IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 13, 2021

CASE NO.: 2D20-3580
L.T. No.: CRC 10-09375 CFANO

WILLIE SAFFORD v. STATE OF FLORIDA

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

BY ORDER OF THE COURT:

The "motion for a rehearing" is treated as a petition filed under Florida Rule of Appellate Procedure 9.141(d) and is dismissed. See Fla. R. App. P. 9.141(d)(5) ("In no case shall a petition alleging ineffective assistance of appellate counsel on direct review be filed more than 4 years after the judgment and sentence become final on direct review.").

BLACK, SLEET, and ROTHSTEIN-YOUAKIM, JJ., Concur.

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

Served:

ATTORNEY GENERAL, TAMPA
KEN BURKE, CLERK

WILLIE SAFFORD

td

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

Exhibit (A)

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DISTRICT COURT OF APPEAL

SECOND DISTRICT
Post Office Box 327
LAKELAND, FLORIDA 33802
(863)940-6060

ACKNOWLEDGMENT OF NEW CASE

DATE:. December 15, 2020

STYLE: WILLIE SAFFORD v. STATE OF FLORIDA

2DCA#: 2D20-3580

The Second District Court of Appeal has received the PETITION reflecting a filing date of December 7, 2020.

The county of origin is Pinellas.

The lower tribunal case number provided is CRC 10-09375 CFANO.

The filing fee is: No Fee-Ineffective Assistance of Counsel.

Case Type: Petition - Ineffective Assistance of Counsel Criminal

The Second District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts enclosed with this acknowledgment.

RECEIVED
FEB 25 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

cc: ATTORNEY GENERAL, TAMPA
KEN BURKE, CLERK
WILLIE SAFFORD

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Exhibit (G)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WILLIE SAFFORD, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D11-2625

Opinion filed February 24, 2012.

Appeal from the Circuit Court for Pinellas County; J. Thomas McGrady, Judge.

James Marion Moorman, Public Defender, and Jack W. Shaw, Jr., Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Joseph H. Lee, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

SILBERMAN, C.J., CASANUEVA and DAVIS, JJ., Concur.

Exhibit (E)

Argument For the SELP Instruction IN the Lower TRIBUNAL

MR. MITCHELL: They are all standard instructions?

THE COURT: Right.

MR. MITCHELL: Then no objection.

MR. KOSKINAS: I mean, other than what we discussed earlier and agreed upon.

MR. MITCHELL: Other than the three crimes of battery, yeah, and the weighing the evidence, everything else is standard, right?

MR. KOSKINAS: Uh-huh.

MR. MITCHELL: Okay.

THE COURT: Okay. So Mr. Safford is now present in the courtroom after our lunch break. Okay. So let's readdress the self-defense instruction that the Defense is requesting.

MS. BRADFORD: Yes, your Honor. I'm providing the State and the Court with a copy of the case that I felt might help the most. It's Polly v. State, and the cite for that is 423 So.2d 562. The pertinent part -- and I didn't have a chance to highlight it.

THE COURT: You don't have to highlight it for me.

MS. BRADFORD: I mean my copy. It's on page 3 of the case, page 4 of the printout. The first

column on the left, the court says, "It is axiomatic that the defendant is entitled to a jury instruction on the theory of his defense if there is evidence on the record to support it."

And then they go on further to say, "A defendant is entitled to his requested self-defense instruction regardless of how weak or improbable his testimony may have been with respect to the circumstances leading up to the battery."

And this case is factually distinctive. I couldn't find a case that's factually on point, but I did find a number of cases that did cite that same -- you know, the same theory that, you know, they are entitled to their defense, and no matter how weak or improbable it may be, they are entitled to the self-defense instruction.

MR. KOSKINAS: What's the name on that case?

MS. BRADFORD: I just gave it to you.

MR. KOSKINAS: You gave me two. I'm trying to figure out which one you're talking about.

MS. BRADFORD: Polly.

THE COURT: Okay. Mr. Koskinas, did you want to respond?

MR. KOSKINAS: Well, I mean, Judge, I think the state of the law is as we all thought it was.

This case -- if I take a look at the facts of this case, it's a case in which they found to be weak and flimsy, but it's one, nonetheless, where the defendant was struck -- was swung at and struck by a person named L-A-Z-E-N-B-Y. So what I'm reading is the second paragraph on page 3 of 5 in the right-hand column.

THE COURT: I'm reading that, too.

MR. KOSKINAS: Polly testified that the incident occurred on his birthday. Another inmate gave Polly two pieces of cake in a bowl as he walked through the line. Lazenby came back and told him to put the cake back. Holly stated that when he protested, Lazenby swung at him and struck him. The two men then locked up.

Well, I would agree under those circumstances that you're certainly entitled to defend yourself. That was, apparently, an unprovoked attack upon the defendant in this case and he was entitled to the self-defense instruction based on that.

That's certainly not the facts of what we've got here, not even close. So, Judge, I think the Court knows my position. I don't believe there is any evidence to suggest that the Defendant is entitled to a self-defense instruction based on the

evidence even that the defendant put forth before the jury. So, respectfully, I disagree that it's appropriate to give.

And the only other point that I would make, Judge, and we talked about a lot about the statements the defendant made and the victim made just before the transaction. But if you take it in the pure essence, the victim said, What are you going to do about it, according to the defendant and the defendant only, but what are you going to do about it, or something to that effect. That is certainly not a statement that implies impending force used upon the defendant. That's a statement that implies that the victim is now putting it on the defendant, What are you gonna do about it? Are you gonna try to hit me or are you gonna walk away? What are you going to do about it? Not a statement as though, Okay, well, I'm going to somehow assert force against you. So I just don't think it rises to the level of self-defense.

THE COURT: All right. Well, I believe I understand the law and that it is that a defendant would be entitled to a self-defense instruction no matter how weak or improbable his testimony may have been about the circumstances leading up to the

battery, and that's in the defense's case that they've cited, and that any evidence, any evidence whatsoever to support a self-defense instruction requires that the court give the defense the self-defense instruction. And I absolutely would give it and recognize that the defendant is entitled to have it if there is evidence, any evidence, no matter how scant, no matter how flimsy, no matter how weak, improbable or unbelievable it may be, the defense would be entitled to it.

But here in this case, and there are some further facts to talk about that I didn't address before, but now that we're back from our lunch break. I need to elaborate on some of the rest of the evidence because I'm not going to give it in this case and don't believe that the evidence supports it or that there is any evidence to support it.

Additionally, prior to the defendant taking the stand, we had some eyewitnesses to the event testify that were called by the State. There was testimony from another boarding house member, Jerry Gay, who was an eyewitness who testified that the victim did not in any way provoke or instigate

the attack by the Defendant towards the victim, that the victim had done nothing.

And that was also the testimony of another boarding house member and eyewitness, Robert Scharn, who said that the victim had done nothing, and there was no provocation on his part. It was purely an attack that was unprovoked by the defendant towards the victim. That was also the victim's testimony. And those were the three witnesses called by the State who were actually present for the event.

And so there is no testimony that would demonstrate that there was any need for self-defense, that the victim had done anything to the Defendant or had provoked the defendant in any way.

And then in looking further at what the Defendant testified to, I think it's important to also note that what he testified to in the beginning of his testimony was that before he even had any contact with the victim, Rodney Hartmyer, when he first came into the residence he was -- he had seen this four-pack of beer. He wanted one. He didn't have any. And there was this four-pack there, he didn't know who it belonged to, but he

was going to take a beer and that was his goal.

And so what happened was he ended up taking a beer and having a confrontation with another person who really wasn't a part of this incident according to any of the other witness' testimony, but according to the Defendant's testimony he had this confrontation with Joe, who was at the boarding house. And Rodney, the victim in the case, wasn't even present for this. But prior to having this incident with Rodney, the victim, the Defendant had a confrontation with Joe over the beer. And during that confrontation over the beer, Joe actually pulled a knife out of his pocket and he opened it. And he did that when the Defendant took a beer.

And the Defendant's testimony was that when this Joe actually pulls a knife out of his pocket and opens it, that that made him a little bit upset, that he became angry. But, certainly, there was nothing in that that caused him to feel a need to act in self-defense. He didn't do anything to Joe, the person who actually pulled a knife out of his pocket and opened it on him, confronting him about the beer. So he didn't testify he was in fear of the person who opened a knife on him. Nothing to suggest any fear on his part in this

boarding house up to this point in spite of having this far more confrontational and potentially violent incident with Joe over the beer where the victim wasn't even present for that.

And so it's after that confrontation at some point later that then the victim, Rodney, who is not present for any of this thing with Joe, comes in with Larry and makes the comment "some people like to talk and some people have big mouths." That was an exact quote from the Defendant's testimony.

And then the Defendant said, "You better go on about your business and stop fucking with me."

And the Defendant testified Rodney put his beer on the table and said, "What are you going to do?"

And then in response to that, the Defendant hits Rodney over the back of the head with the barstool, breaking the barstool over his head.

So that in and of itself is not sufficient. It is not scant evidence of a need for self-defense. There is nothing in that. If he had said -- if the Defendant had testified that Rodney put his beer down then put his fists up, that's a different story. If he had said Rodney put his

beer down and then stepped to me, which is what he said Joe had done. Joe was the one who stepped to him and pulled the knife out on him and opened it. But he never even said Rodney stepped to him. He didn't do anything. He didn't strike him, touch him, push him, step to him, put his fists up, raise his hands, do anything other than put his beer on the table and make the statement, "What are you gonna do?"

And he also defended -- didn't testify at any point that he felt threatened by the victim, that he felt a need to defend himself, that he perceived, based on those actions of putting the beer down on the table and the statement "what are you gonna do," that that meant that was going to be an attack where he would need to defend himself. There was nothing more that the Defendant testified was going on other than -- other than what I've just found.

