor's or incompetent person's parent, his or her guardian, a public agency having the lawful charge of the minor or incompetent person, or any other lawful custodian commits the offense of interference with custody and commits a felony of the third degree..." Fla. Stat. §787.03(1).

lessens the risk of detection." Diez, supra (quoting Faison, 426 So.2d at 965). Regarding the interference with custody offense, Fla.Stat. §787.03(1) makes it a crime for a person, without lawful authority, to knowingly take any minor from the custody of the minor's parent, guardian, or any other lawful custodian. Under Florida law, the natural guardian of a child born out of wedlock is the mother, who is entitled to primary residential care and custody of the child unless a court order states otherwise. See Fla.Stat. §744.301(1); see also, Perez v. Giledes, 912 So.2d 32, 33 (Fla. 4th DCA 2005).

The sufficiency of the evidence to support his convictions were raised and rejected on direct appeal. State v. Diez, 970 So.2d 931 (Fla. 4 DCA 2008); (DE#16:Ex.F). Specifically, the court rejected petitioner's arguments, finding that the manner and means used was not merely incidental or naturally accompanying the interference with custody. Id.

As applied here, even if counsel had done as suggested, no showing has been made that this would have resulted in an acquittal at trial. This is so because, under Florida law, petitioner did in fact interfere with the custody rights of the biological mother. It was established that Alicia, the maternal grandmother, left Elizabeth, the minor, with Eunice, the minor's biological mother because Alicia was traveling out of the country. Therefore, at that time, Alicia relinquished or otherwise forfeited any legal custody of the minor to her daughter, Eunice. On the day in question, June 21st, 2004, petitioner entered Eunice's apartment, pushed her against the wall, then onto the ground, and handcuffed her. He then took her forcibly by the arm, walking through each room at gunpoint in an effort to find, according to petitioner, drugs. Eventually, he took the minor and left the apartment, dropping the minor off on

the doorstep of the apartment where the minor's grandparents were staying.

Careful review of counsel's cross-examination and the defense presented, reveals that counsel was aware and attempted to ascertain proof that the grandparents had legal custody over the minor. Petitioner also suggests that Detective Thomas Simcox, with the Hollywood Police Department, destroyed copies of the grandparents' legal documents establishing they were the legal guardians of the minor. Even if true, as argued at trial, that petitioner's actions and motivations were altruistic, desiring to assist the Lopez' in removing the minor from a dangerous environment and to enable them to recuperate custody of the minor, albeit unlawfully, there is nothing of record to establish that the Lopez had the Venezuelan custody documents domesticated in the states, nor that it was not joint with their daughter. Further, neither the grandparents nor petitioner's girlfriend testified on his behalf at trial, to establish that he had retrieved the child at the consent and direction of the Lopez'. To the contrary, in their statement to police, the Lopez' both indicated they were unaware who or why the minor had been left on their doorstep. Regardless, the evidence showed petitioner did not have the legal authority or custody, and rather then seek help from law enforcement or the courts, he acted unlawfully, using his own devices, to secure the return of the minor to the Lopez', whether for pecuniary or altruistic reasons.

Assuming, the defense had been further investigated and pursued, the Hague Convention was enacted to secure the prompt return of children wrongfully removed to or retained in a contracting state. Seaman v. Peterson, 762 F.Supp.2d 1363, 1367 (M.D. Ga. 2011). Under the International Child Abduction Remedies

Act ("ICARA"), the grandparents could have petitioned a Florida court, where the minor was located, for the return of the minor to Venezuela, where petitioner claims was the minor's lawful residence. See Seaman, supra. The courts, however, are limited under ICARA to determining simply whether the child was unlawfully removed from one country to another. In this case, it is uncontroverted the minor was brought to the United States lawfully by her grandmother, and then allowed to remain here with the biological mother for an unspecified period of time. Moreover, no evidence was demonstrated at trial that the grandparents attempted to petition the Florida courts to regain custody. However, regardless of the grandparents legal rights over the welfare of the child, what is clear is that under Florida law, petitioner did not have the legal right to kidnap the minor, and remove her from the custody of her biological mother.

Even if, as petitioner suggests, the grandparents alternatively had shared responsibilities and guardianship with their daughter Eunice, under Venezuelan law, at the time they attempted to regain custody of the minor, the biological mother was refusing to turn over guardianship, and was thus exercising her custody rights over the minor. Thus, even if as suggested by the defense, there was an affidavit executed by Eunice at some point indicating that she was relinquishing custody to her parents, whether temporary or permanent, and further assuming that such information would have shown the biological mother gave up her rights at some point, it would not have affected the outcome of this case. The evidence established that after execution of that purported affidavit, the minor was brought to the United States to reside with the biological mother, at which time the mother exercised legal custody over her child.

Moreover, at the evidentiary hearing in this case, respondent introduced an "Acknowledgement and Approval of Trial Strategy" in which petitioner confirmed that counsel had spoken with the Lopez' on several occasions, and sought to perpetuate their depositions, but as petitioner "feared," their "testimony was not useful to use," but rather, could damage the defense's theory. (DE#44:Resp.Ex.B:6).

It is evident that the issue of custody and motive for the kidnapping was a central theme of the petitioner's defense at trial. Through vigorous cross-examination and petitioner's testimony,[22] the defense attempted to establish that the biological mother had no right to the minor child, and that the petitioner was merely returning the child it its lawful guardian because he feared for the child's safety if she remained with the biological mother. See T.299-314,1420-1431).

Rather than kidnap the child and interfer with custody, the petitioner could have acted lawfully and assisted the grandparents in obtaining a court order from the court determining legal custody of the minor, or enforcement here of a foreign order establishing such right. See Williams v. Primerano, 973 So.2d 645, 647 (Fla. 4 DCA 2008). He did not do so, and chose to act unlawfully to secure the minor's return to her grandparents, regardless of whether the motivating factor was altruism or monetary gains.

Under the totality of the circumstances present here, even if custodial evidence had been further introduced as suggested, and

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[22]The defense had even obtained information that Eunice had provided an affidavit giving custody of the minor to Eunice's parents. (DE#16:Ex.D). Further, no legal documents were provided in the state forum or here demonstrating that Eunice gave up all legal rights, and that as a result, a legal adoption occurred. (T.550).

assuming further the jury were able to consider that petitioner was acting at the behest of the grandparents, this would still not have affected the outcome of the trial. By petitioner's own admissions, at best, the Lopez' advised him that they only wanted someone to "spook" Eunice into returning the minor Elizabeth to them. (T.940-959,1063-64,1155-56,1159-60). Given these circumstances, no deficient performance or prejudice pursuant to Strickland has been established. Therefore, petitioner is entitled to no habeas relief on this claim.

In **claim 2**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to acquire from the Venezuelan court, a copy of the Venezuelan child custody documents in order to impeach the victim's testimony at trial. (DE#1:8; DE#12:11). According to petitioner, counsel should have acquired the Venezuelan documents prior to trial in order to establish that the maternal grandparents had "Patria Potestad,"[23] or lawful custody of the minor Elizabeth. Petitioner suggests these documents were essential to his defense at trial that he had a good faith belief that the Lopez' had custody, and that his belief arose after he was shown not only these documents, but other documents and photographs over dinner with the Lopez' which, in his mind, cemented the fact that they had custody of the minor.

When the identical claim was raised in the Rule 3.850 proceeding, it was denied by the trial court, after applying the federal Strickland standard, finding in pertinent part as follows:

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[23]"Patria Potestad" is latin for "paternal power," and includes "all the duties and rights of the parents in relationship to their children who have not reached majority, regarding the care, development and education of their children." See Vale v. Avila, 538 F.3d 581, 584 (7th Cir. 2008)(quoting Ley Organica Para la Proteccion del Nino del Adolescente [Organic Law for the Protection of Children and Adolescents], tit.IV, ch.1 §1, art.347.

> ...the Defendant has failed to demonstrate that counsel performed deficiently to the extent that his performance was outside the range of professionally competent assistance. Further, the Defendant's complaint of deficiency or omission that counsel failed to obtain the custody documents from Venezuela, did not prejudice the Defendant to such an extent that the result of the trial was rendered unreliable and there is no reasonable probability of a different result had the alleged deficiency or omission not occurred.

(DE#16:Ex.I).

That denial was subsequently *per curiam* affirmed on appeal in a decision without written opinion. Diez v. State, 107 So.3d 422 (Fla. 4 DCA 2012)(table); (DE#16:Exs.K-L).

Here, even if counsel had obtained an affidavit or other documents from Venezuela establishing Eunice had at one point given the care of Elizabeth, her minor child, to her parents, as discussed in relation to claim 1 above, no showing has been made that this would have affected the guilty phase of petitioner's trial. First, there is nothing to suggest that even had these documents been produced, that they would have been given legal validity in Florida. Assuming, without deciding, that the subject Venezuelan custody documents, are in fact, foreign documents establishing the Lopez' as the legal guardians of the minor Elizabeth, Florida courts are required to "domesticate" the foreign judgment and then "give it full faith and credit." See Zitani v. Reed, 992 So.2d 403, 404 (Fla. 2d DCA 2008) (holding that when the judgment was entered by a California state court that had both subject matter jurisdiction over the claim and personal jurisdiction over the complaining party, a Florida court is "generally obliged to give full faith and credit to [that] foreign

state's judgment"). Thus, when a foreign judgment is domesticated, it becomes enforceable as a Florida judgment. See Herman v. Herman, 658 So.2d 1182, 1182-83 (Fla. 4th DCA 1995) (holding that a New Jersey judgment, domesticated by order in Florida, "would have the same force and effect as a judgment originally entered by the courts of this state").

At the time the issue arose between the Lopez' and their daughter over the minor Elizabeth, Elizabeth was residing in Florida with her biological mother. The evidence also showed that the Lopez' visited Elizabeth on several occasions while she was staying with her mother. During any of these visits, the Lopez' could have brought an action to domesticate the Venezuelan documents in Florida, and had a court treat the foreign country as if it were a state of the United States for purposes of applying Fla.Stat. §§61.501-61.523. See Cobo v. Sierralta, 13 So.3d 493, 495-496 (Fla. 3d DCA 2009)(citing Karam v. Karam, 6 So.3d 87, (Fla. 3d DCA 2009)). They then could have then sought the return of the minor under the Hague Convention. See Seaman v. Peterson, 762 F.Supp.2d 1363, 1367 (M.D. Ga. 2011). The Hague Convention, was enacted to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." Id.

Under the International Child Abduction Remedies Act ("ICARA"), a person may petition a court in the country where a child is located for the return of the child to his or her habitual residence in another contracting country, and thus "empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." See Id. (quoting 42 U.S.C. §11601(b)(4)). There is nothing of record to

suggest the Lopez' attempted to do this.

Regardless, assuming counsel had secured the Venezuelan documents showing the Lopez' had "Patria Potestad" over Elizabeth, and further assuming the documents had been used to cross-examine the minor's mother, or were used during petitioner's direct testimony to corroborate his good faith defense, no showing has been made that the Venezuelan documents were domesticated or otherwise validated by a United States court. Further, it was also uncontroverted that the grandmother voluntarily left the minor with her biological mother, thereby waiving or otherwise forfeiting legal custody to the minor. Thus, petitioner's ignorance of the law or his mistaken belief as to whether the Lopez' had legal custody of Elizabeth would have been discredited once it was established that the Lopez' never had the documents domesticated in any court in the United States. Moreover, Alicia, the maternal grandmother would have been cross-examined regarding the fact that she had left Elizabeth with her biological mother. Finally, there is no showing here or in the state forum that the Lopez' would have testified in support of petitioner's theory, much less that they were asserting legal custody.

Regardless, under Venezuelan law, Patria Postetad calls for shared responsibilities and obligations, including guardianship, which encompasses custody. See Gil v. Rodriguez, 184 F.Supp.2d 1221, 1225 (M.D. Fla. 2002). Therefore, arguably, even if the documents had been made a focus of the jury trial, testimony would have also been elicited to establish that, at best, it called for shared responsibilities of the minor between her biological mother and the Lopez'. Thus, this would have further negated any defense petitioner might have had to the charges. Under these circumstances, petitioner has not demonstrated either deficient

performance, much less prejudice arising from counsel's failure to pursue this claim. Therefore, the rejection of the claim in the Rule 3.850 proceeding, which denial was affirmed on appeal, was neither contrary to nor an unreasonable application of federal constitutional principles, and as such, should not be disturbed here. Williams v. Taylor, supra.

Finally, there has been no showing here or in the state forum that a legal proceeding in Venezuela was had establishing by court order or adoption that Eunice's parents were considered the legal guardians of the minor.[24] For these additionally reasons as previously expressed in relation to claim 1 above, the claim also warrants no relief. No prejudice under Strickland has been shown. The petitioner is entitled to no relief on this claim.

In **claim 3**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to investigate the only available defense witness, the victim's estranged husband, Jorge Sotomeyer ("Sotomeyer"). (DE#1:9; DE#12:12). Petitioner suggests that the prosecution threatened the minor's grandparents and petitioner's fiancé with arrest if they testified at petitioner's trial. (DE#12:13). As a result, he maintains he was only left with one defense witness, Sotomeyer, the victim's ex-husband, who would have corroborated petitioner's testimony that the minor was being unlawfully kept by the biological mother. (Id.).

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[24]In a state habeas petition, petitioner maintains he has some, but not all of those documents for the court's review, but did not provide them to the state or appellate court for its review. Further, petitioner has not provided those legal documents showing that a Venezuelan court established the grandparents as legal custodians of the minor. Even if he had an affidavit or statement from the grandparents to that effect, this is insufficient legally to establish custody, and merely demonstrates that an issue existed as to custody. This would not have affected petitioner's trial. Consequently, he cannot prevail on the claim for this alternative reason.

It should first be noted that the petitioner has not demonstrated either in the state court or this habeas proceeding that Eunice's estranged husband would have testified as proffered. Such a bare and conclusory allegation, bereft of record support, is subject to summary dismissal. Machibroda v. United States, 368 U.S. 487 (1962).

More importantly, at a June 12, 2014 status conference, as well as the July 8, 2014 evidentiary hearing in this matter, the petitioner indicated on the record, under oath, that he was withdrawing this claim. Thus, no further discussion is warranted on this issue.

Regardless, careful review of the facts adduced at trial reveal that Eunice was living with her boyfriend and not her estranged husband at the time of the offenses giving rise to petitioner's conviction. Assuming, arguendo, that Sotomeyer could have somehow corroborated petitioner's testimony that the minor was being unlawfully detained by the biological mother, no showing has been made either in the state court proceeding or here that this would have affected the guilt phase portion of petitioner's trial. This is so because Sotomeyer was not present, nor did he witness that the minor was being unlawfully confined or that custody rights were being interfered with by the biological mother. Thus, no prejudice under Strickland has been established arising from counsel's failure to call this defense witness at trial. Moreover, such testimony would have been cumulative to the petitioner's.

Further, whether or not to call a particular witness is well within counsel's strategy and such strategy should not be second guessed here, especially where there is no showing that the prospective witness would have provided exculpatory testimony or

otherwise altered the outcome of the trial. To the contrary, calling Sotomeyer to testify may have hurt the defense, in that information regarding the relationship between the minor and her biological mother and grandparents may have cemented petitioner's convictions, rather than secured an acquittal. In fact, Eunice testified that her daughter had lived with her parents for a period of time. Therefore, Sotomeyer's testimony to this fact would have simply been cumulative to that of the victim mother. Counsel's decision should, therefore, not be questioned in this federal proceeding.[25]

Finally, the evidence admitted at trial, was more than sufficient to sustain the convictions. See Jackson v. Virginia, 443 U.S. 307 (1979). Thus, even if counsel's performance could in any way be deemed deficient for failing to call Sotomeyer, the petitioner suffered no prejudice as a result of the alleged deficiency. Since the petitioner has not shown that there was a reasonable probability that he would have been found not guilty of

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[25]Which witnesses to call, if any, is a strategy decision that should seldom be second guessed. Conklin v. Schofield, 366 F.3d 1193, 1204 (11 Cir. 2004), cert. denied, 544 U. S. 952 (2005). See also Dorsey v. Chapman, 262 F.3d 1181, 1186 (11 Cir. 2001)(holding that petitioner did not establish ineffective assistance based on defense counsel's failure to call expert witness for the defense in that counsel's decision to not call the expert witness was not so patently unreasonable a strategic decision that no competent attorney would have chosen the strategy); United States v. Costa, 691 F.2d 1358, 1364 (11 Cir. 1982). Tactical decisions within the range of reasonable professional competence are not subject to collateral attack unless a decision was so "patently unreasonable that no competent attorney would have chosen it." Adams v. Wainwright, 709 F.2d 1443, 1445 (11 Cir. 1983). See also Waters v. Thomas, 46 F.3d 1506, 1512 (11 Cir. 1995)("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision and it is one that [the courts] will seldom, if ever, second guess."); Chandler v. United States, 218 F.3d 1305, 1314 (11 Cir. 2000)(en banc), cert. denied, 531 U.S. 1204 (2001)(holding that counsel cannot be deemed incompetent for performing in a particular way in a case as long as the approach taken "might be considered sound trial strategy")(quoting Darden v. Wainwright, 477 U.S. 168 (1986)). Further, "the absence of exculpatory witness testimony from a defense is more likely prejudicial when a conviction is based on little record evidence of guilt." Fortenberry v. Haley, 297 F.3d 1213, 1228 (11 Cir. 2002)(rejecting petitioner's ineffective assistance of counsel argument on lack of prejudice grounds despite "no conclusive forensic or eyewitness evidence" because of petitioner's "multiple uncoerced confessions").

the subject crimes had defense counsel called the subject witness, he has failed to satisfy the second-prong of Strickland. Under these circumstances, the petitioner is entitled to no relief on this claim.

Moreover, the petitioner's proffered testimony does not alter the outcome of the proceedings, given the evidence adduced at trial, which included petitioner's own testimony. See Fugate v. Head, 261 F.3d 1206, 1239, n.54 (11th Cir. 2001)(fact that other witnesses could have been called proves only that short-comings of trial counsel can be identified, while shortcomings can be identified, perfection is not the standard of effective assistance). The evidence admitted at trial, was more than sufficient to sustain the convictions. See Jackson v. Virginia, 443 U.S. 307 (1979).

Since the petitioner has not shown that there was a reasonable probability that he would have been found not guilty of the subject crimes had defense counsel called the subject witness, or that his defense would have been successful, he cannot satisfy the second-prong of Strickland. Therefore, this claim warrants no habeas relief. Williams v. Taylor, supra.

In **claim 4**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to request a Richardson[26] hearing on the state's discovery violation regarding

[26]In Richardson v. State, 246 So.2d 771 (Fla.1971), the Florida Supreme Court set forth a mandatory 2-step procedure to be followed by the trial court in the event of a discovery violation. First, the trial judge must determine whether the state violated the discovery rules. See Sinclair v. State, 657 So.2d 1138, 1140 (Fla. 1995). Second, if a violation occurred, the judge must then assess "whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial." Richardson, 246 So.2d at 775 (quoting Ramirez v. State, 241 So.2d 744, 747 (Fla.

the Patria Postestad custody documents from Venezuela. (DE#1:11; DE#12:14). Petitioner acknowledges that defense counsel requested an in-camera discussion to explore the state's discovery violation during trial, but maintains counsel should have insisted that a full Richardson hearing be conducted. (DE#12:14-15; see also, DE#29:Ex.H:¶27). Petitioner claims the prosecution was aware that there were open investigations pending from the Department of Children and Family Services ("DCF") and the Hollywood Police Department ("Hollywood PD") regarding allegations of child abuse and domestic violence involving the biological mother. (Id.). As such, petitioner maintains these agencies had copies of the Venezuelan documents that would have proven the maternal grandparents had legal custody of the minor. (Id.). Petitioner claims that if a hearing had been conducted, it would have been established that the prosecution withheld the Venezuelan documents from the defense.

The law is clear that the manner in which a state trial court conducts proceedings regarding alleged discovery violations is a matter of state law and not cognizable in a writ of habeas corpus unless the hearing and ultimate ruling rendered the trial fundamentally unfair. "As a general rule, a federal court in a habeas corpus case will not review the trial court's actions concerning the admissibility of evidence," Alderman v. Zant, 22 F.3d 1541, 1555 (11 Cir. 1994), since the state court "has wide discretion in determining whether to admit evidence at trial, and may exclude material evidence when there is a compelling reason to do so." Lynd v. Terry, 470 F.3d 1308, 1314 (11 Cir. 2006). See also Baxter v. Thomas, 45 F.3d 1501, 1509 (11 Cir. 1985)(federal habeas corpus is not vehicle to correct evidentiary rulings); Boykins v.

4th DCA 1970)); see also Curry v. State, 1 So.3d 394, 397 (Fla. 1st DCA 2009).

Wainwright, 737 F.2d 1539, 1543 (11 Cir. 1984)(federal courts are not empowered to correct erroneous evidentiary rulings in state court except where rulings deny petitioner fundamental constitutional protections).