So based on that -- that's not even scant. That's just not sufficient to say that someone put a beer down and says "what are you gonna do," that justifies something attacking that person. So I have tried to look at this in a way where it could be construed in favor of the Defense to give them

that instruction, which could only be that there was a conception on his part because it's real or perceived threat, that there could have been some perceived threat in the actions of the victim. But there was nothing that he testified to. And to have that perception would require testimony by him that he did perceive it that way. And then you don't even have to say that it had to have been a real or accurate perception. There's just got to be some evidence that he actually did perceive it in a way, even if he incorrectly perceived it.

But there is nothing for the Court to find based on the evidence here that the victim had done anything that would support a self-defense instruction or that there is any evidence to support a self-defense instruction, even though it only takes, as we all agree on, which is next to nothing. But nothing is what this is. There is just nothing.

So the request is denied. I'll file that case in the court file. And so what that means, then, is we have our jury instructions all set because nothing is being added to them at this point.

The verdict form has been completed, and I'll invite you guys up to look at it. It's got

disability or permanent disfigurement.

Okay. Any objection from the Defense?

MR. MITCHELL: I'm sorry. Are we going over the felony battery?

MS. BRADFORD: No objection.

THE COURT: Okay. All right. So that's 8.5, felony battery. You can add that to the packet and then add it to the list of the lessers.

Okay. Is the Defense asking for anything else? Any other instructions?

MR. MITCHELL: Judge, I think at this point we could ask for a self-defense instruction.

MR. KOSKINAS: I don't see how, Judge. I think there has to be even a scintilla of evidence - that it was in self-defense. There is not, even from the Defendant's own statement. I don't feel it's appropriate in any way.

THE COURT: What's your argument, Mr. Mitchell, that there was any evidence of self-defense?

MR. MITCHELL: That my client testified that Mr. Hartmyer stopped and said something to him and then essentially bowed up to him saying, What are you gonna do? What are you gonna do? And that's when the incident occurred.

MR. KOSKINAS: Judge, I don't mean to interrupt, I apologize. That's not what I believe the testimony to be. I think he did make some statements after that after he struck him and they were later outside, but that was the Defendant's statements, no other evidence. Aside from that, I don't think that was his statement. I think his statement was that the victim made a statement, something to the effect of some people have a big mouth, and that's what prompted the Defendant to say you better go about your business and stop effing with me, and then the incident happened. The defendant acknowledged that's when he picked up the barstool and struck the victim with it.

MR. MITCHELL: Well, not to interrupt you, but at that point -- the State left out one of the statements was when Mr. Safford said you better go on about your business, then Mr. Hartmyer said, What are you gonna do about it?

THE COURT: And then the incident happened. My notes are on direct the Defendant said the victim -- Rodney and Larry came into the kitchen and didn't say anything and then -- and this is after he had used Rodney -- the victim's phone and had given it back to him.

And then that Rodney said to him, Some people like to talk and some people have big mouths.

And in response to that the Defendant said, You better go on about your business and stop fucking with me.

And at that point Rodney put his beer down on the table and said, What are you gonna do?

And then the incident happened. That was the defendant's testimony. And when he was asked to elaborate about what he meant by "and then the incident happened," what he testified on cross was -- he repeated again that Rodney came walking through and said some people like to talk and some people like big mouths. He said you better go on about your business and stop fucking with me. And on cross he said he picked up the barstool, hit Rodney on the head with it, that Rodney had never pushed him, touched him, punched him, done anything to him. And when he hit him in the head with the stool that he fell like he was unconscious to the ground, that he never punched him in the face, that he appeared to be unconscious and that was the end of it.

That the victim didn't chase him, that he got up and said, Why did you hit me from the blind

side? Why did you hit me from the blind side? And made some statements about he was going to come into his room or come when he wasn't expecting it from his blind side.

And then outside after all of this, at some point the victim had a baseball bat. The defendant had a cart and was saying, Come on and hit me with that. The defendant picked up a log. They ended up ultimately putting all of those items down and the Defendant left.

So the most evidence is the Defendant's direct testimony where he says he put the beer down. Rodney put the beer down on the table after the Defendant said to Rodney, Stop fucking with me. And then the victim puts the beer down on the table and says, What are you gonna do?

At that point the incident happened, meaning he hits him with the barstool.

MR. KOSKINAS: And, Judge, it's the State's position that that doesn't rise to the -- that doesn't prompt a self-defense instruction. That doesn't rise to the level of -- he's in his own home. He has no duty to retreat. He's allowed to stay there. There is no indication or testimony of aggression, physical or otherwise, on the part of

the victim in this case. So even at that point are the Defendant's best words. So in the State's view this does not rise to the level of a self-defense instruction.

MR. MITCHELL: Our position would be he put his beer down, said what are you going to do about it in preparation to fight, and that's when the incident happened. So we're saying he was acting aggressive at that point in time towards our client.

THE COURT: But there is no evidence he was putting his beer down preparing to fight.

MR. MITCHELL: Why else would he be putting it down?

THE COURT: To talk to him.

MR. MITCHELL: I suppose you could look at it that way, Judge.

THE COURT: Well, it's about evidence. It's not speculation. That he put his beer down and -- you know, I might just give it, but it would be different if -- the Defendant didn't say, It appeared to me when he put his beer down that he wanted to fight with me and I needed to defend myself by picking up a barstool. Because it's about appearances, too, in the use of self-defense.

The Defendant testified he put his beer down and said, What are you going to do?

MR. MITCHELL: Well, Judge, I think the standard is some evidence.

THE COURT: Right. And I'm saying this is what his testimony was. So -- and it's whether you can even construe that as some evidence that someone puts their beer down -- the defendant says, You better stop fucking with me. All the victim said was, Some people like to talk and some people have big mouths.

MR. MITCHELL: Well, Judge, when my client said you better stop fucking with me, that already shows that he was being defensive. He felt like the other guy was confronting him in some way.

THE COURT: It shows the defendant is responding to the comment and --

MR. MITCHELL: In a defensive way. Leave me alone. Go away. Leave me alone. He's already being attacked by this alleged victim.

MR. KOSKINAS: Well, he didn't say leave me alone, go away.

THE COURT: He didn't say that.

MR. MITCHELL: That's what it means. Those aren't necessarily the exact words, but that's the

meaning in a more colorful way.

MR. KOSKINAS: Yeah, if we change all the statements, then I'm sure it would fit.

But the point is this, Judge, there is no evidence whatsoever even from the Defendant's own best version of events that the victim took any step towards him, took any display of physical aggression towards him. I mean, self-defense really is prompted by a physical aggression or a verbal threat. There is no threats here and there is certainly no physical displays of aggression from the victim to the Defendant. So I don't think it's appropriate.

THE COURT: And it's real or perceived, you know. You know, at best this has to be perceived by the Defendant because there is no real anything that the victim has done based upon the Defendant's testimony. He hasn't stepped to him. He testified to that. It was the other guy's step to him. The victim never stepped to him. He didn't physically do anything to him that would prompt self-defense. The only thing that the defense could argue was that the defendant had some perception of a need for self-defense.

MR. MITCHELL: Judge, our position would be

that when he said, What are you going to do about it, that at that point in time my client -- you could reasonably argue that at that point in time he was in anticipation of imminent harm by the victim when he says, What are you going to do about it? I'm sure he didn't say it very nicely.

THE COURT: Well, the Defendant said how he said it. He said, What are you gonna do? That's what the Defendant's testimony --

MR. MITCHELL: I think it's reversible error, Judge, if you don't give the instruction.

THE COURT: Well, there's got to be some evidence. And, you know, I know that law says any scintilla of evidence, but I'm looking for a scintilla and -- to construe in the defense's favor. I don't think if somebody puts their beer down and says, What are you gonna do, and they do nothing else, they say nothing else.

MR. MITCHELL: Well, that's for the jury to decide.

THE COURT: No, it's not. It's for me to decide in whether to give the instruction. We're at the point -- I'm trying to make a ruling based on the evidence that's been presented of whether there is a scintilla of evidence to support an

instruction for self-defense, and I'm saying the testimony was the victim puts his beer down on the table and says, What are you gonna do? He doesn't take a step towards the Defendant. He doesn't say anything else. He doesn't touch him, strike him, nothing. He puts the beer down and says, What are you going to do, and that's it. And then the defendant picks up a barstool and smashes it over the back of his head. That's what the evidence was. And based on that evidence, the Defense wants a self-defense instruction.

And, you know, there was nothing in the Defendant's testimony that said he thought he needed to use self-defense, that said he thought that the victim was gonna do anything to him, that he ever perceived that the victim was going to do anything to him, or that he needed to defend himself or that he needed to prevent an attack. He never said that. He just said he responded by picking up the barstool -- by making the incident happen. Meaning he picked up the barstool and smashed him over the head with it in response to someone setting the beer down on the table and saying, What are you going to do?

MR. MITCHELL: Well, Judge, I would just argue

that taking into context the situation in a rooming house that's filled with people with criminal records, lots of them had been drinking, when that kind of interaction takes place -- I don't mean to insult the Court, but I think it's a naive view of the facts when someone says -- put down their beer and says, What are you gonna do about it?

THE COURT: I don't think I'm being naive, Mr. Mitchell. I'm trying to apply the law to the facts, and it's really not a naivete issue. If you have some case law that talks about what types of scintilla are involved that would be sufficient for a self-defense, that would be helpful. Why don't you find a case over the lunch break, Mr. Mitchell, that supports it in a situation where the evidence is scant at best. See if you can find a case like this that supports giving the self-defense instruction. You're the one who wants it.

So I'll think about it over the lunch break, but I think the Defense should with finding something to support their argument. So we'll be in recess now until 1:15.

MR. KOSKINAS: Judge, just very quickly if you want to go through the rest, I can probably try to make the changes over the lunch hour.

Exhibit (P)

After the (DEFENSE COUNSEL) had fought for the (SELF-DEFENSE INSTRUCTION, in the (LOWER TRIBUNAL) and the judge had Denied The Request (Jack Shaw) was the (APPELANT COUNSEL) for Defendant on (DIRECT APPEAL.) In Jack Shaws Initial Brief he had specified, (THAT the Lower TRIBUNAL ERRED IN Refusing to INSTRUCT THE JURY ON the theory of (SELF-DEFENSE) AS WELL AS (THE LOWER TRIBUNAL ABUSED its DISCRETION IN REFUSING TO INSTRUCT the jury That a fist was not a DEADLY WEAPON) with the (SELF-DEFENSE) MR. Shaw had stated, (The standard of REVIEW APPLICABLE to this ISSUE is DE NOVO, SINCE it INVOLVES A PURE ISSUE of LAW) and case were cited by MR. Sha and MR. Shaw had Even stated, THAT THIS Evidence was sufficie to meet the standard of "some" Evidence in the Record, Even if weak or improbable, to support a theory of self-defense. THE LOWER TRIBUNAL ERRED IN REFUSING to give the Requested INSTRUCTION, and the conviction should be vacated and the caus REMANDED FOR A NEW TRIAL. MR. Shaw just left it at that / MR. Sh had to know that this CLAIM was an (constitutional violation) Defendants Rights, Cause of his stating (it INVOLVES A PURE ISSUE of LAW)! But for Some Reason, MR. Shaw didnt put the CLAIM IN THE D.C.A! Defendant feels That if MR. Shaw would've BREIFED this CLAIM AS AN (CONSTITUTIONAL VIOLATION) IN the D.C.A. MAYBE DEFENDANTS CASE WOULD'VE BEEN REVERSED AND REMANDED FOR AN NEW TRIAL, At that point! 10/29/2011 (ANSWER BREIF FOR APPELLEE 10/24/2011, Hadn't STIPALATED ABOUT the)

IF THAT REPLY BREIF FROM the APPELLEE WOULD'VE STIPALATED THAT DEFENDANTS CASE SHOULD BE AFFIRMED, BECAUSE MR. SHAW DIDINT BREIF CLAIM II and III AS (CONSTITUTIONAL VIOLATION THEN DEFENDANT WOULD'VE BEEN ON point with this matter. BUT SCINCE THE APPELLEE ONLY REPLIED AGAINST CLAIMS II AND III without stateng that MR. SHAW hadint BREIFED CLAIMS II AND II AS (CONSTITUTIONAL VIOLATIONS) DEFENDANT DIDINT KNOW TO CHALLENGE CLAIMS II AND III IN the TIMELY motion FOR INEFFECTIVE of (APPELLANT COUNSEL) OR THE TIMELY motion FOR Postconviction RELEIF 3.850 INEFFECTIVE ASSISTANCE of (DEFENSE COUNSEL) I WAS known BY DEFENDANT that CLAIMS II AND III WERE UNEXHAUSTED, when the ASSISTANT ATTORNEY GENERAL DID AN RESPONSE TO petitioner HABEAS CORPUS AND at that time CLAIMS II AND III COULD BE CHALLANGE

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT. STATE OF FLORIDA

(Exhibit F) Rec'd 10/24/11

WILLIE SAFFORD, JR.,
Appellant,

vs.

CASE NO. 2D11-2625

STATE OF FLORIDA;

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court,
Sixth Judicial Circuit, in and for
Pinellas County, Florida,
Honorable Cynthia Newton, Circuit Judge

Jack W. Shaw, Jr.
Florida Bar # 124802
Special Assistant Public Defender
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(941) 534-4200
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PRELIMINARY STATEMENT

In this brief, the individuals involved will generally be referred to by name. Appellant Willie Safford, Jr., Defendant below, will be referred to as "Mr. Safford" and Appellee State of Florida, Respondent below, will be referred to as "the State". References to the witnesses will be by their last name. References to the Record on Appeal will be by the symbol "R: ", followed by the Record page involved. References to the trial transcript, separately numbered beginning in Volume 2 of the Record on Appeal, will be by the symbol "T:", followed by the transcript page involved.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a conviction s of one count of aggravated battery and the resulting sentence, after imposition of Violent Career Criminal and Prison Release Reoffender sanctions, to 30 years in prison (including a mandatory minimum sentence of 15 years as a prison release reoffender), with credit for 378 days served, and the imposition of various costs and fines. (R:172 et seq., T:495-502).

On the day in question, Mr. Safford returned to the boarding house in which he resided with Mr. Hartmyer, Mr. Gay, Mr. Scharn, and several other individuals. (T:204). Several different versions of what followed thereafter were presented in the

testimony. It is undisputed, however, that at some point Mr. Safford struck Mr. Hartmyer over the head with a barstool, causing some injury.

Mr. Hartmyer testified that about 5 people were sitting in the living room of the boarding house, and that Mr. Safford was there, cussing and talking about beating everyone up because no one would give him a beer. (T:205, 223, 237). Mr. Hartmyer testified that he told Mr. Safford to calm down, and that he would give Mr. Safford a beer when he got back from the bathroom. (T:206, 212, 222). As he was walking away, Mr. Hartmyer testified, Mr. Safford hit him over the head with the barstool that was in the room. (T:211, 212-213, 239). Mr. Hartmyer testified that he then turned around, and Mr. Safford hit him in the face with his fist, telling him "That'll teach ya to dig into my business again" or "That'll teach you to get your nose in there". (T:212-213, 225). He also testified to a slightly different version of the event, in which he said he fell to the ground after being hit with the barstool, then turned around and was punched in the face. (T:216).

Mr. Hartmyer testified that he then got up, looked at Mr. Safford, and told him "Okay, I got something for you", and that Mr. Safford then left the room because he didn't know what Mr. Hartmyer was going to do. (T:228, 241). Mr. Hartmyer then went to his room and got an aluminum baseball bat and headed after Mr. Safford, but the other boarders stopped him. (T:226. 228, 2421-242). Mr. Safford left, and did not return to the boarding house. (T:229, 233, 234, 369). Someone called the police.

(T:230, 231, 248). Officer Hansell testified as to the apprehension of Mr. Safford some 8 days after the incident. (T:320-324, 370).

Photos of the barstool were introduced at trial, showing one of its legs broken off. (SX:4; T:211). The leg had not been broken prior to this incident. (T:212).

Mr. Gay testified to much of the same sequence of events, but with a few differences. He testified that before hitting Mr. Hartmyer with the barstool, Mr. Safford said to him "Cracker, I ain't saying nothing to you'", and that as Mr. Hartmyer was going down from the barstool impact, Mr. Safford hit him with an uppercut. (T:285). Mr. Gay did not see Mr. Hartmyer go to his room and get a baseball bat or chase Mr. Safford. (T:288, 293-294). Mr. Gay has 9 prior felony convictions, as well as a conviction for petit theft. (T:291-292).

Mr. Scharn's testimony also differed in some regards from the other State witnesses. Mr. Scharn testified that Mr. Safford did not say anything to Mr. Hartmyer before hitting him with the barstool. (T:302). He testified that Mr. Hartmyer fell to his hands and knees and that Mr. Safford got on top of Mr. Hartmyer's back and began punching him on the side of his face and that Mr. Safford hit him several times with his fists. (T:302). Mr. Scharn also testified that the barstool in question was about 5 years old. (T:314).

Mr. Safford, who has 13 prior felony convictions and a conviction for petit theft, testified that when he came home to the boarding house that day, he noticed a full pack

of beer in the doorway. (T:339). He asked whose beer it was, and no one responded except Joe Simon (who did not testify at the trial), who said they weren't his. (T:340). Mr. Safford took one of the beers, and Joe stepped up to him and told him to give it back, which resulted in a little argument between them, during which Joe pulled a pocket knife on Mr. Safford. (T:340, 355-356, 358).

Some minutes later, Mr. Safford testified, Mr. Hartmyer and Mr. Scharn came in through the back door, and Mr. Hartmyer said that Mr. Safford had a big mouth. (T:344). Mr. Safford responded by asking who Mr. Hartmyer was talking about, and that Mr. Hartmyer should go about his business and "stop fucking with me". (T:344). Mr. Safford testified that Mr. Hartmyer then put down his beer and asked Mr. Safford "What are you going to do?". (T:345). Mr. Safford testified that he thought that Mr. Hartmyer was trying to provoke him. (T:344-345). The same exchange of words was then repeated, and at that point Mr. Safford hit him with the barstool. (T:345). Mr. Safford testified that he did not get on Mr. Hartmyer's back or punch him in the face. (T:345). Mr. Safford testified that Mr. Hartmyer got up and threatened to hit Mr. Safford from the blind side some day, after which Mr. Hartmyer left the room and then came back with a baseball bat, ready to swing. (T:346, 347). At this point, Mr. Safford testified, he left the room. (T:347).

Law enforcement was called to the scene. (T:218). An ambulance was also called to the scene. (T:242, 245, 246). Mr. Hartmyer refused treatment .(T:242, 245).

Instead, he went back inside to have another beer. (T:242). At the time, he testified, he didn't think it was a serious incident. (T:247).

The next day, he did go to the hospital. (T:242, 245). Dr. Girgis testified that Mr. Hartmyer had a tender portion of his scalp and tenderness throughout both nostrils. (T:258). There was no midline shift, mass affect or acute intracranial hemorrhage or depressed skull fracture. (T:262-263). Mr. Hartmyer's skull wasn't broken and no interior damage was seen; the only damage was between the skull and the skin. (T:263).

A CT scan showed comminuted nasal bone fractures, and there was some soft tissue swelling, but Mr. Hartmyer was able to breathe through his nose. (T:258. 264, 265). From the photos, it appeared to Dr. Girgis to be an old fracture of the nose. (T:267, 269). Dr. Girgis testified that it is possible for this to heal back to the way it had been, or that there might be callus formation and should be some residual calcification. (T:260, 261). Other than the nose and a contusion to the back of the head, she did not note any injuries on Mr. Hartmyer. (T:262). Mr. Hartmyer was seen and released. (T:263). He was instructed to follow up with his primary care physician for the head injury, but did not seek any further medical attention for his injuries thereafter. (T:264. 268). His injuries essentially consisted of a broken nose and a lump on his head. (T:259. 262, 263).