Moreover, federal courts are bound by a state court's interpretation of its own rules of evidence and procedure. Machin v. Wainwright, 758 F.2d 1431, 1433 (11 Cir. 1985). Admission of prejudicial evidence may support habeas corpus relief only where the evidence is "material in the sense of a crucial, critical, highly significant factor." Id., (*quoting* Osborne v. Wainwright, 720 F.2d 1237, 1238-39 (11 Cir. 1983)). In Machin, the Eleventh Circuit found that the "surprise" disclosure did not rise to the level of a constitutional due process violation. 758 F.2d at 1433, 1434.

Pursuant to Fla.R.Cr.P. 3.220(b), a prosecutor is obligated to disclose any material information which tends to negate the guilt of a defendant, including a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under Fla.Stat. §90.404(2). See Fla.R.Cr.P. 3.220; see also Richardson, 246 So.2d at 775.

Petitioner maintains here, as he did in his Notice of Extraordinary Circumstances, which was in legal effect a supplement to his then pending Rule 3.850 motion (see DE#29:Ex.H)), that the prosecution had an obligation to disclose the Venezuelan documents to the defense prior to trial, but failed to do so. There was no requirement that the court hold a Richardson hearing since there was no discovery violation as it pertains to the DCF records and

the Venezuelan documents. The record reveals that after the prosecution rested, the defense advised the court that it had previously moved to compel the DCF records but the state had refused to disclose the documents, on the basis that they were privileged. (T.689). The trial court denied the defense's request for the documents at that late stage, noting that petitioner had invoked his speedy trial rights and thus waived any right to pursue further discovery. (T.689-90).

Moreover, as will be recalled, there was no constitutional due process violation. The evidence at trial fully explored the issue of Venezuelan custody. Nevertheless, the record confirms that during a conference with the parties, defense counsel requested that the court review the DCF and Hollywood PD documents in camera, because the state had objected to its production, stating that the information was confidential. (DE#16:Ex.W:T.689-690). However, counsel's request mid-trial was denied on the basis that counsel had failed to "push the issue earlier." (Id.). In so ruling, the court noted that petitioner had indicated he was ready for trial and had demanded a speedy trial. (T.689-690). On this record, no showing has been made either in the state forum or this habeas proceeding that the state violated the discovery rules, much less that the prosecution willfully ignored the defense's request. Further, petitioner himself acknowledged and agreed that he had instructed his attorneys to file a Demand for Speedy Trial, and understood the effects and dangers associated therewith, as set forth in the acknowledgement of plea form executed by petitioner. (See DE#44:Resp.Ex.B:3). In fact, petitioner was aware once the notice was filed, no continuance of trial to secure additional documents or witnesses would be granted. (Id.).

Even if the prosecution withheld the subject information, such

error had no substantial and injurious effect or influence in determining the jury's verdict. See Sims v. Singletary, 155 F.3d at 1312, quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). Thus, the petitioner was not denied a fundamentally fair trial. Consequently, no deficient performance or prejudice has been demonstrated arising from counsel's failure to pursue this issue. Relief must therefore be denied. Williams v. Taylor, 529 U.S. 362 (2000).

On this record, no showing has been made either in the state forum or this habeas proceeding that the state violated the discovery rules, much less that petitioner was prejudiced as a result thereof. As previously discussed in this Report, even if the subject documents had been disclosed by the prosecution and made available to the defense, no showing has been made in the state forum or this habeas proceeding that this would have affected the guilt phase portion of petitioner's trial. Therefore, no showing has been made that the court's failure to conduct a Richardson hearing rendered petitioner's trial fundamentally unfair. Even if the prosecution withheld the subject information, such error had no substantial and injurious effect or influence in determining the jury's verdict. See Sims v. Singletary, 155 F.3d at 1312, quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). Under the totality of the circumstances present here, petitioner has failed to demonstrate prejudice arising from counsel's failure to pursue this issue. He is thus entitled to no relief on this claim.

The petitioner also appears to argue, in the alternative, that the prosecution and trial court suppressed favorable evidence from the defense, in violation of Brady. That claim, likewise, fails on the merits. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court established three criteria a criminal defendant must prove in

order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, the defendant alleging a Brady violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. LeCroy v. Fla. Dept. of Corrections, 421 F.3d 1237, 1268 (11 Cir. 2005); United States v. Meros, 866 F.2d 1304, 1308 (11 Cir. 1989). See also Strickler v. Greene, 527 U.S. 263, 281-82 (1999); United States v. Severdija, 790 F.2d 1556, 1558 (11 Cir. 1986).

Moreover, this duty covers not only exculpatory material, but also information that could be used to impeach a key prosecution witness. Giglio v. United States, 405 U.S. 150, 154 (1972). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Stewart, 820 F.2d 370, 374 (11 Cir. 1987), quoting, United States v. Bagley, 473 U.S. 667, 682 (1985). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. United States v. Alzate, 47 F.3d 1103, 1109-1110 (11th Cir. 1995), quoting, United States v. Bagley, 473 U.S. 667, 682 (1985).

The petitioner has come forward with nothing to show that the state knowingly withheld this information. In fact, petitioner has not demonstrated that the prosecution refused to turn over the records within its possession. In fact, the only records it was withholding were those that were privileged. As argued correctly by the prosecution, petitioner could have had the subject DCF and Hollywood PD files within its possession. Such a conclusory and speculative contention falls far short of establishing that a Brady violation occurred. A court cannot speculate as to what evidence

the defense might have found if the information had been disclosed. Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999).

Likewise, the petitioner has failed to establish in this federal proceeding, as well as in the state forum, that the result of the trial would have been different if the allegedly suppressed information had been disclosed to the defense." Strickler v. Green, 540 U.S. 263, 287 (1999). "The 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, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419 (1995). See also Strickler, 540 U.S. at 287 ("[T]he question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.") (quotation omitted). No such showing has been made here. Regardless, as previously narrated in this Report, the outcome of the trial would not have been affected had this information been disclosed prior to the petitioner's trial.

In this case, given the facts adduced at trial, which included testimony of the minor and her biological mother, no showing has been made that had the information been disclosed, and then used for impeachment of the biological mother, the outcome of the guilt phase portion of the trial would have been different. Nothing of record in the state forum or this federal proceeding establishes a Brady violation. Thus, he is entitled to no relief on this claim. No prejudice under Strickland has been established arising from counsel's failure to pursue this claim.

If the petitioner is somehow raising a related due process claim that his convictions were based upon false or perjured

testimony, any such claim must also fail. A defendant is denied due process when a state knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. Giglio v. United States, 405 U.S. 150, 153 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959). There is no evidence whatever of perjured testimony and/or false evidence and/or prosecutorial misconduct. The fact that the petitioner takes issue with the testimony of certain state witnesses does not mean that such testimony was untruthful or a product of misconduct on the part of the state. Moreover, the witnesses were subject to cross-examination by defense counsel regarding their credibility and the reliability of their testimony and defense counsel in fact conducted thorough and forceful cross-examination of such witnesses. It is apparent that the jury rejected the defense presented and, instead, believed the state's theory and strong evidence presented by the state, as was its prerogative. Thus, the petitioner is not entitled to federal habeas corpus relief on any prosecutorial misconduct claim. Consequently, no prejudice under Strickland has been established arising from counsel's failure to pursue this issue.

Under these circumstances, the claim fails because petitioner does not identify a specific violation of the discovery rules. Thus, he fails to demonstrate that had counsel requested a full Richardson hearing,[27] the trial court would have granted a new

[27]To the extent petitioner's argument suggests that the discussion had by the parties regarding the discovery violation was insufficient, that argument warrants no relief. In Florida, the formalness of a Richardson hearing is not dispositive, and the failure to conduct a proper hearing is not *per se* reversible error. See Tarrant v. State, 668 So.2d 223, 225 (Fla. 4 DCA 1996); State v. Schopp, 653 So.2d 1016 (Fla. 1995). Thus, even if the formalities were not followed, and assuming counsel had requested further expansion of the violation, no showing has been made here that such a request would have been granted. If petitioner suggests that counsel should have requested a hearing on the violation earlier, petitioner also waived the issue by insisting that counsel invoke petitioner's speedy trial rights. Regardless, even if it had been pursued, no showing has been made that the documents contained therein would have established petitioner's innocence. At best, it would have only demonstrated a legal dispute

trial. Accordingly, he fails to show both that counsel's performance was deficient, and that he was prejudiced. Accordingly, this claim warrants no relief.

In **claim 5**, petitioner asserts he was denied effective assistance of counsel, where his lawyer prematurely filed a demand for speedy trial when the defense was not prepared to proceed to trial. (DE#1:17; DE#12:15). Petitioner maintains that since DCF was investigating the biological mother, "there was suspicion" that they would have had copies of the Venezuelan "Patria Potestad" documents showing the Lopez' had adopted or were otherwise the legal guardians of the minor child. (Id.). He claims counsel should have waited until he obtained these documents from the prosecution or DCF before invoking petitioner's speedy trial rights. (Id.). This claim is clearly refuted by the record which reveals that the notice was filed at petitioner's insistence.

Careful review of the record reveals that on April 20, 2006, almost two years after the charges had been pending,[28] a demand for speedy trial was filed in open court. (DE#29:Ex.A:Docket:9). In the Rule 3.850 proceeding, the respondent noted that the request for speedy trial was executed by both petitioner and his counsel. (DE#16:Ex.G:State's Response). Petitioner has not alleged either in the state forum or this habeas proceeding that he was coerced or forced into executing and demanding that his speedy trial rights be invoked. To the contrary, petitioner acknowledged that he discussed the effects and dangers of filing a demand for speedy trial with his attorney months prior to its filing, but demanded that one be

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regarding custody between the biological mother and the grandparents. This would not have affected the guilt phase of petitioner's trial. Thus, no prejudice under Strickland has been established.

[28]Petitioner was arrested and arraigned June 25, 2004. (DE#29:Ex.A:12).

filed anyway, acknowledging that he would be bound by such a request, and that he would be unable to obtain a continuance or have his attorneys do further work on the case. (DE#44:Ex.Acknowledgment of Plea:3). Consequently, he cannot demonstrate that counsel was ineffective for filing the speedy trial notice that petitioner demanded be filed, despite counsel's advice of the dangers in doing so.

Even if petitioner means to argue that counsel should have postponed filing the request until he had gathered all the necessary documents to support petitioner's trial defense, no showing has been made that further postponement of the case, which had already been pending for an extended period of time, would have resulted in the securing of the Venezuelan documents. Assuming the documents would have been secured, petitioner still cannot demonstrate prejudice under Strickland because the subject documents would not have supported the defense at trial, much less any other defense. Such evidence within the DCF or Hollywood PD files would not have negated the charges against petitioner. At best, it would have established that there existed an issue regarding whether custody of the minor was joint, or whether the biological mother had sole custody. This information, however, would not have resulted in a different outcome of trial had it been secured beforehand.

As borne out by the record, defense counsel made all reasonable efforts to ascertain the subject Venezuelan documents purporting to establish that the Lopez' had legal guardianship and custody over the minor. In fact, during a pretrial conference, the issue was explored, during which the prosecution acknowledged existence of the investigation, but stated it did not have copies of the DCF, but represented that the case had been closed after the

minor had been interviewed at the school and no abuse or injuries were observed, therefore the allegations of abuse appeared to be unfounded. (T.259-260). In response, defense counsel acknowledged his awareness of DCF representations' as contained in its report. (T.260). However, counsel indicated the report also showed that DCF attempted to contact the biological mother again, but failed to do so. (T.260).

Given the evidence adduced at trial, as well as, considering the defense presented, delay of the trial to secure the documents would not have altered the outcome of the case. There was sufficient testimony at trial that custody had been relinquished to the biological mother by the maternal grandmother. Further, there was evidence that the biological mother was exercising her parental rights over the child. Thus, this claim warrants no relief because petitioner cannot satisfy Strickland's prejudice prong.

It is also well settled that, under Florida law, defense counsel could not have demanded a speedy trial until he had investigated and completed discovery. See, e.g., Landry v. State, 666 So.2d 121, 125 (Fla. 1995)(explaining that Rule 3.191 "is designed to ensure that an accused cannot control the court's docket by filing spurious demands for a speedy trial for which the accused is not prepared"); San Martin v. Menendez, 467 So.2d 1035, 1037 (Fla. 2d DCA 1985) (explaining that at time defendant filed speedy trial motion, "he was still engaged in discovery and preparation for trial and his demand, therefore, was not proper and was correctly struck upon motion by the state"). Here, review of the criminal docket and the representations of the prosecution and defense counsel before and throughout the course of the trial, confirms that discovery was had, and the matter was ripe for trial. Even if not totally completed, no showing has been made that

further delay of the case or waiver of speedy trial would have resulted in the procurement of the Venezuelan documents, which in turn, would have resulted in an acquittal. Thus, petitioner is entitled to no relief on this claim.

In **claim 7**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to present a voluntary intoxication defense. (DE#1:18; DE#12:17).

First, prior to petitioner's trial, voluntary intoxication was eliminated as a defense by the Florida legislature on October 1, 1999. See Fla.Stat. §775.051, see also, Patrick v. State, 104 So.3d 1046, 1059 (Fla. 2012). Thus, no deficient performance or prejudice under Strickland has been established arising from counsel's failure to pursue this defense at tria.

Second, to the extent petitioner suggests that counsel was ineffective for failing to pursue an involuntary intoxication defense based on the prescription medications petitioner was taking at the time of the kidnapping, this claim also warrants no relief. Petitioner claims on the date in question he took more Clonopin than prescribed. (T.960-961,1202).

Involuntary intoxication is an affirmative defense, thus the petitioner had the burden to establish the defense and present evidence that he was taking the medication as prescribed and pursuant to a lawful prescription. See Montero v. State, 996 So.2d 888 (Fla. 4 DCA 2008), rev. den'd, 15 So.3d 581 (Fla. 2009); Cobb v. State, 884 So.2d 437, 439 (Fla. 1st DCA 2004) (defendant's voluntary ingestion of prescription and over-the-counter medications in amounts exceeding prescribed dosages did not support claim of involuntary intoxication). Here, the petitioner has failed

to meet his burden. To the contrary, as will be recalled, petitioner testified at trial that he purposefully ingested more than the prescribed dose of prescription medication around the time of the offenses.

As to an involuntary intoxication defense based upon the use of prescription medication, in Florida where the intoxication is involuntary, it typically has been raised in an attempt to prove an insanity defense rather than an intoxication defense. See Sluyter v. State, 941 So.2d 1178, 1180-81 (Fla. 2 DCA 2006). The definition of insanity has been expanded to include those situations in which a person could not distinguish right from wrong as the result of an involuntarily-induced intoxicated state. Id. Where the intoxicating dose of medication has been prescribed or administered by a physician, any resulting intoxication is considered to be involuntary. Id. Here, even if this Court assumes that the petitioner was prescribed psychotropic medications and he was taking those medications as prescribed, there is no indication in the record that even having taken the exceeded dose, that he was incapable of distinguishing right from wrong at the time of the commission of the subject offenses.

To the contrary, counsel cannot be deemed inefficient for strategically pursuing the defense of necessity rather than that of insanity. Petitioner always maintained that he believed the minor was in imminent threat of harm, and the only way to eliminate the harm was by taking immediate action, which he did. (T.1552-1553). In fact, at trial, counsel requested a justifiable use of non-deadly force instruction. (T.1553-1557). This is consistent with the evidence adduced at trial, as testified to by petitioner and corroborated by the minor victim, that petitioner pushed the minor's mother up against a wall, but did not physically harm her

when he handcuffed her. He was also well aware of his actions, instructing the victim to hand over the minor's passport and other legal documents, as well as, the drugs she had concealed in the apartment. Thus, on the record before this court, an involuntary intoxication defense would have failed. See Griffin v. State, 114 So.3d 890 (Fla. 2013)(defendant's deliberate actions belie claim of involuntary intoxication).

Accordingly, trial counsel did not render constitutionally ineffective assistance when he failed to pursue the above-discussed defense. Counsel has no duty to raise defenses which have little or no chance of success. See Knowles v. Mirzayance, ___ U.S. ___, ___, 129 S.Ct. 1411, 1422, 173 L.Ed.2d 251 (2009)(the law does not require counsel to raise every available non-frivolous defense). See generally, Chandler v. Moore, 240 F.3d 907, 917 (11 Cir. 2001)(counsel is not ineffective for failing to raise a non-meritorious objection); Card v. Dugger, 911 F.2d 1494, 1520 (11 Cir. 1990)(holding that appellate counsel is not required to raise meritless issues).

In **claim 8**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to present a temporary insanity defenses based on petitioner's history of mental illness. (DE#1:18; DE#12:18).

Florida law permits a person accused of a crime to raise an affirmative defense that he "at the time of the commission of the acts constituting the offense ... was insane." Fla.Stat. §775.027 Insanity is established when:

> (a) The defendant had a mental infirmity, disease, or defect; and

(b) Because of this condition, the defendant:

1. Did not know what he or she was doing or its consequences; or

2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.

Fla.Stat. §775.027(1). Section 775.027 places the burden of proof on the defendant to "prov[e] the defense of insanity by clear and convincing evidence." Fla.Stat. §775.027(2). This statutory enactment, effective June 19, 2000, see Ch.2000-315, §1, Laws of Fla., was the law in effect at the time of petitioner's offense conduct and trial.

Insanity is an available and complete defense to the crime of burglary and armed kidnapping. See Childers v. State, 782 So.2d 513, 517 (Fla. 1st DCA 2001), quoting, 15 Fla.Jur.2d, Criminal Law §3059 at 575 (1993)("A person who is insane is incapable of forming the intent necessary to commit a crime, and such an individual cannot be legally punished for acts which would be criminal if he were not insane"); State v. Cappalo, 932 So.2d 331 (Fla. 2d DCA 2006); Shaffer v. State, 710 So.2d 79 (Fla. 4th DCA 1998).

The standard in Florida for insanity is the McNaughton Rule, which considers 1) the individual's ability at the time of the incident to distinguish right from wrong, and 2) his ability to understand the wrongness of the act committed. See Gurganus v. State, 451 So.2d 817, 820 (Fla. 1984). See also Reynolds v. State, 837 So.2d 1044, 1048(Fla. 4th DCA 2002). Under the McNaughton Rule of Insanity, if a defendant suffers from some mental infirmity, defect, or disease, but nevertheless understands the nature and consequences of his actions and that his actions are against the

law, his actions are punishable. Wallace v. State, 766 So.2d 364, 368 (Fla. 3d DCA 2000).

The facts adduced at trial, including petitioner's own testimony, falls short of suggesting he was insane at the time of commission of the offenses. Further, an insanity defense would have contradicted the defense of necessity presented at trial, that petitioner believed the minor to be in imminent danger. Therefore, having chosen a reasonable defense theory, counsel was not ineffective for failing to pursue an alternative theory that would have negated or been inconsistent with the defense strategy. See cf., Hunt v. Comm'r, Ala. Dep't of Corr's, 666 F.3d 708 (11th Cir. 2012); Nelson v. Nagle, 995 F.2d 1549, 1554 (11th Cir. 1993) (*per curiam*) (citations omitted) ("[The defendant's] factual innocence defense and the intoxication defense were inconsistent. We find that [counsel's] decision not to present an intoxication defense was reasonable in light of the factual innocence defense.").

Counsel was not ineffective for failing to pursue an insanity defense at trial. See Dill v. Allen, 488 F.3d 1344, 1357 (11th Cir. 2007) (citations omitted) ("[C]onstitutionally sufficient assistance of counsel does not require presenting an alternative—not to mention unavailing or inconsistent—theory of the case."); Kight v. Singletary, 50 F.3d 1539, 1546 (11th Cir. 1995) (failure to pursue insanity defense when defendant would not admit culpability in crime and failed to come forward with evidence to support claim of insanity, was not ineffective assistance of counsel); Presnell v. Zant, 959 F.2d 1524, 1533 (11th Cir. 1992) (rejecting habeas petitioner's ineffective assistance of counsel claim based upon counsel's failure to raise insanity defense because defendant failed to come forward with evidence supporting

insanity defense); Sheley v. Singletary, 955 F.2d 1434, 1440 (11th Cir. 1992)(petitioner failed to overcome strong presumption that counsel's conduct was reasonable, especially in view of two doctors' report supporting defendant's competency, which indicated weakness of insanity defense and was relevant factor in determining reasonableness of counsel's conduct); Lee v. Wainwright, 457 F.2d 771, 772 (5th Cir. 1972) (counsel's decision not to pursue insanity defense falls within realm of trial counsel's strategy, which was a wise decision in light of reports of two psychiatrists, who concluded petitioner was sane at time of arraignment and trial)

The record also demonstrates that trial counsel made a reasonable investigation into the facts of the case, was well-prepared for trial, conducted full and extensive cross-examination of the state's witnesses, made appropriate objections, moved for mistrial, moved for judgment of acquittal, and presented a forceful and compelling closing argument. As will be recalled, petitioner executed an acknowledgment and approval of trial strategy, in which he agreed to concede guilt as to the lesser offense of impersonating a police officer, burglary through fraud and lies, and interference with child custody, in order to establish and maintain credibility with the jury regarding his belief that he was rescuing the minor from imminent danger and returning her to her legal custodians, the Lopez'. Concession in this regard was not error given petitioner's post-arrest, detailed confessions. Under these circumstances, petitioner has not demonstrated deficient performance or prejudice under Strickland arising from counsel's failure to pursue this defense at trial. He is therefore entitled to no relief on this claim.

In **claim 9**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to object to the

jury instructions and failed to request special jury instructions. (DE#1:18; DE#12:18). He faults counsel for failing to object to the court's interference with child custody instruction because it did not contain any defenses applicable thereto. (DE#1:18). It is unclear from petitioner's argument what special instructions he specifically wanted counsel to request. He suggests the state charge mirrors the statutory language of the federal statute, but does not indicate how his constitutional rights were violated since he does not identify which precise instruction he wanted counsel to request, other than to state, "special instructions." (DE#1:18). He also cites to the trial transcripts (T.1289-1290), claiming trial counsel was ineffective for advising the court that it was not requesting a special instruction on involuntary intoxication, especially where petitioner testified at trial repeatedly that he was under the influence of multiple, psychotropic medications which altered his "decision making process." (DE#12:19).

Regarding the defense to the charge of interference with child custody, Fla.Stat. §787.03(1) makes it unlawful for any person to take a child from the custody of his or her parents or lawful custodian, absent lawful authority to do so. Section 787.03(2), in relevant part, makes it unlawful for any parent or lawful custodian of a child, to take the child with malicious intent to deprive another parent or lawful custodian of that person's legal right to custody of the child.

"A defendant in a criminal case is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support the instruction." Mitchell v. State, 958 So.2d 496, 499 (Fla. 4th DCA 2007) (citing Smith v. State, 424 So.2d 726, 732 (Fla. 1982)). Failure to give a requested instruction is error when "'(1) the special instruction was

supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing.'" Id. (quoting Stephens v. State, 787 So.2d 747, 756 (Fla. 2001)). "When a trial court denies a defendant's request for a special instruction, the defendant has the burden of showing on appeal that the trial court abused its discretion in giving the standard instruction." Brickley v. State, 12 So.3d 311, 313 (Fla. 4th DCA 2009) (citing Stephens, 787 So.2d at 755-56).

Pursuant to Section 787.03(4), it is a defense to interference with child custody if:

> (a) The defendant had reasonable cause to believe that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare.
>
> (b) The defendant was the victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become the victim of an act of domestic violence as defined in s. 741.28, and the defendant had reasonable cause to believe that the action was necessary in order for the defendant to escape from, or protect himself or herself from, the domestic violence or to preserve the minor or incompetent person from exposure to the domestic violence.
>
> (c) The minor or incompetent person was taken away at his or her own instigation without enticement and without purpose to commit a criminal offense with or against the minor or incompetent person, and the defendant establishes that it was reasonable to rely on the instigating acts of the minor or incompetent person.

Fla.Stat. 787.03(4).

Review of the court's instructions to the jury reveals that the jury was instructed regarding petitioner's theory of defense, including the defense of necessity, and the justifiable use of non-deadly force. (T.1551-1557). Here, it is clear that petitioner's theory of defense instructions were provided. Petitioner cannot demonstrate prejudice arising from counsel's failure to request an unidentified "special instruction" which somehow reflects or otherwise mirrors the federal statute involving interference with child custody.[29] Even if such a request had been made, petitioner has not shown that such a request would have been granted. Therefore, he cannot demonstrate prejudice under Strickland and is entitled to no relief on this claim.

To the extent the petitioner means to argue that counsel erred for failing to request a special instruction on involuntary intoxication, for the reasons previously stated in this Report, petitioner cannot demonstrate either deficient performance or prejudice under Strickland. An involuntary intoxication defense would not have succeeded. Thus, a request for an instruction on this defense was not error, especially as it would have been inconsistent with the defense of necessity. Petitioner is entitled to no relief on this claim.

In **claim 10**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to present a Brady violation. (DE#1:19; DE#12:19). This is a mere reiteration of the

[29]Petitioner cites 28 U.S.C. §1738A, which refers to the enforcement of a court order from one state by a court of another. In other words, petitioner again is reiterating arguments regarding the domestication of the Venezuelan documents and the fact that he had an honest belief that the Lopez' had legal custody to the minor Elizabeth. Again, even if counsel had requested such an instruction, no showing has been made here that the trial court would have granted such a request. Thus, petitioner cannot establish prejudice under Strickland, and is entitled to no relief on this claim.

arguments raised in relation to claim four above and should be denied for the reasons expressed in this Report in relation to that claim.

To the extent petitioner claims the Lopez "fled" to Venezuela after meeting and turning over the minor Elizabeth to authorities because they were threatened with prosecution, such a claim also warrants no relief. In support thereof, petitioner suggests he was "forced into trial" without "any defense witness" and without the Venezuelan documents. This claim is conclusively refuted by the record which reveals that petitioner knowingly waived the right to call the grandparents to testify. As narrated previously in detail in this Report, petitioner agreed not to call the Lopez' nor to perpetuate their testimonies, fearing their testimonies would hurt, rather than aid his defense. Petitioner acknowledged and understood that they would be subject to cross-examination regarding whether petitioner's motives were, in fact, altruistic, or motivated by money, having been paid by them to secure the return of their granddaughter.[30] After conferring with his attorneys, petitioner acknowledged, in pertinent part, as follows:

> Finally, I acknowledge and state that I have discussed the possibility and ultimately the desirability of producing the little girl's grandparents Edgar and Alicia Lopez as witnesses in this case. During our initial discussions, I told my attorneys that these witnesses may possibly be useful to us and as a result, they made efforts and filed motions to secure the testimony of the grandparents (both pairs) and the judge signed an order allowing the attorneys' to take depositions of the grandparents, either in person or in video conference with the understanding that these depositions could be used at the trial. I also understand and [am] aware of the fact that my attorneys repeatedly spoke to Lopez

[30]An airline ticket seized from petitioner's home was also introduced to suggest petitioner was going to flee the jurisdiction.

> family members (including son Edgar Jr.) and spoke to the grandparents directly on numerous occasions and, as I predicated, and as I feared, the testimony by the grandparents was not in [sic] useful to use and in fact, the testimony could very well be damaging to our theory of the case-a theory of defense which we will be able to produce through the state's witnesses and through the state's evidence (my multiple and video taped confessions) without the possibility of the grandparents hurting our defense or contradicting some parts of the defense.

(DE#44:Resp.Ex.B:6).

Thus, no Brady violation has been demonstrated. Moreover, petitioner has not demonstrated deficient performance or prejudice arising from counsel's failure to secure the testimony of the grandparents to testify at petitioner's trial. He is therefore entitled no relief on this claim.

In **claim 11**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to present a Giglio violation. (DE#1:19; DE#12:20). This is a mere reiteration of argument raised in relation to claim four above and should be denied for the reasons expressed herein in relation to that claim.

To the extent petitioner means to argue the minor Elizabeth was born and raised in Venezuela, and counsel was ineffective for failing to correct Eunice's false testimony to the contrary, no such showing has been made that Eunice lied. In fact, Eunice conceded she went to Venezuela to give birth, and in fact, gave birth to her daughter, Elizabeth, there. She also confirmed leaving Elizabeth with her parents while she returned to the United States. However, what is equally evident from the testimony adduced at trial was that the Lopez' brought Elizabeth to the United States, and left her with Eunice, thereby relinquishing custody, whether

temporarily or not. Further, what is also evident from the record is that there is nothing to suggest that the documents from Venezuela were ever domesticated in Florida, nor that the Lopez' ever filed an action in the state court to ascertain their custody rights over the minor Elizabeth. Consequently, even if counsel had further cross-examined Eunice as suggested by petitioner, no showing has been made here that this would have affected the outcome of the trial, resulting in an acquittal. Therefore, petitioner cannot satisfy Strickland's prejudice prong and is entitled to no relief on this claim.

In **claim 12**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to file a motion to suppress statements based on a violation of petitioner's Miranda rights, where the statements were coerced and/or otherwise not knowing and voluntary. (DE#1:20; DE#12:21). Petitioner maintains he was under the influence of psycho tropic medications, and during his videotaped statement, he invoked his Fifth Amendment rights, but police made promises and coerced him into providing the post-arrest statement. (Id.).

Regarding the failure to proceed on the motion to suppress, petitioner acknowledged in the approval of trial strategy agreement he executed, in pertinent part, as follows:

> ...Finally, I understand that my attorneys Gelety and Contini have not formerly filed nor litigated a Motion to Suppress my statements and confessions made to the police officers early in the case. We have discussed this matter several times and I understand that there are three important factors surrounding our consistent decision not to file this motion and not to have hearings on this motion: 1) all of the testimony by several witnesses and supported by documentation (including waiver of rights forms, transcripts and video taped statements during the

> confessions it is obvious that, despite my attorneys' advice to me and despite my attorneys' statements to the police, I felt that I should give statements and I in fact initiated the statements and confessions because I wanted the officers and everyone else to no [sic] that [sic] my motivation was and that my intention were-I felt that if they heard my side of the story that they would understand and would not file charges against; 2) we do not want to loose our collective defense credibility with the judge by litigating motions to suppress statements that do not have a good legal basis and in which the facts are overwhelmingly against us....most of the statements in my various confessions are useful to the defendant, are consistent with the defense that we are putting on (that, essentially, this is not a kidnapping, but this was a rescue that was motivated by my concern for the child and not with any criminal intent)...

(DE#44:Resp.Ex.B:5-6).

Review of the record reveals that when the issue was addressed after the prosecution rested, but before the petitioner testified, it was determined after review of the DVD that there were occasions depicted in the videotape where petitioner clearly invoked his Fifth Amendment privilege when he did not want to discuss a certain topic. (T.654,662,795-801). However, the court found the petitioner at all times reinitiated contact with police, and thus the statements provided were freely given.

Clearly established federal law states that "[A]n accused ..., having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 485-86, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). "[E]ven if a conversation taking place after the accused has 'expressed his

desire to deal with police only through counsel' is initiated by the accused, where re-interrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during interrogation." Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 77 L.Ed.2d 405, (1983); see also Edwards, 451 U .S. at 486 n.9.

First, it must be determined whether the defendant initiated the conversation in a manner evincing a "willingness and a desire for a generalized discussion about the investigation." Bradshaw, 462 U.S. at 1045-46. This is to be contrasted with inquiries into the routine aspects of custody, such as asking for a drink of water or to make a telephone call. Id. In Bradshaw, the defendant asked, "Well, what is going to happen to me now?" Id. The Supreme Court found that question, although somewhat ambiguous, demonstrated a generalized discussion about the investigation, and not merely a necessary inquiry arising out of the incidents of the custodial relationship. Id. at 1056.

However, "[e]ven if a defendant has initiated contact with the police after requesting counsel, any statements made are still inadmissible unless they are the product of a knowing and voluntary waiver." Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988). To meet this burden, the prosecution must show that the relinquishment of the right to counsel and right to remain silent was the product of "free and deliberate choice rather than intimidation, coercion, or deception." United States v. Beale, 921 F.2d 1412, 1435 (11th Cir. 1991). Also, the defendant's waiver must have been made "with the awareness of both the right being abandoned and the consequences of the decision to abandon that right ." Id. Whether the prosecution has met its burden is determined by the totality of

the circumstances. Id. Here, the record confirms that petitioner indicated he understood his rights and was speaking freely and voluntarily with police, without the presence of his attorney, and denied being coerced into doing so. (T.664-670).

"The term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.... [T]he definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301-02, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (footnotes omitted). Although a prisoner cannot be said to have initiated further communication under Edwards by asking for a drink of water or requesting to use the telephone, he does initiate further communication by asking a question such as, "Well, what is going to happen to me now?"—showing a willingness to generally discuss the investigation. Oregon v. Bradshaw, 462 U.S. 1039, 1045-46, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).

Review of the record reveals that the issue was explored by counsel and the court, outside the presence of the jury, at which time the court viewed the DVD of the petitioner's post-arrest statement, which was made part of the transcript of the trial. See T.661-685. It is clear from the statement that the court's finding that petitioner not only reinitiated contact with police, but did so knowingly and voluntarily was not error. Further, it should be recalled that petitioner advised counsel not to pursue the issue further as part of their trial strategy. Regardless, even if the issue had been pursued, the court properly found

petitioner's post-arrest statements to be knowing and voluntary, and not subject to coercion, or made in violation of petitioner's Fifth Amendment rights. Consequently, even if suppression had been sought, no showing has been made that such a motion would have been granted. Thus, petitioner has failed to demonstrate prejudice arising from counsel's failure to pursue this issue.

In **claim 13**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to argue that a taser gun is not a firearm. (DE#1:20; DE#12:22). Petitioner suggests that he could not have been convicted of two counts of armed kidnaping, and armed burglary, because a taser is not a firearm. (Id.).

The jury was specifically instructed, as follows:

> A firearm is legally defined as any weapon including a starter gun which will if designed to or may readily be converted to expel a projectile by the action of an explosive the frame or the receiver of any such weapon. Any firearm muffler, firearm silencer, or any destructive device, or any machine gun.

(T.1544).

Petitioner testified at trial, and counsel argued to the jury during closing that no firearm was utilized during the offenses because a Taser has "non-lethal electrocuting bolts," but "it's not like having a gun and shooting somebody," since it has no projectile. (T.1415-1416).

Under Florida law, a firearm is defined under Fla. Stat. §790.001(6), in relevant part:

> "Firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a riot; the inciting or encouraging of a riot; or the commission of a murder, an armed robbery, an aggravated assault, an aggravated battery, a burglary, an aircraft piracy, a kidnapping, or a sexual battery.

See also Bentley v. State, 501 So.2d 600 (Fla. 1987).

Given the evidence adduced at trial, no deficient performance or prejudice has been established arising from counsel's failure to further argue, as suggested by petitioner here, that he did not possess a firearm, and therefore could not be guilty of the armed kidnappings and armed burglary offenses. It is evident that a taser is encompassed within Florida's definition of a firearm. Moreover, the jury found that the evidence supported the enhancement, in its special verdict form. Consequently, petitioner's claim fails.

In **claim 14**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to raise a double jeopardy violation. (DE#1:20; DE#12:22). Petitioner suggests that his double jeopardy rights were violated because his convictions for kidnapping and interference with child custody contain the same statutory elements. (Id.).

Article I, Section 9 of the Florida Constitution provides, in relevant part, "No person shall ... be twice put in jeopardy for the same offense." Art. I, §9, Fla. Const. Additionally, the Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy

of life or limb." U.S. Const. Amend. V. "The scope of the Double Jeopardy Clause is the same in both the federal and Florida Constitutions." Trotter v. State, 825 So.2d 362 (Fla. 2002).

The Double Jeopardy Clause embodies three separate guarantees: "[I]t protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 307-08, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984)(citation and footnote omitted). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983); Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980)("The Double Jeopardy Clause at the very least precludes ... courts from imposing consecutive sentences unless authorized by [the legislature] to do so."); Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1980)(stating, "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where [the legislature] intended ... to impose multiple punishments, imposition of such sentence does not violate the Constitution."); Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977)(noting "[w]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.").

"Where the same conduct violates two statutory provisions, the

first step in the double jeopardy analysis is to determine whether the legislature ... intended that each violation be a separate offense." Garrett v. United States, 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985)). Although the Double Jeopardy Clause does not flatly prohibit the legislature from punishing the same conduct under two different statutes, federal courts assume that the legislature ordinarily does not intend to do so "'in the absence of a clear indication of contrary legislative intent.'" Missouri v. Hunter, 459 U.S. at 366 (quoting Whalen v. United States, 445 U.S. at 691-92); see also Garrett v. United States, 471 U.S. at 779 (holding that multiple punishments are permissible "when the legislative intent is clear from the face of the statute or the legislative history"); Ohio v. Johnson, 467 U.S. 493, 499 n.8, 104 S.Ct. 2536, 2541 n. 8, 81 L.Ed.2d 425 (1984)("[I]f it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end." (emphasis added)).

If no clear intention is evident, the provisions are analyzed under the "same elements" test announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556 (1993). Although the court will decide under federal law whether a double jeopardy violation has occurred, it must accept the Florida courts' interpretation of the state's own statutes. Hunter, 459 U.S. at 368.

The Eleventh Circuit summarized its interpretation of Supreme Court law regarding double jeopardy as follows:

> To summarize, our review of a potential double jeopardy violation arising from a single prosecution is a two-stage analysis. First, we ascertain whether there exists a clear legislative intent to impose cumulative punishments, under separate statutory provisions, for the same conduct. If a clear indication of such intent exists, our inquiry is at an end and the double jeopardy bar does not apply. If there is no clear indication of legislative intent to impose cumulative punishments, we examine the relevant statutes under the same-elements test of Blockburger. Under that test, if each statutory offense requires proof of an element not contained in the other, the offenses are not the "same" and double jeopardy is no bar to cumulative punishment.

Williams v. Singletary, 78 F.3d 1510, 1513 (11th Cir. 1996).

The "same-elements" test examines whether each offense contains an element not contained in the other offense. "[I]f each statutory offense requires proof of an element not contained in the other, the offenses are not the 'same' and double jeopardy is no bar to cumulative punishment." Williams v. Singletary, 78 F.3d at 1513. Otherwise, "where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." United States v. Dixon, 509 U.S. 688, 696 (1993). Although federal law governs the evaluation of double jeopardy, state law governs the interpretation of a state criminal statute. Tarpley v. Dugger, 841 F.2d 359, 364 (11th Cir. 1988).

Pertinent to petitioner's argument here, he was charged with one count of armed kidnapping of a child under the age of 13 (Count 1), along with interference with child custody (Count 5). (DE#16:ExA). A defendant is guilty of armed kidnapping if he "forcibly, secretly, or by threat," confines, abducts, or imprisons "another person against his or her will without lawful authority, with intent to...commit or facilitate commission of a felony."

Fla.Stat. §787.01(01)(a)2. The statute further provides that confinement of a minor, under the age of 13, "is against his or her will within the meaning of this subsection if such confinement is without the consent of her or his parent or legal guardian." Fla.Stat. §787.01(01)(b). To be found guilty of interference with child custody, in violation of Fla.Stat. §787.03, the prosecution must prove that the defendant knowingly or recklessly took, enticed, or otherwise procured a minor from the custody of the minor's parent, guaridan, or any other lawful custodian.

Thus, contrary to petitioner's allegations, while both offenses arose out of a single act, it did not violate double jeopardy principles because each involved proof of elements separate from one another and thus did not violate the Double Jeopardy Clause. See e.g., Broadnax v. Sec'y, Dept. of Corrs, 2011 WL 2458086, 2-3 (M.D.Fla. June 20, 2011); see also, Brown v. State, 430 So.2d 446 (Fla. 1983); State v. Van Winkle, 407 So.2d 1059 (Fla. 5th DCA 1981); Murphy v. State, 723 So.2d 313 (Fla. 1st DCA 1998); State v. Mitchell, 719 So.2d 1245 (Fla. 1st DCA 1998). As such, trial counsel could not have made a legitimate challenge on double jeopardy grounds. It will be recalled that as to the kidnapping offenses, the appellate court on direct appeal found the state had proven all three elements beyond a reasonable doubt. Diez v. State, 970 So.2d 931, 933 (Fla. 4 DCA 2008). Where the kidnapping and interference with child custody offenses each required different elements, counsel could not have made a legitimate objection or otherwise sought dismissal of the charges for the bases argued by petitioner in the state forum or in this habeas proceeding. Thus, he has failed to demonstrate deficient performance or prejudice arising from counsel's failure to pursue this nonmeritorious claim.

Given the record in this case, counsel's performance was within the wide range of professionally competent assistance. Contrary to petitioner's assertion, there was no double jeopardy violation because the charges were not the "same offense" under the Blockburger test.

In **claim 15**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to impeach state witness, Eunice Lopez, with her deposition testimony. (DE#1:21; DE#12:23). According to petitioner, Eunice testified in her deposition that she did not have custody of her minor daughter, but at trial testified that she did. (Id.). Petitioner maintains counsel should have impeached Eunice in order to cement his defense at trial. (Id.).

This Court finds that the petitioner has failed to establish that trial counsel was deficient or that he was prejudiced. The record reveals that counsel vigorously cross-examined Eunice regarding her statement to police and the fact that she had told them she did not have custody of her daughter. (T.352-372,385-387). At first, Eunice testified she could not recall what she had told police, but then when refreshed with her testimony, she later testified that for the past five years, her daughter had resided with Eunice's parents, the minor's grandparents. (Id.). In fact, Eunice admitted to advising police that the laws in Venezuela were different from those of the United States, and they had advised her that her parents had custody because they did "something in court." (T.385). She acknowledged that her parents determined guardianship issues regarding when and what doctors to see, how she was fed, her piano lessons, and the like. (T.386-387). However, such determination was made after consultation with her. (Id.). On the record before this court, the petitioner cannot demonstrate that

trial counsel was deficient for failing to impeach Eunice on the issue of custody.