Officer Laliberte, who responded to the scene and interviewed the witnesses, described Mr. Hartmyer's injuries as a bloody nose and a large lump on the head. (T:166). Mr. Hartmyer testified that his nose was now crooked from being broken, and that there was some swelling after the incident. (T:218, 219).

At the conclusion of the State's case, and again at the close of all of the evidence, the defense moved for a judgment of acquittal, arguing that the State had failed to adduce any evidence that the barstool was used in a manner sufficient to come within the statutory definition of "deadly weapon" and that there was no evidence that Mr. Hartmyer had suffered great bodily harm, permanent disability, or permanent disfigurement or that Mr. Safford had intended to cause great bodily harm, permanent disability, or permanent disfigurement. (T:326 et seq., 372). The motion was denied in both instances. (T:334, 372).

During the jury charge conference, the defense requested that the standard jury instruction on self-defense be given. (T:382). Although recognizing the appropriate legal standard as to when a defense proposed jury instruction should be given, the lower tribunal determined that there was no evidence to support a theory of self-defense and declined to give the instruction. (T:411, 416).

The defense also requested that the lower tribunal instruct the jury, in connection with the definition of "deadly weapon", that a fist is not a deadly weapon. (T:374).

The lower tribunal decided that the standard instruction was sufficient, and declined that request as well. (T:376).

The jury found Mr. Safford guilty as charged of aggravated battery. (R:48; T:472). The lower tribunal then, in proceedings subsequent to the verdict, found that Mr. Safford qualified as a violent career criminal, a prison release reoffender, a habitual felony offender, a habitual violent felony offender, and a three time violent felony offender. (T:495-497). The lower tribunal sentenced Mr. Safford to a mandatory minimum 30 years in prison as a violent career criminal, including within that sentence a 15 year mandatory minimum sentence as a prison release reoffender, with credit for time served, and imposed various costs and fines. (R:172 et seq.; T:500-501).

This appeal timely followed. (R:178).

SUMMARY OF ARGUMENT

The lower tribunal erred in denying the motion for judgment of acquittal of aggravated battery. The barstool that was used in this case was not used in a manner likely to cause great bodily harm, permanent disability, or permanent disfigurement, and in fact did not cause great bodily harm, permanent disability, or permanent disfigurement. Mr. Hartmyer sustained a lump and/or bruise to his skull and a broken nose, taking the evidence in the light most favorable to the State. Those injuries simply do not rise to the statutory standard of harm. The conviction should be reversed and the

cause remanded with directions to vacate the conviction and render a new conviction for simple battery, with the sentence to be reduced accordingly.

The lower tribunal further erred in denying the requested standard instruction for self-defense. The evidence supporting that defense is that, after one of the other boarders had pulled a knife on Mr. Safford, Mr. Hartmyer called Mr. Safford a big mouth, Mr. Safford responded by telling Mr. Hartmyer to get out of his business, and Mr. Hartmyer then put down his beer and asked Mr. Safford what he was going to do about it. Given the factual context, it is not unreasonable for Mr. Safford to have perceived a threat and have acted in self-defense. The conviction should be reversed and the cause remanded for a new trial.

The lower tribunal abused its discretion in denying the defense request that the definition of "deadly weapon" in the standard instruction be augmented by advising the jury that a fist is not a deadly weapon. The law is that a fist is generally not a deadly weapon, and there was no evidence that Mr. Safford had any martial arts training or the like. The jury should have been instructed on this point to avoid the possibility of confusion. The conviction should be reversed and the cause remanded for a new trial.

The decision below should be reversed, and the cause remanded for a new trial. Alternatively, the conviction should be reversed and the case with directions to vacate the conviction of aggravated battery and enter a conviction of battery, with sentencing commensurate with that conviction.

ARGUMENT

I. THE LOWER TRIBUNAL ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO AGGRAVATED BATTERY.

The standard of review applicable to this issue is de novo as to issues of law, with the evidence to be viewed in the light most favorable to the State. See State v Surin, 920 So. 2d 1162 (Fla. 2006); Jones v State, 790 So. 2d 1194 (Fla. 1st DCA 2001). If a rational trier of fact could find that the elements of the crime have been established beyond reasonable doubt, sufficient evidence exists to sustain the conviction. See E.A.B. v State, 851 So. 2d 308 (Fla. 2nd DCA 2003).

The standard of review as to the sufficiency of the evidence is whether there was competent, substantial evidence from which a jury could conclude that every reasonable hypothesis except that of guilt could be excluded. See Kirkland v State, 684 So. 2d 732 (Fla. 1996); State v Law, 559 So. 2d 187 (Fla. 1989); Porter v State, 752 So. 2d 673 (Fla. 2nd DCA 2000). In applying that test, the defense's version of the facts must be accepted if the circumstances do not show it to be false. See Porter v State, 752 So. 2d 673 (Fla. 2nd DCA 2000); Fowler v State, 492 So. 2d 1344 (Fla. 1st DCA 1986), rev. den., 503 So. 2d 328 (Fla. 1987).

The Fourteenth Amendment's Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. See Barnes v United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); Turner v United States, 396 U.S. 398, 90

S.Ct. 642, 24 L.Ed.2d 610 (1970); Burttram v State, 780 So. 2d 224 (Fla. 2nd DCA 2001), rev. den., 792 So. 2d 1215 (Fla. 2001). If a fact essential to a conviction is not legally established to a moral certainty, the evidence is inconclusive and cannot be said to be sufficient in law to satisfy the mind and conscience of the jury. See Frank v State, 121 Fla. 53, 163 So. 223 (1935).

We do not dispute that the evidence, viewed in this light, was sufficient to sustain a conviction for simple battery. It was not sufficient, however, to support a conviction for aggravated battery. Aggravated battery requires that a battery either (a) involve the use of a deadly weapon or (b) results in great bodily harm, permanent disability, or permanent disfigurement. Neither of these alternatives are supported by the evidence in this case.

Taking the evidence in the light most favorable to the State, Mr. Safford struck Mr. Hartmyer over the head with a barstool, breaking off on of its legs, then punched Mr. Hartmyer in the face, breaking his nose. As discussed in Issue 3 below, a fist is not generally considered a deadly weapon, and there was no evidence in this case that Mr. Safford had any martial arts training or the like so as to take his punch out of that general rule. Patently, a barstool is not designed or intended as an instrument to inflict harm. The issue is whether it was, in this instance, used in such a way as to be likely to cause great bodily harm, permanent disability, or permanent disfigurement.

A deadly weapon is an item which, when used in the ordinary manner

contemplated by its design, will or is likely to cause death or great bodily harm; or any instrument likely to cause great bodily harm because of the way it is used during a crime. See D.B.B. v State, 997 So. 2d 484, 485 (Fla. 2nd DCA 2008) (thrown bicycle is not a deadly weapon); J.W. v. State, 807 So.2d 148, 149 (Fla. 2nd DCA 2002) (cigarette lighter shaped like a gun not a deadly weapon); D.C. v State, 567 So. 2d 998, 999 (Fla. 1st DCA 1990) (spray canister held not to be a deadly weapon). The term "deadly weapon" must be strictly construed. See. Davis v State, 565 So. 2d 826 (Fla. 5th DCA 1990).

"Whether a weapon is deadly is a question of fact to be determined under all the circumstances, taking into consideration the weapon and its capability for use." E.J. v. State, 554 So.2d 578, 579 (Fla. 3rd DCA 1989). More precisely, whether an item is a deadly weapon is a factual question to be determined under the circumstances, taking into consideration its size, shape, material, and the manner in which it was used or was capable of being used. See D.B.B. v State, 997 So. 2d 484, 485 (Fla. 2nd DCA 2008) (thrown bicycle held not to be a deadly weapon); Simmons v. State, 780 So.2d 263, 265 (Fla. 4th DCA 2001) (kitchen knife held not to be a deadly weapon under circumstances of case); C.A.C. v State, 771 So. 2d 1261, 1262 (Fla. 2nd DCA 2000) (victim stabbed in back two or three times with a fork, but did not require medical attention; held that fork was not a deadly weapon); D.C. v State, 567 So. 2d 998, 999 (Fla. 1st DCA 1990) (spray canister held not to be a deadly weapon); Rogan v State,

203 So. 2d 24 (Fla. 3rd DCA 1967) (heavy flower pot one foot in diameter and filled with dirt, thrown through window, held not to be a deadly weapon).

Here, the "weapon" was a common wooden barstool, some five years old. Mr. Safford hit Mr. Hartmyer with it one time, striking him on the head, and one leg of the barstool broke off. Mr. Hartmyer fell to the floor, but did not lose consciousness. Instead, he rose to confront Mr. Safford. Plainly, the barstool was not used in a manner likely to cause great bodily harm in this case.

Nor did the evidence sustain a conviction for aggravated battery under the alternative of great bodily harm. The issue of whether injuries constitute great bodily harm is a question of fact. See Owens v. State, 289 So.2d 472 (Fla. 2nd DCA 1974). The State, however, must prove more than that the victim suffered some harm. See Williams v. State, 651 So.2d 1242 (Fla. 2nd DCA 1995). This Court has observed that great bodily harm " 'means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery.' " Owens v State, 289 So.2d 472, 474 (Fla. 2nd DCA 1974). See also, C.A.C. v State, 771 So. 2d 1261, 1262 (Fla. 2nd DCA 2000).

Thus, in D.C. v State, 567 So. 2d 998 (Fla. 1st DCA 1990), the court held that coughing which required the victim to seek medical attention was not the requisite great bodily harm. Again in Nguyen v State, 858 So. 2d 1259 (Fla. 1st DCA 2003), the same result was reached, the court holding that great bodily harm was not shown where

the victim was hurt by a stun gun, but did not require medical attention as a result. In Williams v State, 651 So. 2d 1242 (Fla. 2nd DCA 1995), this Court held that the required great bodily harm was not shown when the hot coffee thrown on the victim caused pain and blisters, but did not require any medical treatment.