Moreover, both trial counsel's decision to cross-examine and counsel's manner of cross-examining are strategic decisions entitled to deference. Dorsey v. Chapman, 262 F.3d 1181 (11th Cir. 2001), cert. den'd, 535 U.S. 1000, 122 S.Ct. 1567, 152 L.Ed.2d 489 (2002). The only question is whether counsel's strategic decision was "reasonable." Minton v. Sec'y, Dep't of Corr's, 271 Fed.Appx. 916, 918 (11th Cir. 2008) ("The Supreme Court has 'declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'") (quoting Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Even if counsel had further attempted to impeach Eunice with her purported inconsistencies regarding the custody of the minor Elizabeth, given the evidence adduced at trial, petitioner has not demonstrated that a reasonable probability exists that the outcome of the trial would have been different. Accordingly, petitioner has failed to establish both deficient performance and prejudice under Strickland and is entitled to no relief on this claim.

In **claim 16**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to file a motion to change venue. (DE#1:21; DE#12:24). Petitioner suggests that he was denied a fair and impartial trial in Broward County, and that transfer to Miami-Dade County would have been preferable since Miami-Dade has more experience dealing with international child custody issues. (Id.).

To establish a presumption of prejudice which would "necessitate [a] change of venue, a defendant must demonstrate that (1) widespread, pervasive prejudice and prejudicial pretrial publicity saturates the community, and (2) there is a reasonable certainty that the prejudice prevents the defendant from obtaining a fair trial." United States v. Campa, 459 F.3d 1121, 1150 (11th Cir. 2006). Further, "[t]he constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

Thus, to prove ineffective assistance of counsel for failure to move for a change of venue, a petitioner must show, "at a minimum, [that] there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if [petitioner's] counsel had presented such a motion to the court." Chandler v. McDonough, 471 F.3d 1360, 1362 (11th Cir. 2006) (citation omitted).

Neither in the state forum nor this habeas petition has petitioner demonstrate a valid basis for a change of venue. His argument that Miami-Dade County would be better suited to address the international custody issues underlying the charges is an insufficient legal basis to warrant a change of venue. The offenses occurred in Broward County, not Miami-Dade County. Petitioner has not alleged, let alone demonstrated, that there was widespread pervasive prejudicial pretrial publicity, nor that there was a reasonable certainty that the prejudice prevented the petitioner from obtaining a fair trial in Broward County. To the contrary, review of the *voir dire* proceedings reveals that the jury's were questioned at length and indicated they were able to follow the court's instructions and be fair and impartial. (T.66-226). There

is nothing of record to suggest that there was any pretrial publicity, much less that it was prejudicial or pervasive. Further, even if Miami-Dade County might seem like a better venue, as suggested by the petitioner, that is not a sufficient basis to warrant a transfer of the case. Consequently, no deficient performance or prejudice under Strickland has been established arising from counsel's failure to pursue this nonmeritorious issue.

In **claim 17**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to file a motion to suppress a DVD containing petitioner's post-arrest statement which he claims was obtained in violation of his Fifth Amendment rights. (DE#1:21; DE#12:24). This is a mere reiteration of arguments made in relation to claim 12 above and should be denied for the reasons set forth in relation thereto. As will be recalled, petitioner entered into a knowing and voluntary trial strategy in which he agreed to forego pursuit of a suppression motion and to demand the filing of a a speedy trial notice. (DE#44:Resp.Ex.B:5). In fact, petitioner explained that he "initiated the statements and confessions" because he "wanted the officers and everyone else" to know what his "motivation" for rescuing the minor, in an attempt to avoid any charges being filed. (Id.).

Review of the record reveals that after the prosecution rested, the petitioner elected to testify on his own behalf at trial. As a result, defense counsel apprised the court that it would have to review the DVD of petitioner's post-arrest statement, in order to ascertain whether in fact the statement was knowing and voluntary. (T.654). The DVD was then played before the court, outside the jury's presence, after which the court determined that

the statement was, in fact, freely given.[31] (T.902). Thereafter, a colloquy was conducted on the record between defense counsel and the petitioner, in which petitioner acknowledged that he and his attorneys had reviewed the DVD, along with the transcripts of the DVD, several times and had discussions as to its contents. (T.906). Petitioner understood he could play or not the tape, but that it was his decision and he was specifically directing that the tape be played to the jury. (T.906). Under these circumstances, petitioner has failed to demonstrate deficient performance or prejudice arising from counsel's failure to seek suppression of the DVD which he directed that it be played for the jury. He has thus forfeited or waived any claim of ineffective assistance arising from counsel's failure to pursue suppression of the DVD. He is thus entitled to no relief on this claim.

In **claim 18**, petitioner asserts he was denied effective assistance of counsel, where his lawyer failed to inform the jury regarding petitioner's substantial assistance in a high profile murder case. (DE#1:22; DE#12:25). Petitioner suggests that he was a witness for the state in a high profile murder case, as part of his ongoing cooperation with law enforcement. He maintains this fact should have been made known to the jury in order to bolster his credibility. This is not proper evidence for the jury's consideration. However, even if counsel had done as suggested, no showing has been made that this would have, in fact, bolstered petitioner's credibility such that it would have resulted in an acquittal of the charges.

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[31]In hindsight, petitioner now regrets his choice, because the prosecution was able to cross examine him regarding his "psychic statements" that information regarding imminent threats to the minor Elizabeth had become known to the petitioner through a psychic dream. Trial counsel was not ineffective for failing to object to the prosecution's cross-examination in this regard. Nor has petitioner demonstrated any prosecutorial misconduct. He is thus entitled to no relief on these alternative bases.

Thus, petitioner yet again fails to demonstrate deficient performance or prejudice under Strickland. Further, to the extent he means to argue that counsel should have raised the issue in mitigation of sentence, petitioner has not argued, let alone demonstrated, that had counsel raised the issue, there is a reasonable probability that, absent the errors, the sentencing court would have imposed a lesser sentence. Thus, he is not entitled to habeas relief on this claim.

In **claim 19**, petitioner asserts he was denied effective assistance of counsel, where his lawyer conceded petitioner's guilt at trial. (DE#1:22; DE#12:26). This claim is refuted by the record which reveals that petitioner executed a notice of trial strategy in which he specifically acknowledged the risks associated with admitting guilt as to some of the lesser charges in order gain credibility on the more serious offenses, in an attempt to "beat those charges." (DE#44:Resp.Ex.B:2-3).

The law is clear that conceding a client's guilt can be a reasonable trial strategy. See Florida v. Nixon, 543 U.S. 175 (2004). When counsel's strategy, given the evidence bearing on the defendant's guilt, is in his client's best interest and when the Strickland standard is satisfied, no tenable claim of ineffective assistance remains even where a defendant did not expressly consent to the strategy. Id.

Review of the trial court proceedings in its entirety reveals that defense counsel presented the best possible defense under the circumstances of this case by conceding some of the lesser charges, for example, impersonating a police officer, etc., in an effort to gain credibility with the jury, and to support the defense of necessity as to the more serious offenses. Counsel emphasized that

there was sufficient reasonable doubt because the evidence showed that the grandparents had legal custody and petitioner was justified in returning the minor to her legal guardians.

Even if some of the comments uttered by counsel during his extensive remarks to the jury could possibly be viewed as inartfully made, when viewing these remarks in the context of the entire trial, such statements clearly did not result in an improper concession as to the kidnapping offenses. To the contrary, by conceding on some of the lesser charges and/or elements, defense counsel was able to achieve credibility with the jury, and question other evidence presented by the state regarding intent to commit the offenses. See Harich v. Dugger, 844 F.2d 1464, 1470 (11 Cir. 1988)(stating that competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury), cert. denied, 489 U.S. 1071 (1989), overruled on other grounds, Davis v. Singletary, 119 F.3d 1471, 1482 (11 Cir. 1997).

The Eleventh Circuit, similarly, has distinguished a situation in which defense counsel concedes guilt to the offense charged and makes a plea for leniency, and one in which counsel concedes guilt to a lesser charge in the face of overwhelming evidence. The former requires a client's consent while the latter is strategy that may bind a client even without consultation. See McNeal v. Wainwright, 722 F.2d 674, 676-677 (11th Cir. 1984)(citing Thomas v. Zant, 697 F.2d 977, 987 (11th Cir. 1984)); see also Atwater v. State, 788 So.2d 223, 230 (Fla. 2001).

Under the Strickland standard, to show deficiency absent a complete failure to subject the case to meaningful adversarial testing, a petitioner must show that trial counsel's concession strategy was unreasonable. Nixon, 543 U.S. at 189. Here, counsel's

concessions were reasonable given the evidence connecting petitioner to the crimes. Notwithstanding, it will be recalled petitioner agreed with this strategy.

Regardless, petitioner cannot satisfy Strickland's prejudice prong. Petitioner has not shown that but for trial counsel's concessions, the outcome of his trial would have been favorably different. In sum, after review of the record as a whole, it is apparent that the petitioner was not denied a fair trial. The result of the trial was not fundamentally unfair or unreliable, as the petitioner maintains. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993). Stated differently, defense counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing. United States v. Cronic, 466 U.S. at 659. Moreover, the petitioner received able representation more than adequate under the Sixth Amendment standard. See Strickland v. Washington, 466 U.S. 668 (1984).

The record indicates that defense counsel made a reasonable investigation of the facts; was well-prepared for trial; conducted full and extensive cross-examination of the state's witnesses; made appropriate objections; and presented a forceful closing argument. Thus, the petitioner has failed to satisfy either the deficiency or prejudice prongs required by Strickland.

The fact that the jury rejected the defense presented with regard to the kidnapping charges and armed burglary offenses, and chose to find the petitioner guilty does not indicate that trial counsel rendered ineffective assistance of counsel. As was the prerogative of the jury, it chose to believe the strong evidence admitted by the state and the testimony of the state witnesses. This Court must defer to the jury's judgment as to the weight and

credibility of the evidence. See Wilcox v. Ford, 813 F.2d 1140, 1143 (11 Cir. 1987). Relief must therefore be denied.

In **claim 20**, petitioner asserts newly discovered evidence of scientific value, based on recent studies, reports, and articles, unavailable at the time of petitioner's trial, regarding the serious side effects associated with the medications petitioner was taking, warrants vacatur of his convictions. (DE#1:23; DE#12:26). To the extent this is a mere reiteration of arguments raised in relation to claim seven above, this claim should be denied for the reasons expressed therein.

Federal law makes clear that a claim of newly discovered evidence demonstrate: (1) the evidence was discovered after trial, (2) the failure to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material and (5) the evidence is such that a new trial would probably produce a different result. United States v. Jernigan, 341 F.3d 1273, 1287 (11th Cir. 2003). In a motion for new trial context, the failure to satisfy any of these elements is fatal to the motion. See United States v. Lee, 68 F.3d 1267, 1274 (11th Cir. 1993).

Likewise, Florida law essentially mirrors the federal standard. "The evidence must have existed but have been unknown by the trial court, the party, or counsel at the time of trial, and must not have been discoverable through the use of due diligence, and ... the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Kearse v. State, 969 So.2d 976, 987 (Fla. 2007)(citing Jones v. State, 709 So.2d 512 (Fla. 1998)). As discussed previously, petitioner cannot demonstrate counsel was ineffective nor that he was prejudiced

arising from the failure of pursuing a motion for new trial based on newly discovered evidence. Additionally, petitioner cannot demonstrate how scientific information regarding the potential side effects associated with medications he was prescribed would have supported an involuntary intoxication defense, much less how it would have altered the outcome of the trial. Petitioner testified regarding what medications he was taking, as well as, the fact that he took more than the prescribed dose for one of the medications on the day of the offenses. As previously discussed in this Report, where petitioner exceeded the prescribed dose of a medication, he cannot then claim he was involuntarily intoxicated. See Montero v. State, 996 So.2d 888 (Fla. 4 DCA 2008), rev. den'd, 15 So.3d 581 (Fla. 2008). Thus, no deficient performance or prejudice has been established arising from counsel's failure to pursue this nonmeritorious issue.

In **claim 21**, petitioner asserts the prosecution committed a Brady violation by withholding the Venezuelan custody documents. (DE#1:23; DE#12:27). This is a mere reiteration of the arguments raised in relation to claim 10 above, and should be denied for the reasons set forth therein.

Further, to the extent he suggests that the prosecution failed to disclose that Detective Simcox and Kevin Companion, who were involved in obtaining petitioner's post-arrest statements, threatened the Lopez', and then threw away the Venezuelan documents in their possession, such a claim warrants no relief. According to petitioner, the prosecution was ware these detectives were under investigation or otherwise being federally indicted and then convicted and sentenced for witness tampering. Petitioner claims had this fact been known to him before trial, the outcome of the proceeding would have been different because it could have been

used to impeach these witnesses. Petitioner does not state where or when the indictment and conviction occurred. It appears from the documents provided that Simcox was arrested sometime in 2007. Petitioner was tried in 2006, before Simcox's arrest. Petitioner does not demonstrate that Simcox or the others were under investigation as suggested during the time of the petitioner's offenses, much less that they tampered or otherwise threatened or destroyed evidence. He has also not demonstrated that the prosecution knowingly withheld such information. Consequently, he cannot prevail on this claim.

In **claim 22**, petitioner asserts the prosecution knowingly committed a Giglio violation by knowingly presenting false testimony at trial. (DE#1:23; DE#12:28). This is a mere reiteration of the arguments raised in relation to claim 11 above and should be denied for the reasons expressed therein. Further, no Giglio violation has been demonstrated in that petitioner has not shown that the prosecution knowingly suborned the purported false and perjurious testimony of Eunice at trial. Thus, petitioner cannot demonstrate prosecutorial misconduct arising from a Giglio violation, and counsel was thus not deficient for failing to pursue this issue. Petitioner is thus entitled to no relief on the claim.

In **claim 23**, petitioner asserts that his Miranda rights were violated and his consent was not knowing and voluntary because they were the product of police brutality and coercion. (DE#1:24; DE#12:29). To the extent the arguments raised herein are a mere reiteration of the arguments raised in relation to claim 12 and 17 above, it should be denied for the reasons set forth therein.

Regardless, petitioner alleges that Detective Simcox choked him, and then threw him down some flight of stairs prior to

Detective Busk's arrival into petitioner's holding cell. This claim is clearly refuted by the trial transcripts, which includes petitioner's post-arrest statement taken by videotape. There is nothing of record to support petitioner's conclusory allegations that he was forced, intimidated, coerced, or otherwise beaten into providing his post-arrest statements. Thus, for the reasons previously set forth in this Report, the trial court did not err in finding petitioner's statements to be knowingly and voluntarily given, and not the result of any coercion or police brutality as suggested here. Thus, this claim also warrants no relief.

In **claim 24**, petitioner asserts that the prosecution violated petitioner's right to a fair trial by threatening defense witnesses. (DE#1:24; DE#12:30). Petitioner claims the Lopez' left the country after being threatened with criminal charges.

To the contrary, as evidenced by the statement provided by the Lopez' to the police when they brought the minor to the police station, they indicated that the child had been dropped off at their apartment in the middle of the night, and that they were unaware how she had gotten there. (DE#29:Ex.U-Interrogation Edgar/Alicia Lopez:80-106). They also denied paying petitioner to abduct or otherwise retrieve the minor from her biological mother's custody. (Id.). Further, they also advised they planned on returning to Venezuela by December. (Id.).

Moreover, as conceded by the petitioner in his acknowledgment of trial strategy introduced at the evidentiary hearing in this matter as respondent's Exhibit B, petitioner was aware that the Lopez' could offer inculpatory testimony, and therefore, were more involved than they were disclosing to police. However, he did not want the issue pursued for fear that it would adversely affect his

own defense at trial.

On the record here, he has not demonstrated that the Lopez' or any other defense witness has been the subject of threats by the prosecution to prohibit them from testifying as defense witnesses. Consequently, petitioner cannot prevail on this claim.

In **claim 25**, petitioner asserts that the prosecution ignored issues regarding federal subject matter jurisdiction by unconstitutionally applying state law, thereby denying petitioner due process of law. (DE#1:25; DE#12:30).

This claim is patently frivolous. As discussed in this Report, the state had subject matter jurisdiction over the offenses, since petitioner violated one or more Florida statutes. The law is well settled that the State of Florida has jurisdiction over criminal acts that occur within its state boundaries. Fla.Stat.Ann. §910.005(1)(a). Petitioner does not dispute that the offenses occurred in the State of Florida. Thus, this claim fails. What is equally true, however, is that the government could have elected to prosecute petitioner for violation of federal laws and the Constitution. See Title 18 U.S.C. §3231, which gives federal courts original jurisdiction over "all offenses against the laws of the United States."

The trial court's jurisdiction was invoked in this case by the State's filing of the Information. For a defective information to be a cognizable claim in a federal habeas corpus action, the charging document must be so defective that it deprives the court of jurisdiction. DeBenedictis v. Wainwright, 674 F.2d 841, 842 (11th Cir. 1982) (citations omitted) ("The sufficiency of a state indictment or information is not properly the subject of federal

habeas corpus relief unless the indictment or information is so deficient that the convicting court is deprived of jurisdiction.").

Under Florida law, the state circuit courts have jurisdiction over all felonies. See Fla.Stat. §26.012(2)(d). Moreover, the Information properly set forth the required elements for armed kidnaping, armed burglary, interference with child custody, and impersonating a police officer, in violation of numerous Florida statutes, and therefore met the minimum requirement for invoking the jurisdiction of the state circuit court. Additionally, the Information contains the required sworn oath of the Assistant State Attorney, certifying that the allegations in the Information "are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged," that the prosecution "is instituted in good faith," and "that testimony under oath has been received from the material witness(es) for the offense." Such a sworn oath by the prosecutor that he received testimony under oath from the material witness(es) for the offense is sufficient pursuant to applicable Florida law. See Fla.R.Cr.P. 3.140(g).

Under the totality of the circumstances present here, it is evident that the state trial court had subject matter jurisdiction over the offenses charged in the Information. Thus, petitioner is not entitled to habeas corpus relief on the basis of the arguments proffered in support of this claim.

In **claim 26**, petitioner asserts that the appellate court erred in determining that kidnapping and interference with child custody were not lesser included offenses, and therefore, his convictions for both violate petitioner's double jeopardy rights. (DE#1:25; DE#12:32). This is a mere reiteration of the arguments raised in

relation to claim 4 above and should be denied for the reasons expressed therein.

In **claim 27**, petitioner asserts that the appellate court erred in affirming the trial court's denial of petitioner's motion for judgment of acquittal. (DE#1:26; DE#12:32).

The Due Process Clause of the Fourteenth Amendment requires the state to prove each element of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). Under Jackson, federal courts must look to state law for the substantive elements of the offense, but to federal law for the determination of whether the evidence was sufficient under the Due Process Clause. Coleman v. Johnson, ___ U.S. ___, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012).

The standard for review of the sufficiency of the evidence on a petition for federal habeas corpus relief 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.[32] Jackson

[32]Similarly, in Florida, the test for sufficiency of the evidence is whether a "rational trier of fact could have found proof of guilt beyond a reasonable doubt." Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986)(citing Jackson v. Virginia, 443 U.S. 307 (1979)). The courts do not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974)(stating that "[w]here there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge."). A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence admitted at trial, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Gant v. State, 640 So.2d 1180, 1181 (Fla. 4 DCA 1994). It is for the jury to decide what inferences are to be drawn from the facts. Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). In cases consisting solely of

v. Virginia, 443 U.S. 307 (1979); Smith v. White, 815 F.2d 1401 (11 Cir. 1987). This familiar standard gives full play to the responsibility of the jury to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See Wilcox v. Ford, 813 F.2d 1140, 1143 (11 Cir. 1987), citing, Jackson v. Virginia, 443 U.S. at 326. The Jackson standard for the sufficiency of the evidence is equally applicable to direct or circumstantial evidence. Jackson v. Virginia, 443 U.S. at 320; United States v. Peddle, 821 F.2d 1521, 1525 (11th Cir. 1987). The simple fact that the evidence gives some support to the defendant's theory of innocence does not warrant the grant of habeas relief. Wilcox v. Ford, 813 F.2d at 1143, citing Martin v. State of Alabama, 730 F.2d 721, 724 (11 Cir. 1984). It is not necessary that the evidence exclude every reasonable hypothesis except that of guilt. Holland v. United States, 348 U.S. 121, 140 (1954).

As narrated previously in this report, there was more than sufficient evidence adduced at by which the jury could reasonably infer that petitioner was guilty of the charged offenses. See Jackson v. Virginia, supra. This Court must defer to the jury's judgment as to the weight and credibility of the evidence. See Wilcox v. Ford, 813 F.2d 1140, 1143 (11 Cir. 1987), citing, Jackson v. Virginia, 443 U.S. at 326. Even if there was some evidence which gave support to petitioner's theory of innocence, such a fact does not warrant habeas corpus relief. See Gibson v. Collins, 947 F.2d 780, 783 (5 Cir. 1991), cert. denied, 506 U.S. 833 (1992).

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circumstantial evidence, a motion for judgment of acquittal will be granted if the state failed to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt. State v. Law, 559 So.2d 187, 188 (Fla. 1989).

Under these circumstances, the denial of the petitioner's claim,[33] which result was affirmed on direct appeal, Diez v. State, 970 So.2d 931 (Fla. 4 DCA 2008) (DE#16:Ex.F), did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. 28 U.S.C. §2254(d)(1); Williams v. Taylor, supra. Relief must therefore be denied in this habeas proceeding.

In **claim 28**, petitioner asserts that the appellate court erred in determining that there was no prosecutorial misconduct at trial, contrary to the trial transcripts. (DE#1:26; DE#12:32).

A federal habeas court engages in a two-step analysis in determining whether prosecutorial misconduct warrants habeas relief. Spencer v. Sec'y, Dep't of Corr's, 609 F.3d 1170, 1182 (11th Cir. 2010)(citing, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991); United States v. O'Keefe, 461 F.3d 1338, 1350 (11th Cir. 2006), cert. den'd, ___ U.S. ___, 127 S.Ct. 1308, 167 L.Ed.2d 120 (2007); United States v. Eckhardt, 466 F.3d 938, 947 (11th Cir. 2006). Reversal on the basis of prosecutorial misconduct requires that the misconduct be so pronounced and persistent that it permeates the entire atmosphere of the trial. United States v. Weinstein, 762 F.2d 1522, 1542 (11th Cir. 1985)(quotation omitted). In other words, the prosecutor's acts, taken as a whole and in the context of the entire trial, must be so prejudicial as to render the trial fundamentally unfair in violation of the due process clause. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); Hall v. Wainwright, 733 F.2d 766, 733 (11th Cir. 1984); Hance v. Zant, 696 F.2d 940 (11th Cir.), cert. den'd, 463

[33]To the extent he argues here that the armed kidnapping offenses cannot stand, this argument was raised and rejected on direct appeal. As to the other offenses, it was not. Regardless, he cannot prevail for any of the reasons proffered in support thereof, and this claim warrants no further discussion.

U.S. 1210 (1983); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Stone v. Estelle, 556 F.2d 1242 (5th Cir. 1976).

In determining whether the comments are sufficiently egregious to result in the denial of due process, courts consider: "(1) whether the remarks were isolated, ambiguous, or unintentional; (2) whether there was a contemporaneous objection by defense counsel; (3) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; and, (4) the strength of the competent proof to establish the guilt of the accused." Spencer v. Sec'y, Dep't of Corr's, 609 F.3d 1170, 1182 (11th Cir. 2010) (internal quotation marks omitted). However, a prejudicial remark may be rendered harmless by curative instructions to the jury. United States v. Weinstein, 762 F.2d 1522, 1542 (11th Cir. 1985)(quotation omitted).

Even if the prosecutor's comments and actions in eliciting certain testimony and evident, and then during opening statment and closing argument were improper, the court must still consider if the evidence and argument deprived the defendant of a fair trial. See Spencer v. Sec'y, Dep't of Corr's, 609 F.3d 1170, 1182 (11th Cir. 2010). Regardless, prejudice during closing argument can be cured by the court's instructions that the arguments by the lawyers is not evidence and that the jury must decide the case solely on the evidence presented at trial, as was done here. See United States v. Iglesias, 915 F.2d 1524, 1529 (11th Cir. 1990). Nevertheless, the undersigned finds, for the reasons previously expressed herein, that no prosecutorial misconduct, during opening, closing, or throughout pretrial and trial, as suggested by petitioner has been demonstrated. Thus, petitioner is entitled to no relief on this claim.

Finally, this court has considered all of the petitioner's claims for relief, and arguments in support thereof. See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013)(citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, petitioner has failed to demonstrate how the state courts' denial of his claims, to the extent they were considered on the merits in the state forum, were contrary to, or the product of an unreasonable application of, clearly established federal law. To the extent they were not considered in the state forum, as discussed in this Report, none of the claims individually, nor the claims cumulatively warrant relief. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein or in the state forum, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail herein.

VIII. Evidentiary Hearing

Petitioner's request for an evidentiary hearing on additional claims must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, show both extraordinary circumstances and reasonable diligence entitling a petitioner to enough equitable tolling to prevent his motion to vacate or habeas petition from being time-barred. See generally Chavez v. Secretary Florida Dept. of Corrections, 647 F.3d 1057, 1060-61 (11th Cir. 2011)(holding that an evidentiary hearing on the issue of equitable tolling of the limitations period was not warranted in a §2254 proceeding and further finding that none of the allegations in the habeas petition about what postconviction counsel did and failed to do came close to the serious attorney misconduct that was present in Holland, instead, were at most allegations of garden variety negligence or

neglect). If so, he gets an evidentiary hearing and the chance to prove that those factual allegations are true. Id. As noted by the Eleventh Circuit, "[t]he allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing." Id. at 1061. Based upon the reasons stated above, this is not one of those cases where an evidentiary hearing is warranted on any of the remaining claims raised in this Report. Petitioner was granted a hearing solely as to the claim regarding the failure to convey a state plea offer, which did warrant evidentiary findings. However, the remaining claims do not.

IX. Certificate of Appealability

As amended effective December 1, 2009, §2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2254 Proceedings, Rule 11(b), 28 U.S.C. foll. §2254.

After review of the record, petitioner is not entitled to a certificate of appealability. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir.

2001). Because the claims raised are clearly without merit, petitioner cannot satisfy the Slack test. Slack, 529 U.S. at 484.

As now provided by Rules Governing §2254 Proceedings, Rule 11(a), 28 U.S.C. foll. §2254: "[B]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

X. Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be denied, that a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Dated this 2nd day of September, 2014.

UNITED STATES MAGISTRATE JUDGE

cc: Janice L. Bergmann , AFPD
Federal Public Defender's Office
1 E. Broward Boulevard, Suite 1100
Fort Lauderdale, FL 33301
Phone: 954-356-7436
Fax: 954-356-7556
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Melynda L. Melear, Ass't Atty Gen'l
Office of the Attorney General
1515 North Flagler Drive, Suite 900
West Palm Beach, FL 33401-3428

A-6

107 So.3d 422 (Table)
Unpublished Disposition
(The decision of the Florida District Court of Appeal is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
District Court of Appeal of Florida, Fourth District.

Martin DIEZ, Appellant,
v.
STATE of Florida, Appellee.

No. 4D09–4547.
|
Dec. 26, 2012.

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carlos A. Rodriguez, Judge; L.T. Case No. 04–10770 CF10A.

Attorneys and Law Firms

Scott M. Schirrman, Deerfield Beach, and Martin Diez, Okeechobee, for appellant.

No appearance required for appellee.

Opinion

PER CURIAM.

***1** *Affirmed.*

STEVENSON, TAYLOR and CIKLIN, JJ., concur.

All Citations

107 So.3d 422 (Table), 2012 WL 6686064

End of Document

A-7

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARTIN DIEZ,

Defendant.
_____/

CASE NO.: 04-010770CF10A

JUDGE: CARLOS A. RODRIGUEZ

DIVISION: FF

FILED FOR RECORDS
CLERK OF CIRCUIT COURT
BROWARD COUNTY, FLORIDA
2009 OCT -7 PM

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ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE having come before this Court upon the Defendant's Motion for Rehearing, filed pursuant to Florida Rules of Criminal Procedure 3.850(g), and the Court having considered same, and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the Defendant's Motion for Rehearing hereby denied.

Defendant has thirty (30) days to appeal from the rendition of this Order.

DONE AND ORDERED in Chambers on October 6, 2009, at Fort Lauderdale, Broward County, Florida.

CARLOS A. RODRIGUEZ, Circuit Judge

Copies furnished:

Richard B. Martell, Assistant State Attorney, Appeals Division FF

Martin Diez, DC#L64072
DeSoto Correctional Institution Annex
13617 SE Highway 70
Arcadia, Fl 34266-7800

A-8

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	CASE NO.: 04-010770CF10A
Plaintiff,	JUDGE: McCARTHY
v.	
MARTIN DIEZ,	
Defendant.	

ORDER REQUIRING STATE'S RESPONSE TO DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

THIS CAUSE comes before this Court upon Defendant's Writ of Error Coram Nobis, filed August 16, 2011, which this Court shall treat as a Motion for Post Conviction Relief brought pursuant to Florida Rule of Criminal Procedure 3.850, since Defendant is still in custody for the above-styled case. See Howarth v. State, 673 So.2d 580, 582 (Fla. 5th DCA 1996) (holding that the writ of "[e]*rror coram nobis* is now available only to defendants challenging the validity of sentences for which they are no longer in custody"). This Court has reviewed Defendant's motion and finds that a response by the State is necessary. Accordingly, it is

ORDERED AND ADJUDGED that the Office of the State Attorney is hereby directed to file a response to Defendant's Motion for Post Conviction Relief within **sixty (60)** days of the date of this Order, with a courtesy copy sent to the undersigned Judge.

DONE AND ORDERED on this 24 day of August, 2011, in Chambers, Fort Lauderdale, Broward County, Florida.

JUDGE BARBARA McCARTHY

AUG 24 2011

A TRUE COPY

BARBARA McCARTHY
CIRCUIT COURT JUDGE

Copies furnished to:

Office of the State Attorney, Appeals Division

Martin Diez, DC#: L64072
Okeechobee Correctional Institution
3420 N.E. 168th St.
Okeechobee, FL 34972

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

MARTIN DIEZ
Defendant,
V.
STATE OF FLORIDA,
Plaintiff,

CASE No: 04-10770CF10A
JUDGE: Carlos Rodriguez

WRIT OF ERROR CORAM NOBIS

COMES NOW, Martin Diez, pro se, in the above styled cause, pursuant to Fl. R. CRIM. P. 3.850, "or as otherwise provided by law", and states the following in support thereof:

. The defendant presents "a newly discovered evidence claim" based on the "Patria Potestas" Venezuelan documents, because this evidence existing at the time of a motion or trial but then unknown to a party, who, upon later discovering it, asserts it as grounds for reconsideration or a new trial, was willfully suppressed by the State and was circumvented, additionally, through the States Compulsory process violation. After defendants Sentencing, the maternal grandparents came out of hiding in Venezuela, and forwarded via Courier these exculpatory documents. (See record) Had the "Patria Potestas" documents not been suppressed by the State to the Jury "a reasonable probability exists that the result of the proceeding would have reached a different outcome". The instant writ is filed to bring to this Courts attention that had these documents been known at the time of Judgment, was rendered, would have prevented rendition of the Judgment. See State v. ex rel Butterworth, 714 So.2d 404 (Fla. 1998); Chambers v. State 158 So. 153 (Fla. 1934); Russ v. State 45 So.2d 594 (Fla. 1957); State v. Perry 786 So.2d 554 (Fla. 2001).

5. The record (TT. 262, 526) supports the fact that the SAO ASA Stacey Honowitz stated to the media "if the grandparents set foot in the U.S., they will be arrested." Notwithstanding, the State did have Constructive Knowledge of these documents and failed to disclose these documents as was the State's obligation.
. The record in this case (TT 1325-1326) supports that the State failed to introduce any evidence whatsoever that the mother actually birthed the child or had proof of custody.
To the contrary, the state knew that the mother had given up the child to the grandparents as this was confirmed in the mothers deposition where she stated "until she gets adopted back to me," (page 12 Line 2).

THEREFORE: The defendant most respectfully requests that this Honorable Court Conduct a preliminary hearing to make a determination as to the defendants equal protection — due process violations surrounding this Manifest miscarriage of justice, or other relief as this Court deems just and proper.

It is so prayed.

DECLARATION/UNNOTARIZED OATH

UNDER PENALTIES OF PERJURY I declare that I have read the foregoing Motion and that the facts stated within are true and correct. Florida Statute §92.525 and *State v. Shearer*, 628 So.2d 1102 (Fla. 1994)

(Name)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished to the following: Prison officials at Okeechobee C.I., for mailing to the State Attorneys office located at 201 S.E. 6th Street Ft. Lauderdale, FL 33301

And was placed in the hands of prison officials for mailing by U.S. Mail on this 9th day of August 20 11

(Name)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

December 19, 2011

CASE NO.: 4D11-4060
L.T. No. : 04-10770 CF10A

MARTIN DIEZ v. STATE OF FLORIDA

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that petitioner shall file, within twenty (20) days from the date of this order, an appendix including a copy of petitioner's Writ of Error Coram Nobis on Newly Discovered Evidence, any state responses, a copy of the September 20, 2011 Order Staying Defendant's Writ of Error Coram Nobis on Newly Discovered Evidence, and any portions of the record which the petitioner deems necessary to an understanding of the issues presented in his petition for writ of mandamus. *See* Fla. R. App. P. 9.100(g), 9.220; further,

ORDERED that the petitioner shall serve a copy on the Attorney General's office.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Martin Diez Attorney General-W.P.B.

dl

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

DISTRICT COURT OF APPEAL * FOURTH DISTRICT * STATE OF FLORIDA

RECEIVED
OFFICE OF THE ATTORNEY GENERAL
DEC 20 2011
CRIMINAL APPEALS DIVISION
WEST PALM BEACH

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

November 10, 2011

CASE NO.: 4D11-4060
L.T. No. : 04-10770 CF10A

MARTIN DIEZ v. STATE OF FLORIDA

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that the Notice of Appeal is hereby treated as and shall proceed in this Court as a Petition for Writ of Mandamus.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Martin Diez Attorney General-W.P.B. Howard Forman, Clerk

dl

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA

EXHIBIT I

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARTIN DIEZ,

Defendant.
_____/

CASE NO.: 04-010770CF10A

JUDGE: CARLOS A. RODRIGUEZ

DIVISION: FF

ORDER DENYING DEFENDANT'S
MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE having come before this Court upon the Defendant's Motion for Post-Conviction Relief, filed pursuant to Florida Rules of Criminal Procedure 3.850, and the Court having considered same, along with the State's Response thereto, and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the Defendant's Motion for Post-Conviction Relief is hereby **denied.** As a result of the voluminous nature of the State's Response and because a copy of said Response has already been supplied to all parties, including the Defendant on July 27, 2009, as indicated by Assistant State Attorney Richard B. Martell, an additional copy of the Response is not attached to the instant Order.

The Court has reviewed the Defendant's Motion, the State's Response, the Defendant's Response to the State's Response and attached transcripts labeled as attachments thereto.

The Defendant's motion is legally sufficient but refuted by the records. Under the standard announced in Strickland vs. Washington, 466 US 668 (1984), the Defendant has failed to demonstrate that counsel performed deficiently to the extent that his performance was outside the range of professionally competent assistance. Further, the Defendant's complaint of deficiency or omission that counsel failed to obtain the custody documents from Venezuela, did not prejudice the Defendant to such an extent

FELONY

that the result of the trial was rendered unreliable and there is no reasonable probability of a different result had the alleged deficiency or omission not occurred.

Defendant has thirty (30) days to appeal from the rendition of this Order.

DONE AND ORDERED in Chambers on September 21, 2009, at Fort Lauderdale, Broward County, Florida.

CARLOS A. RODRIGUEZ, Circuit Judge

Copies furnished:

Richard B. Martell, Assistant State Attorney, Appeals Division FF

Martin Diez, DC#L64072
DeSoto Correctional Institution Annex
13617 SE Highway 70
Arcadia, FL 34266-7800

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO: 04-10770 CF10A

MARTIN DIEZ,
Defendant.

MOTION FOR REHEARING, CLARIFICATION OF RULING AND EVIDENTIARY HEARING

COMES NOW, Defendant, Mr. Martin Diez, *pro-se*, and moves this Honorable Court in the above-styled cause to grant rehearing in accordance with Florida Rules of Criminal Procedure, 3.850(g), and shows the Court as follows:

Undersigned pro-se litigant states with particularity the following points of law or fact:

1. Most respectfully, this Honorable Court misapprehended, overlooked and did NOT take into full consideration the totality of Defendant's claims, as, this Court only addressed one (1) claim and the need for an evidentiary hearing.

2. This Honorable Court's order denying Defendant's 3.850 motion only addressed trial counsel's deficiency or omission regarding the Venezuelan custody documents, which allegedly did not prejudice Defendant to such an extent that the result of the trial was not unreliable. The records attached to State's Response does not determine or support Venezuelan custody documents as these documents

were withheld in violation of Brady v. Maryland, 373 U.S. 83 (1964), and are not part of the record.

3. After the State's Response to Defendant's initial unamended motion, Defendant filed eleven (11) amendments, notices, supplements and notices with support documentation, pleading for this Court to at a minimum **GRANT** an evidentiary hearing where Defendant's pro-bono, standby counsel, Maury Halperin, could effectively present and argue the complex issues of the instant case which include; double jeopardy issues, trial counsel's inadequate representation during the plea negotiation/substantial assistance phase, newly discovered evidence of scientific nature, Brady and Giglio discovery violations, actual innocence claims of interference with custody, venue, police (Detective Thomas Simcox) official misconduct, dud statement to police, venue, jury instructions, et cetera.

4. The State's Response only addressed one of Defendant's claims and flatly ignored the rest. Subsequently, this Honorable Court only addressed one claim.

5. To prevent "injustice" from continuing, this Honorable Court should at a minimum **GRANT** an evidentiary hearing where standby counsel Maury Halperin will adequately present **ALL** of Defendant's claims that are meritorious and meet the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).

6. Defendant has already suffered a nine (9) months delay due to State's untimely response and in the interest of justice it would be unfair for Defendant to exhaust remedies and support through the Fourth District Court of Appeals to obtain an indispensable evidentiary haring surrounding all of the Defendant's claims which are not refuted by the record.

WHEREFORE, Defendant most respectfully requests that this Honorable Court reconsider and **GRANT** an evidentiary hearing at a minimum, in all fairness and to prevent a continued miscarriage of justice.

Respectfully submitted,

Mr. Martin Diez, DC# L64072

OATH

I Declare Under Penalty of Perjury that I have read the foregoing motion and that the facts stated therein are true and correct[1]. Executed on this 27th day of September, 2009.

Mr. Martin Diez, DC# L64072

[1] § 92.525, Florida Statutes; and *State v. Shearer*, 628 So.2d 1102 (Fla. 1994).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing motion has been furnished to the following:

- Clerk of Courts; 201 S.E. 6th Street; Ft. Lauderdale, FL. 33301
- Judge Carlos Rodrigues, 201 S.E. 6th Street; Ft. Lauderdale, FL. 33301
- Mr. Richard Martell, Esq.; % Office of the State Attorney; 201 S.E. 6th Street; Ft. Lauderdale, FL. 33301

and was placed in the hands of prison officials, ufc 6th, for the purposes of mailing by U.S. Mail on this 27th day of September, 2009[2].

Provided to DeSoto CI for
Mailing on 9/27/09
Inmate Initials mp
Officer Initials KG

Mr. Martin Diez, DC# L64072
Desoto Correctional Institution
13617 Southeast Highway 70
Arcadia, Florida 34266-7800

[2] See *Haag v. State*, 591 So.2d 614 (Fla. 1992) and *Thompson v. State*, 761 So.2d 324 (Fla. 2001).

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO: 04-10770CF10A
JUDGE: CARLOS RODRIGUEZ

MARTIN DIEZ,
Defendant.
_____/

NOTICE OF APOLOGY TO COURT AND CLARIFICATION REGARDING RECENT ADMENDMENTS, SUPPLEMENTS, NOTICES ETC. / INSERTION OF ADDITIONAL POINT FOR CONSIDERATION

COMES NOW, Martin Diez, pro se, pursuant to Florida Rule of Criminal Procedure 3.850 and his currently filed motion before this Honorable court and states the following:

1. Defendant asks most respectfully that this Honorable court excuse the recent influx of filings as they are not intended to arrive as piecemeal, but rather are to arrive as good cause shown as issues were not known nor could have been known at the time of filing of initial motion.

2. Defendant was involved in substantial assistance as previously mentioned and was not aware of legal issues until this past month where defendant was afforded time to study and assert these issues in light of the "totality of circumstances" in this most complex and unusual case that set's this case apart

from any other. See Bradford v. State, 701 So.2d 899 (4th DCA 1997); Regan v. State, 643 So.2d 1175 (3rd DCA 1994).

3. The Defendant promises that at an evidentiary hearing, counsel Maury Halperin, will adequately present the issues and will place the "pieces of the puzzle" together professionally for a clear and concise picture.

4. Defendant will demonstrate that Detective Thomas Simcox, took some action with his jailhouse snitch Daniel Thompkins, beyond mere listening, that was deliberately to elicit incriminating remarks. Accordingly, defendant's right to counsel was violated by this informant who was elicited information after defendant's arraignment. See Main v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed. 2d 481 (1985); US v. Henry, 447 US 264, 106 S.Ct. 2183, 65 L.Ed. 2d 115 (1980); Malone v. State, 390 So.2d 338 (Fla.1980). A "*Henry Violation*" is established when police improperly use a jailhouse informant to elicit statements from a defendant in violation of his Sixth Amendment right to counsel. See Lightbourne v. State, 742 So.2d. 238 (Fla.1999).

5. Clearly substantial and irrefutable evidence will show that the State through Detective Thomas Simcox, jailhouse snitches Russel Sloan, and Daniel Thompkins, violated defendants right's by pushing defendant Diez, down a flight of stairs,[1] had stolen attorney-client privileged information, letters ect., in violation of defendants Federal Constitutional rights. Documentation provided at the

[1] Correctional staff laughed at the incident.

evidentiary hearing will support these claims and will show injuries to defendant where defendant was treated at the Broward County Main Jail Infirmary. (See defendants Motion To Compel Discovery dated April 20, 2005, page 5 line 14 iii (R.0029), page 6 line 22 (R.0030), page 7 line 23, 29 (R.0031) States reply to defendants Motion To Compel Discovery page 2 line 8 (R.0044)). See Defendants currently filed 3.850 Motion; page 17. The State in this case clearly interfered with the effective assistance of counsel in light of the overwhelming "totality of circumstances" in this extraordinary case.