In the present case, Mr. Hartmyer suffered a lump on the head and a broken nose (although the doctor testified that the nose injury appeared to be an old injury, we will assume arguendo that it was sustained in this incident). He refused medical assistance at the scene, and instead went back into the house when law enforcement left to have another beer. Mr. Hartmyer himself testified that he didn't think it was serious at that point. The following day, he did go to the hospital, but was examined and released without any treatment. Despite instructions from the doctors at the hospital to follow up with his primary care physician, Mr. Hartmyer never sought any further medical attention for these injuries. At most, his injuries were mild to moderate, not the great bodily harm required to sustain a conviction for aggravated battery.

The lower tribunal erred in not granting the motion for judgment of acquittal as to aggravated battery, and reducing the charge to simple battery. This Court should reverse and, subject to the disposition of the arguments raised below, remand the case with directions to vacate the conviction of aggravated battery, enter a new judgment of conviction for simple battery, and resentence Mr. Safford accordingly.

Exhibit (D)

II. THE LOWER TRIBUNAL ERRED IN REFUSING TO INSTRUCT THE JURY ON THE THEORY OF SELF-DEFENSE.

The standard of review applicable to this issue is de novo, since it involves a pure issue of law. See State v Paul, 934 So. 2d 1167 (Fla. 2006).

It is axiomatic that a defendant is entitled to a jury instruction on the theory of his defense if there is evidence in the record to support it. See Palmes v. State, 397 So. 2d 648, 652 (Fla. 1981), cert. den., 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981); Taylor v. State, 410 So.2d 1358, 1359 (Fla. 1st DCA 1982), rev. den., 418 So. 2d 1281 (Fla. 1982). A defendant is entitled to his requested self-defense instruction regardless of how weak or improbable his testimony may have been with respect to the circumstances leading up to the battery. See Holley v State, 423 So. 2d 562. 564 (Fla. 1st DCA 1982); Taylor v. State, 410 So.2d 1358, 1359 (Fla. 1st DCA 1982), rev. den., 418 So..2d 1281 (Fla. 1982). .

The lower tribunal recognized these legal principals, but erred in holding that there was no record evidence to support the claim of self-defense. The conviction should accordingly be vacated, and the case remanded for a new trial.

The evidence supporting the theory of self defense is that, after one of the other boarders had pulled a knife on Mr. Safford for taking a beer that wasn't his, Mr. Hartmyer called Mr. Safford a big mouth. Mr. Safford responded by telling Mr. Hartmyer to get out of his business, and Mr. Hartmyer then put down his beer and

asked Mr. Safford what he was going to do about it. Mr. Safford repeated that Mr. Hartmyer should get out of his business, and Mr. Hartmyer again challenged him by asking what Mr. Safford was going to do. Given the factual context, it is not unreasonable for Mr. Safford to have perceived a threat and have acted in self-defense. Certainly, Mr. Hartmyer's subsequent action in getting a baseball bat and chasing Mr. Safford with it evidence that Mr. Hartmyer was not shy to resort to violence, a character trait that Mr. Safford would have known from living in the same boarding house with him for some time.

This evidence was sufficient to meet the standard of "some" evidence in the record, even if weak or improbable, to support a theory of self-defense. The lower tribunal erred in refusing to give the requested instruction, and the conviction should be vacated, and the cause remanded for a new trial.

III. THE LOWER TRIBUNAL ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY THAT A FIST WAS NOT A DEADLY WEAPON.

The standard of review applicable to this issue is abuse of discretion. See Simmons v State, 780 So. 2d 263, 265 (Fla. 4th DCA 2001). See also, Henry v State, 359 So. 2d 864, 866 (Fla. 1978).

The decision not to give a supplemental, non-standard jury instruction falla within the discretion of the court. See Henry v. State, 359 So.2d 864, 866 (Fla.1978); Parker v State, 795 So. 2d 1096, 1100 (Fla. 4th DCA 2001). Here,

the requested addition,al instruction correctly stated the law, was applicable to the evidence adduced, and was necessary to avoid the possibility of jury confusion.

During the charge conference, the defense requested that the standard instruction as to the definition of a "deadly weapon" be augmented by adding a sentence that a fist is not a deadly weapon. The language of the standard instruction is such that a jury might think that a fist, if used in a way likely to cause serious bodily harm, came within the definition, and accordingly convict Mr. Safford of aggravated battery based on his punching Mr. Hartmyer in the face, breaking his nose, rather than based on his use of the barstool. The defense suggestion was intended to remove any such misperception of the law.

As a general rule, a fist is not considered to be a deadly weapon. In Bass v State, 172 So. 2d 614, 616-617 (Fla. 2nd DCA 1965), this Court recognized that there might be some merit to the claim that a fist is not a deadly weapon, although holding that it was a jury question whether a shoe was a deadly weapon.

Subsequent to the decision in Bass, the question arose in the Fifth District, which held that a fist is not considered a deadly weapon absent evidence of something unusual in the assailant's training. See Dixon v State, 603 So. 2d 570 (Fla. 5th DCA 1992), rev. den., 613 So. 2d 9 (Fla. 1992). As in Dixon, there was no evidence in this

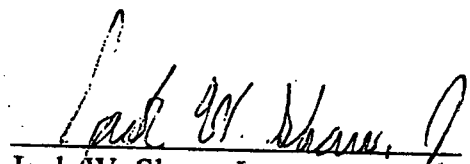
case that Mr. Safford had been a professional boxer, had martial arts training, or anything else that would take this case outside the scope of that general rule.

The lower tribunal abused its discretion in declining to give this requested instruction, and the conviction should be vacated and the case remanded for a new trial.

CONCLUSION

For all of the reasons set forth above, the decision below should be reversed, and the cause remanded with directions to the lower tribunal to grant a new trial. Alternatively, the conviction should be reversed and the case remanded with directions to vacate the conviction of aggravated battery and enter a conviction of battery, with sentencing commensurate with that conviction.

Respectfully submitted,



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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

WILLIE SAFFORD, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D11-2625

(Exhibit F)

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts, except as disputed, qualified, emphasized, supplemented, or otherwise amended below.

1. In relevant part, the victim testified that Appellant struck him with a barstool in the head, while the victim's back was toward Appellant. (Vol. III, T. at 213). A leg broke off of the barstool after Appellant used it to strike the victim, though the stool was in "pretty good" condition. (Vol. III, T. at 211-12).

The victim further testified that due to the injury to his nose from being punched, his nose was crooked and now differently shaped than before. (Vol. III, T. at 217, 219).

2. In relevant part, Dr. Girgis testified that the victim suffered multiple breaks to the bone in his nose. (Vol. III, T. at 259-60). The injury will likely result in a permanent callus formation, and the victim's nose would not heal back to its prior position. (Vol. III, T. at 260-61).

3. In relevant part, Appellant testified as follows:

> So I was standing talking to Robert and then all of a sudden about - I'd say about five minutes later Rodney [the victim] and Larry come back out. And when they come back out, Rodney made a statement. Rodney was like, You know, some people like to talk, but some

people just got a big mouth.

So at that time I say, Hold on. Who you talking to?

I say, Man, you better go on about your business and stop fucking with me.

So he had a beer in his hand at the time being, and he put his beer on the table.

[* * * *]

So he put a beer [...] on the table and he was like, Well, what are you going to do?

I'm like, Man, hey, you better go on about your business now.

So he stand there like, Hey, what are you going to do?

So before I know it, the incident, you know, that's being talked about right here happened, you know?

And as he fell, he fell like he was - you know, like if you hit a person and knock him out [...] and they just fall out unconscious [...] [and] fell to the ground. And when he fell to the ground, that was it. I looked at it, and that was it.

(Vol. IV, T. at 344-45).

4. In relevant part, the State argued as follows in its first closing argument:

So either of these two ways [to establish aggravated battery]. Now, when I say that, I mean it can be proven in multiple ways, here's what I mean. If your're[sic.] finding is that this defendant, Mr. Safford, did strike the victim with a barstool and that barstool was a deadly weapon, then he is

> guilty of aggravated battery, and his intent to knowingly cause great bodily harm is not required.
>
> If you find that that barstool was a deadly weapon, then his intent only has to be that he touched or struck the victim and he did not have to intend that he caused great bodily harm.
>
> The second theory: That the Defendant in this case in his actions by striking him, did intend to cause great bodily harm to the victim and did cause it by breaking his nose, by knocking him unconscious.

(Vol. V, T. at 424-25).

In relevant part, Appellant argued as follows in his closing argument:

> [. . .] There is no evidence that [the victim's nose] is now deformed or that there was any permanent disability. He could still breathe. He could breathe that day. The doctor said he could breathe through his nose. So there is no disability here. [. . .]
>
> There is no evidence at all of disfigurement. You saw him sit on the stand there. He looked like a nice-looking young man. Did he look deformed, disfigured in any way? No. Not in any way that we couldn't tell - he already had a broken knows[sic.], apparently, from some incident before that we don't know about.
>
> So was there great bodily harm? You get a punch in the nose or the face and you bleed [. . .] So no treatment at all. If there was no treatment at all, this was not a serious bodily injury. It's not a great bodily injury.

[* * * *]

First question is: Was great bodily harm, permanent disability or permanent disfigurement caused? If there was no disability, no disfigurement or great bodily harm, then it cannot be aggravated battery unless there was a deadly weapon.

[* * * *]

Could it [the barstool] have been used as a deadly weapon by someone else in a different incident? Maybe. But that's not the question here. The question was how was it used in this particular incident. And based on the level of injury that was caused, it wasn't a deadly weapon. It cannot be.

[* * * *]

[. . .] Well, certainly, we know that the contusion on the head is not great bodily harm.

Let's talk about the nose. One punch is what's alleged. One punch is what's proven. [. . .]

[* * * *]

We submit that there was no great bodily harm that was caused, that these injuries that are complained of are either preexisting injuries or are just a bloody nose. [. . .] It's a blood[sic.] nose.

(Vol. V, T. at

5. In relevant part, the trial court instructed the jury as follows:

To prove the crime of aggravated battery, the State must prove the following two elements beyond a reasonable doubt. The first

element is a definition of battery:

> One, Willie Safford intentionally touched our[sic.] struck Rodney Hartmyer against his will.
>
> Two, Willie Safford, in committing the battery, A, intentionally or knowingly caused great bodily harm or permanent disability or permanent disfigurement to Rodney Hartmyer.
>
> Or, B, used a deadly weapon.
>
> A weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm.

(Vol. V, T. at 460).

SUMMARY OF THE ARGUMENT

As to the first issue, the evidence is sufficient to sustain the conviction for aggravated battery under either theory (that Appellant utilized a deadly weapon and/or that the victim suffered the requisite injury).

As to the second issue, the trial court did not abuse its discretion in denying the self defense instruction, since no evidence to support such an instruction was present.

As to the third issue, the trial court did not abuse its discretion in denying the requested instruction that a fist is not a deadly weapon, since no question exists that no such theory was advanced.

ARGUMENT

ISSUE ONE

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTIONS FOR JUDGMENT OF ACQUITTAL.

In moving for a judgment of acquittal, a defendant admits all the facts and evidence adduced at trial, as well as all reasonable inferences that reasonably may be drawn from such evidence. If the evidence, when viewed in a light most favorable to the state, does not establish the prima facie case of guilt, the court should grant the motion. See, e.g., Thomas v. State, 743 So. 2d 1190, 1192 (Fla. 4th DCA 1999).1 A directed verdict is not proper where reasonable persons might differ as to facts tending to prove ultimate facts or inferences to be drawn from the facts. See Washington v. State, 737 So. 2d 1208, 1215-16 (Fla. 1st DCA 1999). The standard of review is de novo. E.g., State v. Surin, 920 So. 2d 1162, 1164 (Fla. 3d DCA 2006).

Appellant contends herein that the evidence was insuffi-

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1 By reference to the exclusion of a hypothesis of innocence, it appears that Appellant is suggesting that the circumstantial evidence rule applies herein. See Appellant's Brief at p.13. The State disagrees. Sub judice, the evidence was not circumstantial: direct evidence was presented that Appellant struck the victim with a barstool and his fist, causing a contusion and breaking the victim's nose in multiple places. Such would not be enough to invoke the circumstantial evidence rule. See Floyd v. State, 913 So. 2d 564, 571 (Fla. 2005).

cient on the alternate theories basing the conviction for aggravated battery, vis-à-vis: (1) that the barstool was not a deadly weapon; and (2) that the victim did not suffer the requisite injury. The State disagrees, and contends that the evidence was sufficient as to both theories.

As to the theory of aggravated battery by use of a deadly weapon, a deadly weapon is 1) any instrument which, when it is used in the ordinary manner contemplated by its design and construction will or is likely to cause great bodily harm, or 2) any instrument likely to cause great bodily harm because of the way it is used during a crime. E.g., Nguyen v. State, 858 So. 2d 1259, 1260 (Fla. 1st DCA 2003). With regard to the latter, and as applied hereto, a barstool used to strike someone in the head, while the victim's back was toward the perpetrator, with enough force to break one of its legs, is more than sufficient evidence for the jury to determine if the barstool was utilized as a deadly weapon. See L.R.W. v. State, 848 So. 2d 1263 (Fla. 5th DCA 2003) (aggravated assault with a deadly weapon affirmed where juvenile was holding a chair over the victim's head and menacing the victim). Cf. P.R. v. State, 782 So. 2d 509 (Fla. 2d DCA 2001). Compare J.A. v. State, 697 So. 2d 969 (Fla. 3d DCA 1997) (stool was not deadly weapon for aggravated assault where juvenile held the chair close to his chest at all times

and did not use the stool in an aggressive manner at any time).

As to the theory of aggravated battery by the requisite injury, the evidence established, in the light most favorable to the State, that Appellant, by punching the victim, broke the victim's nose in multiple places resulting in permanent displacement of his nose and for which treatment was sought the next day. Such is sufficient for the jury to determine if the victim suffered the requisite injury. See Owens v. State, 289 So. 2d 472 (Fla. 2d DCA 1974).

An affirmance is proper.

ISSUE TWO

WHETHER THE TRIAL COURT ERRED IN DENYING THE INSTRUCTION ON SELF DEFENSE.

Although the appellate court reviews the trial court's ruling on whether to admit or exclude a jury instruction only for an abuse of discretion, that discretion is fairly narrow because a criminal defendant is entitled, upon request and by law, to have the jury instructed on his theory of defense if any evidence supports that theory, so long as the theory is valid under Florida law. Goode v. State, 856 So. 2d 1101, 1104 (Fla. 1st DCA 2003).

Sub judice, Appellant argues that he was entitled to a self defense instruction, based upon his testimony that he and the victim exchanged some words. Appellant's argument, however, is unpersuasive. In this regard, Appellant was the initial aggressor, and struck the victim while the victim's back was toward Appellant. Moreover, there is nothing in Appellant's testimony which suggests a nexus between the words exchanged and the battery herein. For example, Appellant did not testify as to any threatening language per se, nor even a suggestion of a threatening gesture by the victim. Nor did Appellant testify as to any fear of the victim. Indeed, the extent of Appellant's testimony was that words were exchanged, and "then before [Appel-

lant knew] it, the incident [. . .] happened." No reasonable view of such evidence suggests the propriety of a self defense instruction.

An affirmance is proper.

ISSUE THREE

WHETHER THE TRIAL COURT ERRED IN DENYING THE REQUESTED SPECIAL JURY INSTRUCTION THAT A FIST IS NOT A DEADLY WEAPON.

Appellant argues that the trial court erred in denying the requested special jury instruction, that a fist is not a deadly weapon. The State disagrees that any error occurred. The standard of review is abuse of discretion. E.g., Myles v. State, 54 So. 3d 509, 512 (Fla. 3d DCA 2010), review denied, 2011 WL 4425560 (Fla. Sep 21, 2011).

A review of the jury instruction as to the theories basing the charged offense, especially in the context of the evidence and the parties' respective closing arguments, see Statement of the Case and Facts infra, establishes without question that the State's theory was that Appellant committed aggravated battery by utilizing a deadly weapon, to wit, a barstool; and/or by inflicting the requisite degree of injury by breaking the victim's nose in multiple places, by Appellant punching the victim. No error lies herein, since no reasonable view of the proceedings manifests that the State maintained that Appellant's fist could be viewed as a deadly weapon, for purposes of the aggravated battery.

An affirmance is mandated herein.

CONCLUSION

Based upon the foregoing authorities and arguments, Appellee respectfully requests that this court affirm Appellant's convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jack W. Shaw, Jr., Special Assistant Public Defender, 255 North Broadway, 3rd floor, PO Box 9000 - PD, Bartow, Florida 33831, on this 24th day of October, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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COUNSEL FOR APPELLEE

(UNSEALED)

Exhibit [redacted] (H)

After Mr. Shaw had thown Defendants CASE! on 2/24/2012 the D.C.A PERCUMIUM AFFIRMED Mr. Shaws Efforts! Defendant [redacted] was left with [1 year to file for Ineffective of assistance of (Appallant counsel)] and two years to put in for A motion for Postconviction relief 3.850 (Ineffective of assistance of Counsel) Defendant Didn't file for Ineffective of appelant counsel, because Defendant Hadn't realized that (appelant counsel) Hadn't Exhousted claims II and III By not Breifing those claims as (Constitutional Violations) Defendant also in his Endevor, in the timely 3.850, Hadn't attact Defense Counsel from the Lower tribunal about this matter! Defendant had Ever Did an second motion for Postconviction Ineffective of counsel, and still Hadn't challanged defense Counsel! Defendant raised six grounds on 8/0/2012 and was given the chance at an second 3.850, wh.ch Defendant Had raised, four grounds which two of those grounds were repeat ground from the first motion! on 2/13/2013...

Exhibit [redacted] (H)

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

WILLIE SAFFORD,
Defendant.
00324504

Case No.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO

MOTION FOR POSTCONVICTION RELIEF

Defendant, Willie Safford, pro-se, pursuant to Rule 3.850, Fla. R. Crim. P. (2012), moves this Honorable Court to grant the Motion for Post-Conviction Relief and futher alleges that the judgment entered and sentence that was imposed is in violation of Defendant's Sixth Amendment right provided by the Constitution of the United States.

1. Name and location of the court which entered the judgment of conviction under attack: Circuit Court, Sixth Judicial Circuit, Pinellas County.

2. Date of judgment of conviction: May 21, 2011.

3. Length of sentence: Thirty Years (30) as a Violent Career Criminal and Minimum Mandatory Fifteen (15) years as a Prison Release Reoffender (PRR) in the Department of Corrections.

4. Nature of offense(s) involved (all counts): Count I Aggravated Battery.

8

SENT TO STAFF ATTORNEY
DATE: 8/7/12

5. What was your plea? Not Guilty

6. Kind of trial: Jury

7. Did you testify at the trial or at any pretrial hearing? Yes

8. Did you appeal from the judgment of conviction? Yes

9. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in this court? No

10. The Defendant seeks a full and fair evidentiary hearing in this matter and seeks to vacate and set aside the judgment based on the following argument.

Argument:

While the 6th Amendment of the United States Constitution provides an accused with the right to counsel, the U.S. Supreme Court in both *Strickland v Washington, 466 U.S. 668 (1984)* and *McMann v Richardson, 397 U.S. 759 (1970)*, interpreted that as the "right to counsel is the right to the effective assistance of counsel." Moreover, if the government interferes with counsel's ability to make "independent decisions about how to conduct a defense" the constitutional right to effective assistance has clearly been violated. *Strickland, 466 U.S. 668, at 686.* Further, if the attorney himself fails to "render adequate legal assistance," that too will violate the rights of the accused in regards to effective assistance of counsel.