WHEREFORE: Defendant request on evidentiary hearing and hereby asserts the above statement of claim by way of this notice.

Respectfully Submitted,

MARTIN DIEZ, DC# L64072

DECLARATION UNDER PENALTY OF PURJURY

I HEREBY DECLARE UNDER THE PENALTY OF PERJURY, that the facts stated in the foregoing notice is true and correct.

DATE: September 2, 2009

MARTIN DIEZ, DC# L64072

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, I placed this document in the hands of prison officials at Desoto Correctional Institution, for mailing to:

Clerk of Court, Judge Carlos Rodriguez201 S.E. 6th Street; Ft. Lauderdale; FL. 33301

Richard Martell, ASA (Appellate Division); 201 S.E. 6th Street; Ft. Lauderdale; FL. 33301

This day of September 2, 2009.

MARTIN DIEZ, DC# L64072
Desoto Correctional Institution
13617 Southeast Highway 70
Arcadia, Florida 34266-7800

Provided to DeSoto CI for
Mailing on 8/2/09
Inmate Initials MM
Officer Initials KG

i. The apartment of Eunize Lopez;

ii. The Defendant's apartment;

19. Any and all fingerprint analysis reports dealing with latent fingerprints, raised standards, compared, conclusions and results;

20. Any and all cell phone or land line phone records of:

i. The Defendant;

ii. The purported victim, Eunize Lopez;

iii. Jose Requina;

iv. Phone records from Broward County Jail;

v. Phone records of Edgar and Alicia Lopez.

21. Any evidence, photographs, notes, reports or documentation dealing with;

i. Supposed damage to the front door of the apartment of Eunize Lopez;

ii. Damage to closet doors of the Lopez apartment;

iii. Any damage within the apartment or photographs showing the apartment being in disarray, shower curtains pulled down, etc.

22. Copies of any and all written or recorded statements by jailhouse snitches Thomkins or Russell Sloan, including but not limited to documents, letters, communications, notes, etc. supposedly taken from or secured from the Defendant by these jailhouse snitches;

4. The address of witness Sheldon York as previously provided being at 3550 Washington Street, Apartment 508-B.

5. Also available upon receipt of blank tapes are taped statements of Jose Requena, Daniel Thompkins, Eunize Lopez, Elizabeth Lopez, Shelton York, and a DVD of Martin Diez.

6. Photo lineup, police reports, any and all evidence taken into custody by the police as listed in the property receipt has been turned over to the defense and may be viewed upon request.

7. Any and all cell phone records are not in the undersigned's possession and are not intended to be used at trial.

8. No promises or inducements have been made to any jailhouse snitches.

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail/hand delivery this 4th day of September, 2005, to: Michael Gelety, Esq., 1209 SE 3rd Avenue, Fort Lauderdale, Florida 33316

MICHAEL J. SATZ
State Attorney

By: _____
STACEY HONOWITZ, ESQ.
Assistant State Attorney
Florida Bar # 771139
201 S.E. Sixth Street, Suite 568
Fort Lauderdale, Fl 33301
(954) 831-6933
FAX: (954) 831-6936

HOWARD C. FORMAN
CLERK OF CIRCUIT AND COUNTY COURT
17TH JUDICIAL CIRCUIT

201 SOUTHEAST 6TH STREET
BROWARD COUNTY
COURTHOUSE
FORT LAUDERDALE, FL 33301

Date: December 19, 2008

To: Martin Diez
From: Felony Division
Re: Correspondence Request: 04-10770cf10a

We are writing to acknowledge receipt of your letter. However, we must return your letter for the following reason(s):

_____ The transmittal letter does not indicate the correct case number.

_____ We need the original signature.

_____ Please provide the date of birth for the person in question.

_____ We are unable to locate a felony record.

_____ Please state what document you need from the file.

_____ This is not a Broward County felony case.

_____ The file has been sent to the judge for review.

xxxxx The file has been checked out by the State Attorney Appeals division.

Howard C. Forman, Clerk
Circuit and County Court

Deputy Clerk

CLERK OF COURT
201 SOUTHEAST 6TH STREET/RM 100 FELONY DIV
BROWARD COUNTY COURTHOUSE
FORT LAUDERDALE, FLORIDA 33301

M2 1025

MARTIN DIEZ; L64072
Desoto Correctional Institution
13617 S. E. Hwy 70
Arcadia, Fl. 34266

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARTIN DIEZ,

Defendant.
_____/

CASE NO.: 04-010770CF10A

JUDGE: CARLOS A. RODRIGUEZ

DIVISION: FF

FILED FOR RECORDS
CLERK OF CIRCUIT COURT
BROWARD COUNTY, FLORIDA
2009 OCT -7 PM 12:

FELONY

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE having come before this Court upon the Defendant's Motion for Rehearing, filed pursuant to Florida Rules of Criminal Procedure 3.850(g), and the Court having considered same, and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the Defendant's Motion for Rehearing hereby denied.

Defendant has thirty (30) days to appeal from the rendition of this Order.

DONE AND ORDERED in Chambers on October 6, 2009, at Fort Lauderdale, Broward County, Florida.

CARLOS A. RODRIGUEZ, Circuit Judge

Copies furnished:

Richard B. Martell, Assistant State Attorney, Appeals Division FF

Martin Diez, DC#L64072
DeSoto Correctional Institution Annex
13617 SE Highway 70
Arcadia, Fl 34266-7800

EXHIBIT J

SNK

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Martin Diez,
Defendant/Appellant,

v.

STATE OF FLORIDA,
Plaintiff/Appellee.
_____/

DCA No.: (*to be given*),
Case No.: 04-[illegible]70 CF10A

RECEIVED
CLERK, CIRCUIT COURT
BROWARD COUNTY, FL
2009 OCT 20 AM 9:35
FELONY

NOTICE OF APPEAL

NOTICE IS GIVEN that Martin Diez, Defendant/Appellant, appeals to the Fourth District Court of Appeals, the order of this Court rendered on September 21, 2009. The nature of the order is Summary Denial of Rule 3.850 motion. [Except in criminal cases, a conformed copy of the order appealed shall be attached to this notice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed this document in the hands of Prison Official(s) for mailing to:

- Clerk of Court; 201 Southeast 6th Street; Fort Lauderdale, Florida 33301
- Office of the State Attorney, Richard Martell 201 Southeast 6th Street; Fort Lauderdale, Florida 33301
- Clerk of Court, 1525 Palm Beach Lakes Blvd; West Palm Beach; FL. 33401

on this 12th day of October 2009.

_____
Martin Diez DC#L64072
DeSoto Correctional Institution
13617 SE Highway 70
Arcadia, Florida 34266-78

Provided to DeSoto CI for
Mailing on 10·12·09
Inmate Initials MDx
Officer Initials _____

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

MARTIN DIEZ,
Defendant/Appellant

vs.

STATE OF FLORIDA,
Plaintiff/Appellee.
/

Case No.: 04-10776CF10A

DIRECTIONS TO THE CLERK

Defendant/Appellant, MARTIN DIEZ, in propria persona directs the clerk to INCLUDE (INCLUDE/EXLUDE) the following items FROM (IN/FROM) the original record described in Rule 9.141(b)(2) A

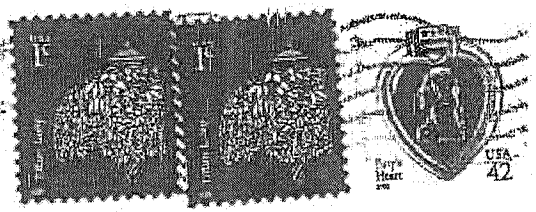
ITEM	DATE FILED
1. MOTION FOR REHEARING	9/24/09
2.	
3.	
4.	
5.	

/S/ [signature]
NAME: MARTIN DIEZ
DC#: L64072 MN#: 4866
DeSoto C.I. ☑ R.P. ☐ W.C.☐
13617 SE Highway 70
Arcadia, Florida 34266-7800

Provided to DeSoto CI for
Mailing on 10.12.09
Inmate Initials MD
Officer Initials [signature]

Martin Diez, DC#L64072
Soto Correctional Institution
417 SE Hwy 70
Arcadia, FL 34266-7800

MINNESOTA
13 OCT 2009



Clerk of Courts (Felony division)
201 SE 6TH Street
Ft. lauderdale, FL 33301

33301+3303

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

MARTIN DIEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

4D 09-4547
09-4030

APPEAL CASE NO.:
LT. CASE NO.: 04-10770 CF 10A

INITIAL BRIEF ON SUMMARY DENIAL OF RULE 3.850 POSTCONVICTION MOTION Pursuant Rule 9.141(b)(2)

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

MARTIN DIEZ
PRO SE

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PERFORMANCE OF TRIAL COUNSEL. THE APPELLANTS STATEMENTS, AND CONSENT TO SEARCH WERE COERCED BY POLICE MISCONDUCT AND APPELLANTS COMPULSORY PROCESS WAS VIOLATED, ALL OF WHICH SEVERED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

ISSUE III:
THE TRIAL COURT IMPROPERLY DENIED APPELLANTS MOTION FOR POST CONVICTION RELIEF WITHOUT ADDRESSING DOUBLE JEOPARDY-FUNDAMENTAL ERRORS. THE SINGLE CRIMINAL EPISODE REQUIRES RELIEF AND VACATING OF SENTENCES, IN ACCORDANCE WITH DUE PROCESS

ISSUE IV:
THE TRIAL; COURT IMPROPERLY DENIED APPELLANTS MOTION FOR POST CONVICTION RELIEF WITHOUT CONSIDERING NEWLY DISCOVERED EVIDENCE OF SCIENTIFIC VALUE AND THAT COUNSEL WAS INEFFECTIVE IN FAILING TO INFORM, EXPLORE, OR PRESENT, THE POSSIBLE DEFENSE OF TEMPORARY INSANITY DUE TO THE CONSUMPTION OF LAWFULLY PRESCRIBED PSYCHOTROPIC AND PAIN MANAGEMENT MEDICATIONS IN THEIR COMBINED EFFECT DURING EPISODE.

ISSUE V:
THE TRIAL COURT IMPROPERLY DENIED APPELLANTS MOTION FOR POST CONVICTION RELIEF AND MOTION FOR DISCOVERY SURROUNDING TRIAL COUNSEL'S INEFFECTIVENESS DURING PLEA NEGOTIATIONS AND APPELLANTS EXTENSIVE SUBSTANTIAL ASSISTANCE TO THE STATE AND OTHER AGENCIES.

TABLE OF CITATIONS

Other Authorities:

28 U.S.C. § 1738A (Supp 1988) (FPKPA)
18 U.S.C. § 1073
18 U.S.C. § 1204
42 U.S.C. § 653, 663 (Supp 1988) (FPKPA)
42 U.S.C. § 11601 (6) (UCCJEA)

Florida Statutes Sections (§)

787.01(1); 787.03(1); 787.04(1)
775.082-087; 775.021(1)- 775.051
63.062(1)
39.001(48); 39.503(1)
810.02
742.091

Florida Rules of Criminal Procedure
Rule 3.850

Florida Rules of Appellate Procedure
9.141 (b)(2)(D)

United States Constitution
Amendments 5, 6, 14.

Florida Constitution
Art. I, § 9

PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In this Brief, the parties will be referred to as they appear before this Court, except that Appellee may also be referred to as "State" or "Prosecution."

The following symbols will be used:

T=Transcript

STATEMENT OF CASE AND FACTS

As a child the Appellate had suffered physical and sexual abuse which had culminated in the Defendant suffering from mental health illnesses which had required that the Defendant live his life under a daily regiment of psychotropic medications, and that when not properly administered the defendant's decision making and judgment were adversely effected. Through the Appellant's fiancée, Monica Alaroon, the defendant first became aware of the situation in which a minor female child might be in danger of suffering physical and sexual abuse from the mother's boyfriend. At the behest of the Appellants fiancée, the Defendant met with the child's maternal grandparents.

At the foregoing meeting the grand parents told Appellate compelling story that led appellate to firmly believe; (1) that the child was wrongfully withheld by

the mother who did not have lawful custody of the child; (2) that lawful custody of the child had been legally transferred from natural mother to the maternal Grand parents under Venezuela law, (3) that the child was a lawful citizen of the country of Venezuela, and while visiting in the United States, through a temporary 90-day visa, with the grand parents who were the lawfully appointed custodians of the child, the child had been paternally kidnapped by the mother who refused to return the child to the grandparents in violation of the International Parental Kidnapping Crime Act (IPKCA),(4) while wrongfully retained by the mother who was working at a strip club, the child was being abused sexually by the mothers boy friend, and was being caused to live in a dangerous environment where drugs were present; (5) that the grandparents had tried the authorities in an effort to remove the child to no avail as the authorities failed to take actions;(6) that the minor child needed immediate rescue.

The grandparents at the aforementioned meeting produced the" Patria Postestad", i.e., Paternal Authority adoption papers which proved that the mother did not possess lawful custody and had no right's to wrongfully retain the child nor did natural mother possess paternal rights over the child where under Venezuelan law those rights had been effectively transferred to the Grandparents[1a,b].

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[1] a.)The forgoing facts are a mere summary of the facts bearing on the meeting between the defendant and the minor child's Grandparents. The totality of those facts are set-forth in meritorious detail in the trial transcripts of the defendant's

During the period in which the minor child had been residing with the natural mother in the United States, one or more incident arose which resulted in the Hollywood Florida Police Department (H.P.D) being called to the Nature Mother's residence in response to one or more complaints of domestic violence being afflicted upon the Natural Mother at the hands of her live-in boyfriend. These incidents resulted in the Broward Sheriff's Office (B.S.O), and Florida Department of Children and Family services (D.C.F.S.), Child Protection team (C.P.T.), commencing investigations into the safety and well being of the subject minor child. The investigations also resulted in the H.P.D., D.C.F.S., and C.P.T.,

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criminal trial in the instant case. For a more detailed account of all such facts the defendant asks that this court consult the trial transcripts which are in their entirety incorporated into this motion by reference as if set forth fully herein, with all emphasis (T.TR 1 -1617).

b.) The defendant toward clarity emphasized that the Country of Venezuela is a signatory to, inter alia, The Hague Convention; as well as the IPKCA; UCCJEA; and PLCPA. These acts directly relate to minor children who are wrongfully removed form their custodian's custody; place of birth, and habitual residence. Moreover, under the forgoing congressionally sanctioned Acts, both Mr.Gelety as well as the Office of the State Attorney prosecuting the defendant, possessed a means of acquiring documentation from the Venezuelan authorities that established that lawful custody and parental rights, over the minor child had been lawfully transferred from the natural mother to the Maternal Grandparents, and that on the date of the incidents leading to the State's charges that the natural mother had been divested of, and was without lawful custody and parental authority over the subject child. As well be shown infra neither defense counsel nor the prosecution ever employed any of the forgoing laws to acquire such documentation even though the same documentation did exist, and such in action by both counsel and the prosecution severely prejudiced the defendant where acquisition of said documentation would have resulted in pre-trial dismissal of the State's charges, or at worse acquittal on all counts where the natural mother's custody over the minor child was the catalyst of all the State's charges against the defendant.

procuring documentation that prima facie established that lawful custody and parental rights over the minor child had been lawfully transferred from the natural mother to the Maternal Grandparents shortly after the minor child's birth in February 1999. The appellate took extra medications as his fiancée was pleading for him to do something immediately after receiving a call from the grandparents who found the child in bed with mothers' naked boy friend. Appellant, went over caught the mother red handed smoking crack, said he was a police officer, hand cuffed the mother, seized the drugs and gave mother a choice, child goes with to grandparents or you go to jail. Appellant left a receipt for the child and safely delivered the child to grandparents who were staying at mothers "husbands" apartment in South Beach, Miami (the marriage was to obtain a green card).

Defendant surrendered himself to authorities with his attorney present. Shortly thereafter, the defendant was charged by amended information with count one: Kidnapping of Elizibeth Nicole Lopez, a minor child, while armed, in violation of § 787.01(1) and 775.087(2)(a), Florida Statutes. The felony offense underlying the principle kidnapping charge was alleged to be interference with custody, Section 787.03(1), Florida Statute (R.90). Count Two: Kidnapping of Eunice Lopez, while armed, in violations of Sections 787.01(1) and 775.087(2)(a), Florida Statute. The felony offense underlying the Kidnapping charge was alleged to be interference with custody, Section 787.03(1), Florida Statutes (R. 90). Count

Three: Burglary with intent to commit felony kidnapping and/or inference with custody, assault or battery, in violation of Sections 810.02(1)(b),(2) and 775.087(2)(a), Florida Statute (R. 91). Count Four: Impersonating a Police Officer in violation of Section 843.08, Florida Statute (R. 91), and Count Five: Interference with custody in violation of Section 787.03(1), Florida Statutes (R. 91). Upon learning of the aforementioned Police incidents, and that the Hollywood Police Department; Florida Department of Children and Family Services; and Broward Sheriff's Office's Child Protection Team, had possession of documentation that was beneficial and critical to the defense, counsel commenced process against those Departments and Agencies toward disclosure of these documents to the defense. However, prior to bringing disclosure to fruition, Mr. Gelety prematurely filed a Demand for Speedy Trial under Florida Rule of Criminal Procedure 3.191(b). Notwithstanding, Mr. Gelety's efforts to realize disclosure of documents within the State's control as aforementioned, the State refused disclosure and opposed Mr. Gelety's efforts at each turn, and falsely claimed in their responses to Mr. Getely requests for disclosure, that the State had provided all documentation within their possession and control to the defense. This was false where the State had not disclosed everything within their possession and control to the defense.

SUMMARY OF ARGUMENTS

Whether the Lower court erred by either not holding an evidentiary hearing or otherwise failed to independently review the claims and assert the correct standards of established law and authorities in making its determination to deny all claims within.

ARGUMENT

ISSUE I:
THE TRIAL COURT'S TREATMENT OF APPELLANTS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS AN UNREASONABLE APPLICATION OF THE STRICKLAND TEST, AND WAS ABSENT CONSIDERATION OF CLEARLY ESTABLISHED FEDERAL CONSTITUTIONAL LAWS BECAUSE COURTS ASSESSMENT OF COUNSEL'S PERFORMANCE FAILED TO CONSIDER THE TOTALITY OF CIRCUMSTANCES THAT RELATED TO THAT PERFORMANCE, INCLUDING THE STATES INTERFERENCE WITH COUNSEL'S EFFECTIVE PERFORMANCE, SPECIFICALLY, TOWARDS THE VENEZUELAN CHILD ADOPTION DOCUMENTS GOVERNED BY THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT, ICARA, IPKCA, UCCJEA AND THE DOCTRINE OF BRADY v. MARYLAND, AND VIOLATIONS TOWARDS APPELLANTS RIGHTS TO COMPULSORY PROCESS.

Appellant claim is subject to de novo review as Appellants allegations are sufficient to satisfy prejudice prong of *Strickland*, and thus sufficient to plead on ineffective assistance claim and interference of effective assistance claim based on clarity on clearly established federal law.

But there is more than presumed prejudice in the record of this case. The record also shows a reasonable probability that, in absence of trial counsel's errors

and restrictions imposed by the State, the outcome of the proceeding would have been different. There is a reasonable probability that Appellant would not have been convicted, and thus, Appellant was denied effective assistance; a trial court's decision consistent with *Strickland* would have determined that, in the circumstances of this case, prejudice could be presumed, and reviewing trial courts decision to deny at minimum an evidentiary hearing, was abuse of discretion by the trial court. In the case at bar, the mitigating factors far outweigh the aggravating circumstances and combined with the extreme prosecutorial misconduct, police misconduct, and suppression of evidence and violation of compulsory process rights, Appellant has shown cause for the default and resulting prejudice or a fundamental miscarriage of justice. Appellant cited a number of relevant facts of which his attorney were not aware of, specifically, the assault by Detective Thomas Simcox; his tampering with evidence specifically, the documents, his effectuating the exodus of the maternal grandparents i.e., adoptive parents and threats against Appellants fiancé Monica Alarcon, the only witness left, where, Appellant could not have her testify on his behalf further aggravating Appellants already existing compulsory rights violation by ASA Stacey Horwitz, who told the media "if the grandparents set foot in the United States they would be prosecuted," Trial counsel was not aware of Appellants coerced statements and consent to search as that Appellant was pushed down stairs by jailhouse snitches

Russell Sloan and Daniel Thompkins, Appellant was in fear of his safety and for the safety of his fiancé. As noted above, these circumstances went to the vitals of Appellants case and defense, and no juror would ignore it had these facts been presented at trial. Indeed these circumstances directly bore on any intention notwithstanding the facts that DCF and the Broward CPT were called out to victims apartment on several occasions and child abuse reports, the Hollywood Police Department was called on several occasions for domestic violence and that the mother and boyfriend were both arrested for possession of drugs where defendants actions where referred to as a "rescue mission" by Detective Busk, clearly on the face of the record.