The Strickland Court opined that there are two components to the effective assistance of counsel claim. First, the claimant must show a deficient performance by counsel and second, that such a deficient performance resulted in prejudice to the accused. *Id. at 687.* While there is a presumption that counsel has provided adequate assistance to the accused, the claimant can rebut the presumption by, "identifying acts or omissions of counsel that are alleged not to have been resulted of reasonable professional judgement." *Id. at 690*

Ground One

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

In this case, the Defendant was denied proper representation, when his counsel failed to conduct a reasonable pre-trial investigation and this violated the Defendant's right to counsel as guaranteed in the United States Constitution.

Defense counsel's actions in the present case were unreasonable and had an adverse affect on the outcome of Defendant's case, including but not limited to the attorney's failure to engage in pre-trial investigation. Defense counsel proceeded to trial, having made no attempt to investigate the case on Defendant's behalf. First, the investigation would have revealed that there were medical records to prove that the alleged victim was not in dire need of medical assistance which should have

been used as part of Defense counsel's trial strategy; especially since, Defense counsel advised Defendant that their sole trial strategy consisted of proving Mr. Hartmyer's was slightly injured and that Defendant was only guilty of a simple battery instead of aggravated battery. Second, counsel performed deficiently in failing to investigate and obtain available official-record information that his client told him existed and would prove he was entitled to discharge. Defendant's claim is not speculative. Because the State was not entitled to a recapture period as a matter of law, Defendant demonstrates prejudice.

The outcome of the proceedings would have been different in that had counsel performed an adequate investigation and obtained this available official-record information Defendant's outcome would have been different. Additionally, they would have corroborated Defendant's version of events, likely resulting in an acquittal or being discharged. Defendant even requested that counsel obtain these records to present a reasonable doubt of the events leading up to the arrest.

Clearly, this does not fall within the category of mere strategy, and the attorney's egregious performance is not one of "reasonably effective assistance" as provided by *Strickland*. Defense attorney's have, "a duty to make resonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, at 691. In the present case, the Defendant's counsel did not make *any* reasonable investigation into the Defendant's case. The failure to

investigate these facts of the case and advise the facts in relation to the law, can deprive the Defendant of his right to a full and fair trial. A "do nothing" strategy is not acceptable where counsel engages in little or no pre-trial investigation and presents no witnesses, McMann v Richardson, *397 U.S. 759, 766 (1982).* Futhermore, a Defendant is entitled to an evidentiary hearing when he puts forth a sufficient claim for ineffective assistance of counsel based on trial counsel's failure to investigate. *Jacobs v State, 880 So2d 548 (Fla. 2004).* The Defendant was prejudiced by the trial counsel for not properly investigating before the Defendant's trial which would have cast doubt within the jury's mind or eliminated the intent element and the deadly weapon which was necessary to prove aggravated battery.

In addition to Defense counsel's lack of pre-trial investion, the unorthodox trial tactics also provide facts necessary for this Honorable Court to find that Defense counsel's representation was ineffective. This prejudiced the Defendant because it hindered the Defendant's opportunity to set forth an adequate defense. Moreover, Defendant's opening statements was not made for strategy purposes but rather because of the lawyer's ineptitude.

The investigation would have given credibility to the defense and substantiated Defendant's claim that he was not guilty of aggravated battery. Additionally, the outcome of the proceedings would have been different in that had

counsel performed a proper investigation and obtained the available official-record information would have bolstered the credibility of the defense.

Defendant has identified particular acts or omissions of Defense counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. The above references are example of the deficient preformance on the part of Defense counsel. In *Kimbrough v State, 886 So2d 965, (Fla. 2004)*; a movant is entitled to an evidentiary hearing when the movant alleges specific facts which are not refuted by the records and has demonstrated a deficiency in defense counsel's performance.

Defendant asserts that his Fifth, Sixth, and Fourteenth Amendment Rights as guaranteed by the United States Constitution have been violated. Defendant asserts that he is entitled to relief. An evidentiary hearing should be held with appointment of conflict-free counsel.

Ground Two

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY AND SUFFICIENTLY ARGUE FOR A JUDGMENT OF ACQUITTAL AFTER THE STATE RESTED AND AGAIN AFTER THE DEFENSE RESTED

Defendant asserts that his Defense counsel was ineffective for failing to properly and sufficiently argue a judgment of acquittal. Defendant alleges that his trial counsel was ineffective for failing to file an adequate motion for judgment of

acquittal at the close of the State's case and after the defense rested. In particular, Defedant alleges that the evidence was insufficient to establish that he actually committed aggravated battery. Generally, the crime of aggravated battery as defined in Florida can be established by proving one of two possible scenarios:

> Fla. Stat. §775.084 (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.

Defendant maintains that had his counsel filed a motion which did not rely on boilerplate language, but instead articulated the specific shortcomings of the State's case, he would have been acquitted on that charge. In the present case, at trial, Defense counsel filed a boilerplate motion for judgment of acquittal on the count of which Defendant was convicted. In the ground in which Defendant was charged, the state provided insufficient evidence to prove the intent or the use of a deadly weapon necessary to convict Defendant of aggravated battery. See *Boykin v. State, 725 So.2d 1203 (Fla. 2d DCA 1999).* In Boykin, the defendant claimed that "trial counsel was ineffective for failing to file an adequate motion for judgment of acquittal at the close of the State's case. In this particular case, Defendant allege[d] that the evidence was insufficient to establish burglary of an occupied dwelling."

The trial court denied the claim, finding that the defendant was trying to raise matters in a rule 3.850 motion that should have been raised on direct appeal. This court stated:

> It appears the trial court misunderstood that Boykin was required to argue the sufficiency of the evidence in his motion in order to establish he had suffered prejudice from counsel's alleged deficiency. Rather than attempting to rehash grounds that should have been dealt with on appeal, Boykin sets forth a facially sufficient claim for postconviction relief. Id.

The same is true in the present case. In order to prove aggravated battery, there must be evidence to support a finding that the Defendant 1) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or 2) Uses a deadly weapon. In the instant case, all the evidence presented proved that Defendant was merely hit the alleged victim with a bar stool which is not considered a deadly weapon. Also, Defendant was charged with violating Fla. Stat. §775.084 subsection (1)(a)2, use of a deadly weapon. A weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm. See Fla. Std. Jury Instr. (Crim.) 8.4. A "deadly weapon," within the meaning of the aggravated battery statute, is "1) any instrument which, when used in the ordinary manner contemplated by its design

and construction will or is likely to cause great bodily harm, or 2) any instrument likely to cause great bodily harm because of the way it is used during a crime." *V.M.N. v. State, 909 So.2d 953, 954 (Fla. 4th DCA 2005)*. Additionally, great bodily harm is "distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in simple assault and battery." *C.A.C. v. State, 771 So.2d 1261, 1262 (Fla. 2d DCA 2000)*. Defendant relies on *D.C. v. State, 567 So.2d 998 (Fla. 1st DCA 1990)*, and *C.A.C., supra*, to support his position that the state did not provide sufficient evidence that the bleach, as used, was likely to cause great bodily harm. These cases, however, are distinguishable because in both, the state presented no evidence that the object was used in a manner likely to cause great bodily harm. This prejudiced the Defendant because it hindered the Defendant's opportunity to set forth an adequate defense. The Defense counsel failure to properly and sufficiently argue a judgment of acquittal had its prejudicial value outweigh any probative effect. The outcome of the proceedings would have been different in that had counsel properly argued this point in law and the jury would have acquitted Defendant of the charged offense.

Defendant has identified particular acts or omissions of Defense counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.

Defendant asserts that his Fifth, Sixth, and Fourteenth Amendment Rights as guaranteed by the United States Constitution have been violated. Defendant asserts that he is entitled to relief. An evidentiary hearing should be held with appointment of conflict-free counsel.

Ground Three

DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO FILE A MOTION TO DISMISS CHARGES AFTER SPEEDY TRIAL TIME HAD RUN

Defendant asserts that his Defense counsel was ineffective for failing to file a motion to dismiss after the speedy trial time had run. Defendant had repeatedly advise counsel that he did not want to waive his speedy trial rights nor did he sign any waiver. Therefore, Defendant also contends that the State could not have brought him to trial within the recapture period. In accordance to Fla. R.Crim. P. 3.191(p), the State may bring a Defendant to trial within fifteen (15) days after receiving notice that the speedy trial period has expired. Had trial counsel moved for a discharge upon the expiration, the outcome of the preceeding would have been different and Defendant would have been entitled to discharge. Unlike the speedy trial rule, the constitutional speedy trial right "is measured in tests of reasonableness and prejudice, not specific numbers of days." See *State v. Naveira, 873 So.2d 300, 308 (Fla.2004)* (quoting *Blackstock v. Newman, 461*

So.2d 1021, 1022 (Fla. 3d DCA 1985)). See *Seymour v. State, 738 So.2d 984, 985 (Fla. 2d DCA 1999)* (stating that the four factors pertinent to determining whether the defendant's constitutional right to speedy trial has been violated "are (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has timely asserted his rights; and (4) the existence of actual prejudice as a result of the delay"); *Hallman v. State, 462 So.2d 120, 121 (Fla. 2d DCA 1985)*

The Defense counsel failure to file a motion to dismiss had its prejudicial value outweigh any probative effect. Defendant asserts that Defense counsel's failure to move for discharge upon the expiration clearly constituted a prejudicial error. Defense counsel was deficient and Defendant suffered prejudice. Defense counsel's actions in the present case were unreasonable and had an adverse affect on the outcome of Defendant's case.

Defendant has identified particular acts or omissions of Defense counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. The above references are example of the deficient preformance on the part of Defense counsel. In *Kimbrough v State, 886 So2d 965, (Fla. 2004)*; a movant is entitled to an evidentiary hearing when the movant alleges specific facts which are not refuted by the records and has demonstrated a deficiency in Defense counsel's performance.

Defendant asserts that his Fifth, Sixth, and Fourteenth Amendment Rights as guaranteed by the United States Constitution have been violated. Defendant asserts that he is entitled to relief. An evidentiary hearing should be held with appointment of conflict-free counsel.