Because of the States interference with Appellant's defense, counsel could only minimally investigate and prepare for Appellant case which the end result was the total "sum" of errors caused a substantial irreparable prejudice in the outcome of the proceeding. With respect to the prejudice prong of the *Strickland* test, focus should be on whether the Appellant has established "that there is a reasonable probability that, but for counsel's unprofessional error's, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. For a probability to be "reasonable" it must be "sufficient to undermine confidence in the outcome" of the proceeding. Id at 694, 104 S.Ct. at 2068. Therefore consideration of the totality of the evidence to determine whether

appellant was prejudiced by counsel stemming from the States infringement was not reasonably applied by the trial court in absence of an indispensable evidentiary hearing. The issues involved and the accompanying circumstances would justify Appellant being afforded the right to have his pro-bono counsel Maury Halperin, present legal arguments and results of substantial legal research at required evidentiary hearing, or such other relief as this court deem necessary.

PROCEDURAL HISTORY

On October 30, 2008, Appellant filed a timely 3.850 which was followed by a copy of the withheld Venezuela Court documents, and incorporated 1617 pages of records and trial transcripts. On July 28, 2009, the state responded with an eight (8) page response that flatly ignored the complex issues set forth in Appellants thirty-eight (38) page motion which included double jeopardy issues, violation of Appellants compulsory process through Police Detective Thomas Simcox and *Brady* and *Giglio* claims. See *Brady v. Maryland*, 373 U.S. 92 (1973); *Giglio v. U.S.*, 92 S.Ct. 763 (1972).

During the months of August and September 2009, Appellant filed twelve (12) Amendments, notices, supplements, new claims and support documentation as Appellant during pendency of his 3.850 ruling was heavily involved in providing substantial assistance for the F.B.I., FDLE, Broward State Attorney Sheri Tate, and FDOC. And was unable to fully, set forth all desired issues and claims. In each of

the Appellant's twelve (12) motions, Appellant request that trial court conduct an evidentiary hearing in order that standby pro-bono counsel Maury Halperin, could present the complex and unusual circumstances in Appellants case as conceded to by State in their response. On September 21, 2009, trial court issued an order denying Appellants initial claim ruling that Appellant's motion alleging that counsel's failure to obtain the (*Brady i.e)* Venezuelan custody documents did not render thee trial unreliable. Trial court's ruling is erroneous and based upon the "totality of circumstances" and trial courts failure to rule on the "inextricably intertwining merits and claims," demonstrates that Appellant is entitled to relief, at a minimum an evidentiary hearing, as it is impossible for trial court to make a showing absent consideration of merits and attaching portions of the records that conclusively refute Appellant's claims. The crux of Appellants Post conviction relief and it's amendments relate to *Brady* material and fundamental errors that are conclusively apparent on the face of the record, the state interfering with the, effective performance of trial counsel due to evidence being withheld, specifically, the patria postead, Venezuelan adoption- paternal rights documents, by the state through Detective Thomas Simcox and it's agencies. Additionally, the maternal grandparents i.e., the lawful custodian's adoptive parents were influence to flee the United States back to Venezuela in violation of the Appellants compulsory process as guaranteed by the United States and Florida Constitutions. See *Rivera v. State*,

995 So.2d 191(2008) (Defendants allegations in successive post conviction relief motion were sufficient to require an evidentiary hearing with regard to whether there were *Giglio* or *Brady* violations, defendant alleged he did not have the plea offer to one witness or other key state documents in his possession at trial or during earlier proceeding).

In the instant case at bar, Appellant Diez, places sharp contrast upon the fact that the victim in his case Eunice Lopez, was arrested prior to defendant's trial and offered a plea deal interestingly enough.

In *Lang v. State*, 826 So.2d 433 (Fla. 2d DCA 2002), trial court should have considered allegations contained in amended petition for postconviction relief before issuing order denying motion, even though amendment was filed after evidentiary hearing on motion, in light of requirement that trial court consider timely amendment filed prior to entry.

A *Brady violation* occurs "when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006); see also Reichmann v. State, 966 So.2d 298, 307 (Fla. 2007) (citing *Mordenti v. State*, 894 So.2d 161, 168 (Fla. 2004)). The governments obligation to disclose materially favorable evidence extends to both exculpatory and impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and to "evidence that is known ONLY to police investigators and not to the prosecutor."

Youngblood, 547 U.S. at 870 (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). In order to demonstrate a *Brady violation*, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced *Strickler v. Green*, 527 U.S. 263, 281-82 (1999) see also *Way v. State*, 760 So.2d 903, 910 (Fla. 2000). In order to meet the materiality prong of *Brady*, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different.

The jury in Appellant Diez' case would have most likely found his testimony credible had Appellant Diez, had an opportunity to present the child custody documents and testimony of the maternal grandparents. The prosecution knew that the maternal grandparents' testimony was exculpatory in nature, and extremely beneficial to the defendant, in that said testimony would have established that the maternal grandparents lawfully possessed under Venezuelan law, full parental and custody rights over the subject minor child. Moreover, the prosecution fully understanding the impact of the maternal grandparents' testimony in regard to the State's chase in chief, intentional took actions through Hollywood Police Department Detective, Thomas Simcox, to significantly influence the maternal grandparents to flee the United States to avoid being prosecuted.

In furtherance of effectuating the maternal grandparent's exodus from the United States, and in a continued effort to destroy any remnant of documentary evidence that might establish a lawful custody and parental rights over the minor child, Detective Simcox made a secret visit to the defendant at the Hollywood Police Department holding cell, and informed the defendant that he, Simcox, had paid the maternal grandparents a visit "to where you delivered the child, without their lawyer there, and they gave me the custody documents but now they are trashed." Then Detective Simcox chocked the defendant to he degree that the defendant almost lost consciousness. Simcox then said to the defendant "*you better give a statement and cooperate. By the way we never had this conversation. This is clear right?*" Simcox also threatened the defendant that if he mentioned anything that transpired, not only would the defendant suffer, but the defendant's fiancé, Monica Alarcon, would also realize adverse consequences. When after being transferred to the Broward County Jail, the defendant was pushed down a flight of stairs by correctional staff, which resulted in injuries that warranted the defendant being brought to the jail infirmary for treatment, the defendant put two and two together and realized the Simcox meant business, and for that reason he remained silent as to Detective Simcox's police misconduct. **Only because Detective Simcox was himself prosecuted, convicted, and sentenced to federal prison, does the defendant now feel safe to bring these facts to light.**

First and foremost the defendant necessarily establishes that Count Five Interference with Child Custody, was the catalysis of the State's case in chief, with the exception of Count Four; Impersonating a Police Officer. e.g., Kidnapping, § 787.01(1), Florida Statutes, (Counts One and Two) require an underlying predicate felony offense, and sub judice the State charged that the defendant committed the Count One and Two Kidnapping offenses with the intent to facilitate Interference with Child Custody (R. 90). Likewise, the Burglary offense charged in Count Three was alleged to have been committed with the intent to commit the offenses of Kidnapping and/or Interference with Child Custody (R. 91). Thus, if it is prima facie established that the offense of Interference with Child Custody could not have been committed under the facts of the instant case, the State's charges in Counts One, Two, Three and Five necessarily would have fallen.

Interference with Child Custody is a criminal offense which finds its origin in common law. Under common law a parent, or other lawful custodian of a child, possessed a right-of-action to recover a child who was wrongfully taken from that parent, or lawful custodian See, generally, *Stone v. Wall*, 734 So.2d 1038 (Fla. 1999). In *Costlow v. State*, 543 So.2d 1259 (Fla. 5th DCA 1989), the court opined, inter alia:

> [T]he legislature made a decision that interference with a person's custody rights is a serious matter which should be addressed by the criminal law. (footnote omitted) Problems with parents and surrogate parents snatching children from one another have escalated to such a

> degree that this has been recognized on a national level as a concern and a disgrace. The old standby contempt-of-court remedies have proven inadequate. Such laws as the Federal Parental Kidnapping Prevention Act (FPKPA) – 28 U.S.C. § 1738A (Supp. 1988), 18 U.S.C. § 1073 (Supp. 1988), 42 U.S.C. §§ 653, 663 (Supp. 1988), and the Uniform Child Custody Jurisdiction Act (U.C.C.J.A), § 61.1302 – 61.1348, Florida Statutes, have been enacted by Congress and all fifty states and all territories to thwart such behavior.

Id. at 1262.

As shown by the foregoing the offense of Interference with Child Custody was considered such an egregious act that all fifty states entered into congressional sanctioned interstate acts such as the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.)[2]. Moreover, membership in such Acts is not limited to the continental United States and its Territories, but in fact a plethora of foreign countries, including Venezuela, have elected to enlist as member countries of the U.C.C.J.E.A., see, e.g., *Gil v. Rodriguez*, 184 F.Supp.2d (M.D. (Fla.) 2002) (as to effect of patria potestas under Venezuela law and availability of the U.C.C.J.E.A.).

Other congressionally sanctioned acts cross international borders to ensure the protection of minor children, and to establish uniformed laws which determine custody, and which further establish recognized guidelines toward prosecution of those who unlawfully remove a minor child from their lawful custodian, be that custodian a natural parent or other person authorized by law to exercise parental

[2] The U.C.C.J.A. was superseded by the Uniform Child Custody Jurisdiction Enforcement Act (U.C.C.J.E.A.), and Florida's version of that Act is codified as §§ 61.0 through __, Florida Statutes.

and custody rights over the subject minor child. See, e.g., International Parental Kidnapping Crime Act (I.P.K.C.A.), Title 18, U.S.C. § 1204; International Child Abduction Remedies Act (I.C.A.R.A.)., Title 42, U.S.C. § 11601(b); Uniform Child Custody Jurisdiction Enforcement Act (U.C.C.J.E.A.), Title 28, U.S.C. § 1738(A);

Careful review of the foregoing acts reveal that "lawful custody" of the subject minor child is an integral element in any cause-of-action, be that cause-of-action civil or criminal. Therefore, it is judicially recognized that it is a defense in such cause-of-action that the plaintiff did not have superior custody rights over the subject minor child, or that the defendant took the subject minor child to prevent physical harm to the child, or that the defendant possessed a reasonable good faith belief that the interference as proper. See, e.g., *Stone v. Wall*, 734 So.2d 1038, 1042 (Fla. 1999), quoting *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, 766 (Fla. 1998), cert. denied, 52 U.S. 1142, 119 S.Ct. 105, 143 L.Ed.2d 43 (1999).

In *Costlow v. State*, 543 So.2d 1259 (Fla. 5th DCA 1989), the defendant was convicted of concealment of a minor child, § 787.04(1), Florida Statues, and the court instructed on the lesser of interference with custody of a minor child, § 787.03(1), Florida Statutes. After examining the facts the appeals court opined that "concealment" must mean, under this statute, concealing a child from a person entitled to its custody – not concealing it from motel guests, friends and relatives",

Id., at 1262. The same rationale extends to interference with child custody, § 787.03(1), Florida Statutes, i.e., "'Interference' must mean, under this statute, interfering with the parental and custody decisions of a person who was lawfully entitled to parental and custody rights over the subject minor child – not interfering with parental and custody decisions made by a person who did not possess lawful parental or custody rights over the subject minor child" See, e.g., *State v. Elliott*, 171 La. 506, 131 So. 28 (1930).

Sub judice the defendant was charged with interference with custody, § 787.03(1), Florida Statutes. That statute reads, inter alia:

> (1) whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any minor or any incompetent person from the custody of the minor's or incompetent person's parent, his or her guardian, a public agency having the lawful charge of the minor or incompetent person, or any other lawful custodian commits the offense of interference with custody and commits a felony of the third degree punishable as provided in § 775.082, § 775.083, or § 775.084.

Id. (emphasis added).

The statute is a proscription against a person interfering with a parent's custody rights over their minor child; however, the statute does not define "Parent". The term "Parent" is defined elsewhere in the Florida Statutes and that definition provides, inter alia:

> "Parent" means a woman who gives birth to a child and a man whose consent to the adoption of the child would be required under § 63.062(1). If a child has been legally adopted, the term "Parent"

> means the adoptive mother or father of the child. The term does not include an individual whose parental relationship to the child has been legally terminated, or an alleged or prospective parent, unless the parental status falls within the terms of § 39.503(1) or § 63.062(1). For purposes of this chapter only, when the phrase "Parent or Legal Custodian" is used, it refers to rights or responsibilities of the parent and, only if there is no living parent with intact parental rights, to the rights or responsibilities of the legal custodian who has assumed the role of the parent.

See, West FSA § 39.001(48).

The foregoing definition is conclusive and is tempered by the language, "the term does not include and individual whose parental relationship to the child has been legally terminated", which removes a biological parent from the legal definition of "Parent", where that biological parent's parental rights have been terminated by judgment of a court of competent jurisdiction. (Emphasis added).

When Sections 39.001(48), Florida Statutes, is read in pari; material with Section 787.03(1), Florida Statutes, it is prima facie established that it is not unlawful for the lawful custodian of a minor child to effectuate the removal of a minor child from a person who possesses no lawful custody rights over the subject minor child, even where said person in physical custody of the minor child is a biological parent whose parental or custody rights over the minor child have been terminated, or otherwise divested by judicial decree.

Sub judice counsel initially presented a defense that the defendant was not guilty of interfering with Eunice Lope's custody rights over minor child, Elizabeth

Nicole Lope, because as a matter of law Eunice Lopez possessed no custody rights over said Elizabeth Nicola Lope, in that Eunice's custody rights over Elizabeth had been divested by judicial decree of a Venezuelan court of competent jurisdiction. Namely, where shortly after Elizabeth's birth in Venezuela on February 19, 1999, those rights had been lawfully transferred to Elizabeth's maternal grandparents, Edgar Lope (Grandfather) and Alicia S. Iaffa De Lope (Grandmother). The undisputed facts *prima facie* established that the minor child, Elizabeth Nicole Lopez, was born on February 19, 1999, in Caracas, Venezuela, and habitually resided in Venezuela with her maternal grandparents *all of her life*; that the maternal grandparents exercised *full* parental and *custody* rights over Elizabeth during the foregoing years, and the biological mother, Eunice's contact with Elizabeth for the better part was limited to telephone calls from the United States to Venezuela between Eunice and Elizabeth. The focus of the defense was relative to the question of who possessed lawful custody of Elizabeth, i.e., the maternal grandparents or the biological mother? The foregoing custody question was a question of law to be answered by the court not the jury, and the court's determination was to be realized by examination and application of the laws governing custody. Because the minor child was a citizen of the country of Venezuela, and was only present in the United States pursuant to visa authorizing temporary entrance into the United States for purposes of visitation, custody was to

be determined by the court in the first instance by employment of Venezuelan law, As mandated by the Uniform Child Custody Jurisdiction Enforcement Act (U.C.C.J.E.A), of which both Florida and Venezuela are members.

What is perfectly clear under the facts of the instant case is that lawful custody of Elizabeth was an integral element of the State's charges against the defendant, and the court's determination of the question of who possessed lawful custody rights of Elizabeth, implicated International law. Moreover, it is just as clear that when the foregoing International considerations are measured against Section 787.031(1), Florida Statutes, and Sections 39.001(48), Florida Statutes.

Documentation is now in the possession of Appellant, and includes patria potestas, and is available for examination by this court, See, eg., *Altamiranda vale v. Avila* 538 F.3d 581 (7th Cir. 2008). (As to effect of patria potestas/paternal power under Venezuela law and availability of the U.C.C.J.E.A.). Moreover, the defendant notes that the Maternal Grandparents' custody rights over the minor child, Elizabeth, were also established by biological Mother, Eunice Lopez's, testimony during deposition when she stated under oath that the maternal grandparents had custody over Elizabeth "*until she gets adopted back to me*". See e.g., Deposition of Eunice Lopez at pg. 15, line 2.

Finally; This Honorable Court recently addressed an international child custody dispute governed by ICARA, UCCJEA, and Florida Statutes 61.501-

61.540 and rule that "a court of this state shall treat a foreign country as it were a state of the U.S. for purposes of determinations made pursuant to child custody. See *Dyce v. Christie*, 4D09-1187 (September 16, 2009).

ISSUE II:
THE TRIAL COURT IMPROPERLY DENIED APPELLANTS MOTION FOR POST CONVICTION RELIEF WITHOUT CONSIDERING THE FUNDAMENTAL ERRORS AND THEIR COMBINED EFFECT AGAINST THE EFFECTIVE PERFORMANCE OF TRIAL COUNSEL. THE APPELLANTS STATEMENTS, CONSENT TO SEARCH WERE COERCED BY POLICE MISCONDUCT AND APPELLANTS COMPULSORY PROCESS WAS VIOLATED, ALL OF WHICH SEVERED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Prior to Miranda warnings, in the holding cell, appellant was assaulted by Detective Thomas Simcox, and was under threat which evidence has substantial bearing on Appellant's case and the effective assistance of trial counsel. Detective Simcox, threaded adverse consequences to Appellant did not cooperate, and expedited the grandparent's exodus out of the country and destroyed the custody documents.

Appellant was pushed down stairs by jail house snitches, Daniel Thompkins and Russell Sloan that evidence of treatment in the jail infirmary was to be provided at an evidentiary hearing. For fear of Appellant's life, Appellant remained silent until after sentencing where Appellant felt safe enough to bring these facts to light to Appellant's attorney and file a complaint. With the foregoing in mind, trial court did not determine any legal conclusions nor attach any record to

justify it's denial of Appellant's request for at minimum, an evidentiary hearing, where, Appellant's standby pro-bono counsel Maury Halprin, who will only engage once an evidentiary hearing is granted, will present with greater particularity and substantiation necessary to give the instant claim sufficient credibility. See (TTP. 1387-1391; P. 897 L. 8-9) (Record of complaint sent with appellants Post conviction Motion).

Trial court did not consider this matter in the totality of circumstances and their combined effect on due process grounds nor as newly discovered evidence. Under federal law, a confession is deemed involuntary if the [speaker's] will was overborne in such a way to render his confession the product of coercion. *Arizona v. Fulminate,* 499 U.S. 279, 288 (1991). In this determination, a court must consider the totality of the surrounding circumstances and ensure that the State has met it's burden of demonstrating by a preponderance of evidence that confession was a result of voluntary choice. *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

It is now recognized that such statement may be excluded on due process grounds See *Black v. State*, 630 So.2d 604, 615 (Fla. 1st DCA 1993); *Ramerez v. State*, (1D07-6500; opinion 7/24/09). The Supreme Court has made it clear that it is the providence and capacity of juries to assess the truthfulness of confession... [And] any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant... [is free] to familiarize jury, with circumstances that

attend the taking of his confession, including facts bearing upon it's weight and voluntariness. In like measure, of course, juries [are] at liberty to disregard confessions that are insufficient corrupted or otherwise deemed unworthy of belief. Lego at 404 at 485, 486 (emphasis added); See also *U.S. v. Harper*, 432 F.2d 100, 102 (5th Cir. 1970).

Therefore, the record fails to conclusively demonstrate that the Appellant is not entitled to relief. On appeal from denial of post conviction relief, Appellant court would remand for an evidentiary hearing defendants claim that his defense counsel failed to call certain alibi witnesses at trial, where record did not conclusively refute the claim. *Bell v. State*, 901 So.2d 180 (Fla. 3rd DCA 2005). Where no evidentiary hearing is held by the trial court in motion for post conviction; the Appellant court must accept the defendant's factual allegations to the extent that they are not refuted by the record, to determine whether an evidentiary hearing is warranted. See *Phillips v. State*, 894 So.2d 28 (Fla. 4th DCA 2004).

The Fifth, Sixth, or the Fourteenth Amendment if a state is involved, concomitantly provide a criminal defendant the right to present a defense by compelling the attendance, and presenting the testimony of his own witnesses.

Herein, in the instant case, it is clear that the government violated Appellants Constitutional Rights to present a defense by infringing upon witnesses attendance

through threats of prosecution and intimidation, which actively discouraged testimony. The necessary ingredients of the Fifth and Fourteenth Amendments guarantee that no criminal defendant shall be deprived of liberty without due process of law that includes a right to be heard and to offer testimony.

ISSUE III:
THE TRIAL COURT IMPROPERLY DENIED APPELLANTS MOTION FOR POST CONVICTION RELIEF WITHOUT ADDRESSING DOUBLE JEOPARDY-FUNDAMENTAL ERRORS. THE SINGLE CRIMINAL EPISODE REQUIRES RELIEF AND VACATING OF SENTENCES, IN ACCORDANCE WITH DUE PROCESS

To uphold the trial courts summary denial of claims in a 3.850 motion, the claims must be facially invalid or conclusively refuted by the record. Further, to properly evaluate the claim trial court should conduct an evidentiary hearing and make the findings necessary to properly evaluate claim, if claim, is facially valid and where allegations are not rebutted by the record. The Fifth Amendment guarantee against Double Jeopardy protects a defendant from, among other things, multiple punishments for the same core offense. See *Capron v. State*, 948 So.2d 954, 957 (Fla. 5th DCA 2007).

From the face of the information, verdict form and judgment it is obvious that Count III, Armed Burglary to commit Armed kidnapping and /or interference with custody while possessing a firearm, were accomplished to commit the same "specific intent- core offense." Kidnapping and Burglary are "specific" intent crimes, and Burglary with the specific intent to commit kidnapping as charged in

Counts I and II, cannot stand against the test of section 775.021 F.S. 810.051 also defines legislative intent for Burglary.

In contrast, Double Jeopardy rights are fundamental and may be raised at anytime, and a defendant is placed in double jeopardy where based upon the same specific intent the defendant is convicted of two offenses, each of which were constructed with the same intent. Therefore, it was fundamental error for the trial court to convict and then to deny motion for postconviction relief without addressing the instant claim, especially without refuting the claim by any portion of the record. Also clearly on the face of the record, Count III reflects a scrivener's error and the parasitic firearm charge of Count I, II, and III violate double jeopardy as the one criminal episode and alleged firearm possession are circular. Technically, the *Block burger* test fails as the firearm possession was inherent or incidental to the single criminal episode of kidnapping to commit interference with custody. See *Payne v.State*, 538 So.2d 1302 (Fla. 1st DCA 1998)

> **"Defendant could not be convicted of use of a firearm during commission of felony of armed robbery and armed kidnapping since firearm use occurred during one criminal act and was inherent or incidental to armed robbery."**

In the instant case, the element necessary to support a conviction cannot be borrowed from other counts. Application of "rule of lenity" means that if there is a reasonable construction of penal statue favorable to accused, court must employ that construction. See *Wallace v. State*, 860 So.2d 494 (Fla. 4th DCA

2003), where the language of a criminal statute is susceptible of differing constructions courts must adopt the construction most favorable to the defendant. *McLaughline v. State*, 721 So.2d 1170 (Fla. 1998)

F.S. 775.021(4)(b); also provides exceptions to the rule for offenses requiring identical elements of proof such as in the instant case at bar. Recently, this Honorable Court found that Double Jeopardy Clause prevented defendant from being convicted of aggravated battery since defendants kidnapping conviction was enhanced based on aggravated battery. See, *Finkley v. State*, 4D08-2527 (September 16, 2009). Plenary review of claims presenting a mixed question of law and fact requires an independent review of trial court's legal conclusions, while giving deference to the trial courts' factual findings.

ISSUE IV:
THE TRIAL; COURT IMPROPERLY DENIED APPELLANTS MOTION FOR POST CONVICTION RELIEF WITHOUT CONSIDERING NEWLY DISCOVERED EVIDENCE OF SCIENTIFIC VALUE AND THAT COUNSEL WAS INEFFECTIVE IN FAILING TO INFORM, EXPLORE, OR PRESENT, THE POSSIBLE DEFENSE OF TEMPORARY INSANITY DUE TO THE CONSUMPTION OF LAWFULLY PRESCRIBED PSYCHOTROPIC AND PAIN MANAGEMENT MEDICATIONS IN THEIR COMBINED EFFECT DURING EPISODE.

Appellant states that in the instant case the Appellant Diez, motion and trial transcripts makes abundantly clear by substantial evidence that Appellant was under the influence of lawfully prescribed psychotropic and pain management medications; that Appellant was under a "cocktail of medications. Trial counsel

failed to present a defense of voluntarily intoxication and more over, failed to inform, or explore the possibility of temporary insanity at time of commission of specific intent crime. Furthermore, Appellant was assessed by Dr. Walzak, PHD, and trial counsel should have had this available expert witness testify at trial. Further exacerbating trial counsel ineffectiveness, trial counsel failed to obtain medical records from Dr. Natasha M. Padrino, MD, Appellant's psychiatrist prior to incident who prescribed several medications. See *Munoz v. State*, 819 So.2d 874 (Fla. 4th DCA 2002) (Trial court erred in denying Post conviction relief claim alleging trial counsel rendered ineffective assistance in failing to inform about the possibility of temporary insanity", and as such, case would be remanded to trial court for attachments of the record which conclusively refute allegations or for an evidentiary hearing. See also *Hall v. State*, 972 So.2d. 264 (Fla. 4th DCA 2008); *Carter v. State*, 590 So.2d 1096 (Fla. 3rd DCA 1991) Post conviction movant was entitled to evidentiary hearing on his claim that trial counsel was ineffective for failing to provide court appointed psychologist with information needed to determine whether movant was sane or in-sane at time of commission of crime.

Appellant has alleged specific facts that when considering the "totality of circumstances" are not rebutted by the record but are conclusively supported by the record (TTP. 1254-1338, 912-919). The Supreme Court has enunciated the proper

standard of review of a rule 3.850 claim, including a claim of newly discovered evidence, as follows:

> **"To uphold a trial courts summary denial in a 3.850 motion, the claims must be facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent that they are not refuted by the record."** ***McLin v. State***, **827 So.2d 948, 954 (Fla. 2002)(quoting** ***Foster v. State***, **810 So.2d 910, 914(Fla. 2002)).**

The analysis governing a newly discovered evidence claim is set forth in *Green v. State*, 975 So.2d 1040-100(Fla. 2008)(citing *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) (*Jones II*). To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements first, the evidence must not have been known by the trial court, party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial see *Jones v. State*, 709 So.2d 512, 512 (1998)(Jones II), Newly discovered evidence satisfies the second prong of the test if it "weakens the case against [defendant] so as to give rise to a reasonable doubt as to his culpability." Id at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996), rejecting circuit courts finding that defendant could have discovered evidence earlier by due diligence.

In sharp contrast, Appellant Diez, was taking Neurotin which after Appellant's, appeal was found to cause suicidal tendencies, aggressive behavior, anxiety, depression etc. This was not known or determined to be an adverse reaction towards the medication at time of trial. More specifically, Neurotin alone was not ***determined/or known*** to have the severe psychological adverse reactions that were recently discovered. However, the Supreme Court of Florida did find that some pain and depressant medications may impair judgment so as to diminish culpability. See *Florida v. McFall*, 863 So.2d 303 (Fla. 2003); (see also Appellant's Notice of Supplemental support documents for newly discovered evidence of scientific value based on recent studies, reports, articles etc filed 8/30/09 prior to trial courts ruling and denial of 3.850 motion).

Because trial court failed to conduct an evidentiary hearing, it did not analyze the newly discovered evidence. Taking the facts put forth in this claim, should lead to a conclusion that the newly discovered evidence is of such a nature that it would have produced an acquittal on retrial for the specific intent crime of kidnapping to interfere with custody due to belief of child abuse and burglary to commit kidnapping or interference with custody. F.S. 775.051 does legally support this claim. The crux of Appellant's post conviction relief motion relates to fundamental errors that are apparent on the face of the record, sufficiency of evidence due to evidence being with held by the State through it's agencies, and in

view of the unusual circumstances of the instant case, the totality of circumstances in their combined effect deprived Appellant of due process. Where there is no evidentiary hearing, allegations in support of motion for post conviction relief must be taken as true unless they are rebutted by the record. See *Anthony v. State*, 660 So.2d 374 (Fla. 4th DCA 1995). Trial court failed to attach to the order denying relief any portions of the record conclusively showing no entitlement to relief as required by Florida Rules Criminal Procedure 3.850(d). Appellant did reference the entire record (pages 1-1617) however; Appellant did not attach transcripts as appellant is not required to attach transcripts to his motion for post conviction relief per this Honorable Courts ruling. See *Mannolini v. State*, 760 So.2d 1014 (Fla. 4th DCA 2000). Appellant has demonstrated that trial court has failed to comply with rule governing procedures, evidentiary hearing, and disposition of motion to vacate, set a-side, or correct sentence, where, with respect to several allegations, written order denying motion did not have attached to it any portions of the record, and trial court did not rule on allegations before an evidentiary hearing or address allegations at hearing. See *Morales v. State*, 734 So.2d 1098 (2nd DCA 1999). If a motion for post conviction relief is denied on the grounds that the motion and files and records in case conclusively show that movant was not entitled to relief, trial court is required t attach to dispositive order so much of records in case that will demonstrate that prisoner is entitled to no relief. See

Gentry v. State, 464 So.2d 659 (Fla. 4th DCA 1985). Trial courts failure to attach portions of record that refute defendant's claims is grounds for reversal. See *Simon v. State*, 997 So.2d 490 (Fla. 4th DCA 2008). Rule governing motions to vacate, set aside, or correct sentence. Explicitly require that the record "conclusively" rebut an otherwise cognizable claim if it is to be denied without a hearing. See *Robinson v. State*, 972 So.2d 115 (Fla. 5th DCA 2008).

ISSUE V:
THE TRIAL COURT IMPROPERLY DENIED APPELLANTS MOTION FOR POST CONVICTION RELIEF AND MOTION FOR DISCOVERY SURROUNDING TRIAL COUNSEL'S INEFFECTIVENESS DURING PLEA NEGOTIATIONS AND APPELLANTS EXTENSIVE SUBSTANTIAL ASSISTANCE TO THE STATE AND OTHER AGENCIES.

Appellant had filed a post conviction motion for discovery to obtain trial transcripts for case No. 05-016477 CF 10A, where Appellant recently testified as a State's key witness. However, trial court flatly ignored Appellant's motion for discovery and failed to rule on merits, or attach any portions of the record to record to rebut Appellant's claims.

Appellant moved for an evidentiary hearing to perpetuate and formalize knowledge and to communicate information implicating *Brady/Giglio* and *Richardson violations*, among other things as it is impossible to determine all of the complex inextricably intertwining issues without conducting an evidentiary hearing. However, trial court flatly ignored the same. Specifically, the appellant has demonstrated (1) that the State suppressed evidence, (2) that the evidence

suppressed was favorable to appellant or exculpatory and, (3) that the evidence suppressed was material. *United States v. Severdija*, 790 F.2d. 1556, 1558 (11th Cir 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United State v. Stewart*, 820 F.2d 370, 374 (11th Cir 1987); *Brady v. Maryland* 373 U.S. 83 (1963).

Contrary to trial courts order absent any attached required portions of the record, due process dictates that the facts as alleged by Appellant entitle him to relief, a hearing at which Appellants standby counsel Maury Halperin, may prove these facts. (See substantial assistance letters as supplements to 3.850 Motion)

Appellant's motion for post-conviction relief was to afford Appellant opportunity to reduce sentence or at least to comport with the original sentence of ten (10) years offered by ASA Stacey Honowitz, prior to exchange from substantial assistance. For the past five (5) years, Appellant has significantly assisted many agencies which is supported fully by the record. See *Porter v. State*, 561 So.2d 1325 (4th DCA 1990)("Defendant provided substantial assistance and motion for post conviction relief was to allow defendant an opportunity to reduce sentence in exchange for substantial assistance".)

Contrary to trial courts ruling absent any attached records to order, clearly it is demonstrated that there was not a determination on the merits of Appellants

motion. Even though Post-Conviction Relief Motion advised trial counsel had access before trial to police reports that contained exculpatory evidence, and which formed basis of Appellant's motion. Alleging ineffective assistance of counsel due to inadequate investigation, Appellant could not be charged constructive knowledge of availability of those documents since his ineffective assistance of counsel claim assailed counsel for failing to discover that evidence. See *Porter v. State*, 670 So.2d 1126 (Fla. 2nd DCA 1996).

CONCLUSION

Given due consideration, trial courts order denying Motion for Post-Conviction Relief incorporating States response by reference and absent any records attached to trial courts order as required by rule governing procedure as it was incumbent upon trial court to attached those portions of the record sustaining it's ruling, combined with trial court's failure to consider Appellants well-pled volumous applications presenting multiple grounds and extraordinary circumstances that State conceded to, at a minimum Appellant should be afforded entitlement to be heard and afforded entitlement to present legal argument's through already acquired Pro-bono stand-by counsel Maury Helperin, who will represent Appellant at an indisputably required evidentiary hearing.

In light of circumstances in the particular case at hand the identification and demonstrated constitutional infringements have had substantial adverse effects

upon the effectiveness of counsel's representation, and Appellant was grossly prejudiced. Absent such impact, Appellant demonstrates that there is a substantial probability, but for counsel's deficient performance forced by external constraints by the State, that the result of the proceeding would have been different. In sharp contrast, reasonability is a probability sufficient to undermine confidence in outcome and with reference to the entire record a firm presumption of prejudice is confirmed.

In ineffective assistance of counsel claims, two requirements must be satisfied; (1) the claimant must identify a particular act or omission of the lawyer that is outside the broad range of reasonable standards, and (2) the clear, substantial deficiently shown must further be shown to have affected the fairness and reliability of the proceeding so that confidence in the outcome is undermined. U.S.C.A. Const. Amend. 6.

Evidence presented at a post-conviction evidentiary hearing will support factual findings of ineffective assistance of counsel and infringement of effective assistance of counsel by government actors, trail counsels non-investigation of Appellants mental health issues, police official misconduct, suppression of evidence, compulsory violations by police and State Attorney Stacy Honowitz, and misrepresentation during plea negotiation and substantial assistance phase of case.

WHEREFORE: Taking all the facts put forth, by Appellant Diez in his motion, amendments and supplements with supporting documentation, where trial court failed to consider, address or refute, should lead this Honorable Court to conclude that the set forth claims are of such, a nature that they would in there combined effect would produce an acquittal on retrial.

Most respectfully, this Honorable Court must remand for an evidentiary hearing in order that trial court carry out a full cumulative analysis of the evidence that is required to properly evaluate claims and to make the proper findings or remand for other further proceeding in the interest of justice, fundamental fairness and due process.

It is so prayed.

Respectfully Submitted,

Martin Diez

OATH

I Declare Under Penalty of Perjury that the foregoing is true and correct.[3]

Executed on 26th day of October, 2009.

/s/

Martin Diez

[3] 28 U.S.C. § 1746.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing motion has been furnished to the following:

- Office of the State Attorney; 1515 N. Flagler Avenue; 9th Floor; West Palm Beach, FL. 33401
- Clerk of Court; 1525 Palm Beach Lakes Blvd; West Palm, FL. 33402

and was placed in the hands of prison officials, C/O J. Wood, for the purposes of mailing by U.S. Mail on this 20 day of October, 2009.[4]

Provided to DeSoto CI for
Mailing on 10.20.09
Inmate Initials MD
Officer Initials J

/s/ Martin Diez
Desoto Correctional Institution
13617 SE Highway 70
Arcadia, Florida 34266-7800

CERTIFICATE OF COMPLIANCE

I hereby certify the foregoing brief has been typed in TIMES NEW ROMAN 14 point font, a computer generated typeface, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Martin Diez
Desoto Correctional Institution
13617 SE Highway 70
Arcadia, Florida 34266-7800

[4] See *Houston v. Lack*, 487 U.S. 266 (1988).

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

MARTIN DIEZ,
Appellant,
vs.

Case No.: 4D09-4547
L.T. Case No.: 04-10770 CF 10A

STATE OF FLORIDA,
Plaintiff.
_____/

SUPPLEMENTAL APPENDIX FOR 9.141(B)(2), SUBSTANTIAL ASSISTANCE INEFFECTIVE ASSISTANCE OF COUNSEL

COMES NOW, Martin Diez, pro se, pursuant to Fla. R. App. P. 9.141(b)(2), and provides the following in support thereof:

1. Appellant has for five and a half years during the course of his incarceration, provided substantial assistance with the following agencies to comport with the States agreed to offer of TEN YEARS:

A. United States Drug Enforcement Administration.
B. Florida Department of Law Enforcement
C. Putnam County State Attorney's Office
D. Broward County State Attorney's Office
E. Florida Department of Corrections (Operation Birdcage)(See attached)
F. Internal Revenue Service

WHEREFORE: Appellant prays that this Honorable Court would Grant on Evidentiary Hearing in order that Appellants current sentence may be reduced to comport with the governments original offer.

DECLARATION

Under the penalties of perjury, I declare that I have read the foregoing and the facts alleged are true, to the best of my knowledge and belief.

Mr. Martin Diez, DC# L64072

CERTIFICATE OF SERVICE

I certify that a true copy of this notice has been furnished to prison officials at Desoto Correctional Institution for mailing to Clerk of Court; 1525 Palm Beach Lakes Blvd; West Palm Bch., FL. 33401; Attorney General; 1515 N. Flagler Ave., Ste. 900; West Palm Bch., FL. 33401

Mr. Martin Diez, DC# L64072
Desoto Correctional Institution
13617 Southeast Highway 70
Arcadia, Florida 34266-7800

Mailed on 1.4.13

EXHIBIT

A

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, D.C. 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

November 14, 2008

Mr. Martin Diez L64072 (Medical)
1900 SW 377 Street #300
Florida City, FL 33034

Dear Mr. Diez:

I am responding to your letter dated September 30, 2008, alleging several prisoners filing fraudulent tax returns using the names of deceased relatives.

I am forwarding your letter to the appropriate area of the Internal Revenue Service to be evaluated. It is important to understand if we initiate an investigation as a result of your information; it could take several years until a final resolution of all tax matters. This is especially true if the taxpayer exercises all administrative and judicial appeal rights. We want to thank you for providing information regarding alleged tax noncompliance. The IRS will evaluate the information you submitted, and determine whether it will use that information in an investigation or audit. If we should need additional information from you, we will contact you.

It is the responsibility of the IRS to administer the tax laws, and we appreciate information provided to us concerning noncompliance with the tax laws. We often rely on law-abiding people to report those who violate the tax laws.

We cannot tell you what actions we may take, if any, regarding the information you provide. Disclosure laws protect the tax information of all taxpayers and prevent us from discussing the tax issues of a third party without his or her written consent [section 6103 of the Internal Revenue Code]. However, I can tell you we review all the information we receive and take appropriate action to ensure taxpayers pay the correct amount of tax.

I hope this information is helpful. The IRS contact for this letter is Ms. Stuart, Identification Number 1000095737, phone number (631) 447-4862.

Sincerely,

Joyce Spence

Scott B. Prentky
Director, Campus Reporting Compliance

Miami Herald, The (FL)
October 10, 2008
Section: Metro & State
Edition: Final
Page: 5B

Charges vs. officer dropped

BY JAY WEAVER jweaver@MiamiHerald.com

Federal prosecutors have dropped criminal charges against a senior officer indicted as part of an alleged drug-distribution ring at a Florida City state corrections facility, the U.S. attorney's office confirmed Wednesday.

The charges against Capt. Jimmy Lee Love Jr., 33, of Homestead were dismissed this week before he and others were to face trial next Tuesday.

In July, FBI agents arrested Lee and four other correctional officers -- along with eight inmates and civilians -- in a crackdown on the alleged drug-dealing network at the Dade Correctional Institution.

They were charged with conspiring to traffic drugs inside a prison. Most of the suspects were arrested at the facility, 19000 SW 377th St., and the rest at their homes.

According to court records, an undercover detective posed as a drug dealer. The detective eventually supplied the defendants with "sham cocaine and heroin" to be smuggled into the prison and sold.

In addition to Love, the other indicted corrections officers were Alexander Davis, 20, Dennard Fluker, 28, Ivis Grace, 27, and Shantavia Johnson, 21.

Among the other defendants: food services employee Felicia Calloway, 32, of Trinity Services Group; and an inmate's friend, Barbara Rodriguez, 29. Six inmates were also indicted.

The investigation, dubbed "Operation Bird Cage," was a joint effort by the FBI, Homestead police and the Florida Department of Corrections.

A-9

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARTIN DIEZ,

Defendant.
_____/

CASE NO.: 04-010770CF10A

JUDGE: CARLOS A. RODRIGUEZ

DIVISION: FF

ORDER DENYING DEFENDANT'S
MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE having come before this Court upon the Defendant's Motion for Post-Conviction Relief, filed pursuant to Florida Rules of Criminal Procedure 3.850, and the Court having considered same, along with the State's Response thereto, and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the Defendant's Motion for Post-Conviction Relief is hereby **denied.** As a result of the voluminous nature of the State's Response and because a copy of said Response has already been supplied to all parties, including the Defendant on July 27, 2009, as indicated by Assistant State Attorney Richard B. Martell, an additional copy of the Response is not attached to the instant Order.

The Court has reviewed the Defendant's Motion, the State's Response, the Defendant's Response to the State's Response and attached transcripts labeled as attachments thereto.

The Defendant's motion is legally sufficient but refuted by the records. Under the standard announced in Strickland vs. Washington, 466 US 668 (1984), the Defendant has failed to demonstrate that counsel performed deficiently to the extent that his performance was outside the range of professionally competent assistance. Further, the Defendant's complaint of deficiency or omission that counsel failed to obtain the custody documents from Venezuela, did not prejudice the Defendant to such an extent

FELONY

CASE NO.: 04-010770CF10A

that the result of the trial was rendered unreliable and there is no reasonable probability of a different result had the alleged deficiency or omission not occurred.

Defendant has thirty (30) days to appeal from the rendition of this Order.

DONE AND ORDERED in Chambers on September 21, 2009, at Fort Lauderdale, Broward County, Florida.

CARLOS A. RODRIGUEZ, Circuit Judge

Copies furnished:

Richard B. Martell, Assistant State Attorney, Appeals Division FF

Martin Diez, DC#L64072
DeSoto Correctional Institution Annex
13617 SE Highway 70
Arcadia, FL 34266-7800