Ground Four

DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO REQUEST A JURY INSTRUCTION THAT MADE A DISTINCTION BETWEEN SERIOUS, MODERATE AND SLIGHT INJURY

Defendant asserts that his Defense counsel was ineffective for failing to request a jury instruction that made a distinction between serious, moderate and slight injury. Defendant alleges that his trial counsel was ineffective for failing to request a jury instruction that defines these different types of injuries. Mr. Hartmyer's injuries were not so serious as to constitute great bodily harm, permanent disability, or permanent disfigurement as required by Fla.Stat. 784.045, F.S.A., it is noted other jurisdictions have considered this subject as follows:

In *People v. Smith (1972), 6 Ill.App.3d 259, 285 N.E.2d 460*, the Defendant therein argued that his conviction for aggravated battery must be reversed because the victim's injuries were not 'great bodily harm', a necessary element in the offense of aggravated battery. The Defendant argued 'that he struck the complainant twice in the face with his fist, gave her a lump in her mouth, put a

scar on her face, and left bruises under her chin', none of which injuries were permanent. The Illinois court in affirming conviction said:

> 'A person who, in committing a battery, intentionally or knowingly causes great bodily harm to another, commits aggravated battery. * * * Whether aggravated battery is committed when the injury inflicted does not break the skin, does not injure the bones and does not leave disfigurement or permanent injury of any kind, is a question of fact to be determined by the judge or jury.
> 'The statutory term 'great bodily harm' is not susceptible to precise legal definition. * * * Defendant asserts that great bodily harm is synonymous with permanent injury. True, it can be argued that all permanent injury constitutes great bodily harm. It does not follow, however, that all great bodily harm consists of permanent injury. Indeed, many serious bodily injuries leave no lasting effect on the health, strength, and comfort of the injured person.'

In *Anderson v. State (1973, Ind.App.), 291 N.E.2d 579*, wherein was involved the interpretation of an aggravated assault and battery charge in which the victim was struck five blows with a fist, the court in affirming conviction on said charge, said:

> 'Great bodily harm defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are

> likely to be inflicted in a simple assault and battery. . . . Whether the evidence describing such harm or injury is within the meaning of the statute . . . is generally a question of fact for the jury.'

The outcome of the proceedings would have been different in that had counsel properly argued this point in law and requested a jury instruction that made a clear distinction between the different types of injury. Defense counsel was ineffective assistance for failing to object or to move for a mistrial where the jury could have become confused due to the distinction between serious, moderate and slight injury. Had the jury had the privy of getting a clear understanding of the distinction between these different types of injuries they would have convicted Defendant of a lesser-included offense, simple battery.

The Defendant has identified particular acts or omissions of defense counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.

Defendant asserts that his Fifth, Sixth, and Fourteenth Amendment Rights as guaranteed by the United States Constitution have been violated. Defendant asserts that he is entitled to relief. An evidentiary hearing should be held with appointment of conflict-free counsel.

Ground Five

DEFENSE COUNSEL WAS INEFFECTIVE FOR FILING TO OBJECT TO INCONSISTENT STATEMENTS

Defendant asserts that his Defense counsel was ineffective for failing to object to the inconsistant statements made by the state witnesses. Trial counsel's failure to impeach the alleged eyewitness to the aggravated battery with statements the witnesses made on day of the alleged offense was not reasonable and constituted ineffective assistance of counsel as there was reasonable probability that result would have been different had information been brought to jury's attention; did not mention defendant or version of events presented at trial. There is a significant contradiction in all the witnesses's position. There is a reasonable probability that the result of Defendant's trial would have been different but for counsel's failure to bring this information to the jury's attention.

It is clear that where the record does not indicate otherwise, trial counsel's failure to impeach a key witness with inconsistencies constitutes ineffective assistance of counsel and warrants relief. *Richardson v. State, 617 So.2d 801, 803 (Fla. 2d DCA 1993); Kegler v. State, 712 So.2d 1167, 1168 (Fla. 2d DCA 1998)*

A party may always impeach its witness if the witness gives affirmatively harmful testimony. In a case where a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the

witness with a prior inconsistent statement. Of course, the statement should be truly inconsistent, and caution should be exercised in permitting impeachment of a witness who has given favorable testimony but simply fails to recall every detail unless the witness appears to be fabricating.

Failure to impeach the victim, Mr. Hartmyer, who made inconsistent statements. Defendant asserts that counsel did nothing to reveal the inconsistency until closing arguments. In the instant case, Defense counsel conceeded that he was ineffective for failing to impeach the state's witnesses in which counsel mentioned in closing arguments on page 437 of the trial transcripts which clearly states in relevant part:

> "There was a lot of testimony today from Mr. Gray and Mr. Scharn that completely impeached what the victim -- or the alleged victim said about who was where and what happened when. The first one says that Mr. Hartmyer was in the room first. The other one says, no Mr. Safford was in the room first. That's a conflict in evidence. Frankly, I don't know how you could really believe either one of them. Mr. Gay has numerous convictions for felonies and a conviction for crime of dishonesty as does my client. And he took the stand, so you can consider that as well...."

In accordnace with Section 90.608(1)(a), Florida Statutes (2011) which recognizes the right to impeach a witness and attack his credibility with statements

which are inconsistent with the witness's present testimony. To be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial. That includes allowing "witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." Thus, trial counsel's failure to impeach the victim and witnesses's testimony on cross-examination was not reasonable and it prejudiced Defendant's defense. The jury's assessment of the witnesses credibility was critical in Defendant's case and the omissions was material, a significant fact rather than mere details. See *Driscall v. Delo, 71 F.3d 701(C.A.8{Mo.}1995)*

Had counsel impeached the state's witnesses, the jury would have heard favorable testimony towards Defendant's defense which is consistant with Defendant's version of what actually happened. The outcome of the proceedings likely would have been different in that had the jury heard correct testimony this testimony would have added credibility to the defense. Defendant asserts that Defense counsel's failure to impeach the witness was a breach with so much potential to infect other evidence that, without it, there is a reasonable probability that the jury would find reasonable doubt of Defendant's guilt. Therefore, his trial counsel's omission amounted to a deprivation of Defendant's Sixth Amendment right to counsel.

An ineffective assistance of counsel claim consists of a performance component and a prejudice component. *Strickland, 466 U.S. at 687, 104 S.Ct. 2052.* The performance component requires a showing by the defendant that counsel's performance was not reasonable under the circumstances. Id. at *688, 104 S.Ct. 2052.* The prejudice component requires a showing by the defendant that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at *694, 104 S.Ct. 2052.*

Defendant has identified particular acts or omissions of Defense counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. The above references are example of the deficient preformance on the part of Defense counsel. In *Kimbrough v State, 886 So2d 965, (Fla. 2004)*; a movant is entitled to an evidentiary hearing when the movant alleges specific facts which are not refuted by the records and has demonstrated a deficiency in defense counsel's performance.

Defendant asserts that his Fifth, Sixth, and Fourteenth Amendment Rights as guaranteed by the United States Constitution have been violated. Defendant asserts that he is entitled to relief. An evidentiary hearing should be held with appointment of conflict-free counsel.

Ground Six

THE OVERALL CUMULATIVE EFFECT OF ANY TWO OR MORE ERRORS COMMITTED BY COUNSEL SUPPORTS A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL

When considering the cumulative effect counsel's representation, it is clear that the level falls well below that of reasonably competent counsel. Futhermore, it is also discernible there is a reasonable probability that the outcome of the proceeding would be different but-for any one particular error. Relief is warranted under these circumstances. See *State v Gunsby 670 So2d 920 (Fla. 1996); Rose v State 774 So2d 629 (Fla. 2000); Chliders v State 782 So2d 513 (1st DCA 2001)*

Defendant contends that he was denied a fundamentally fair trial based on cumulative errors that occurred. Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." *McDuffie v. State, 970 So.2d 312, 328 (Fla.2007)* (alterations in original) (quoting *Brooks v. State, 918 So.2d 181, 202 (Fla.2005)*). Here, the cumulative errors meet the requirements as outlined in Strickland, the standard for ineffective assistance of counsel.

Defendant has identified particular acts or omissions of Defense counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. The above references are example of the deficient preformance on the part of Defense counsel. In *Kimbrough v State, 886 So2d 965, (Fla. 2004)*; a movant is entitled to an evidentiary hearing when the movant alleges specific facts which are not refuted by the records and has demonstrated a deficiency in defense counsel's performance.

Defendant asserts that his Fifth, Sixth, and Fourteenth Amendment Rights as guaranteed by the United States Constitution have been violated. Defendant asserts that he is entitled to relief. An evidentiary hearing should be held with appointment of conflict-free counsel.

Conclusion:

"Defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland at 693*. The defendant must only show that there is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability sufficent to undermine confidence in the outcome. In the present case, had the Defense counsel engaged in any pre-trial preparation and investigation or made specific objections, the probability that the outcome would have been different is sufficiently high.

The primary concern of the Strickland case was ensuring that the accused had a fair trial. In the present case, the Defendant did not receive a fair trial due to his trial attorney's lack of preparation regarding discovery and his failure to make a proper objection. The Defendant's counsel was unprepared as reflected by her performance during trial. If the Defendant had been informed he would not have proceeded to trial without proper pre-trial preparation. Based on the foregoing facts, the Defendant has alleged specific facts to warrant an evidentiary hearing allowing him to satify the burden of proving his claim of ineffective assistance of counsel based on *Fla. R. Crim. P. 3.850.*

When a State Court rules that a defendant fails to adequately satisfy the prongs of *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)*, he should be given an opportunity to amend his postconviction motion. In concluding that a postconviction motion is facially insufficient, the postconviction court should enter an order dismissing it without prejudice to file an amended motion. The order dismissing without prejudice should set forth a reasonable time limit within which a defendant can amend the claims, as is required by *Spera v. State, 971 So.2d 754, 761 (Fla. 2007).*

WHEREFORE, Defendant asserts that his Fifth, Sixth, and Fourteenth Amendment Rights as guaranteed by the United States Constitution have been

violated. Defendant asserts that he is entitled to relief. An evidentiary hearing should be held with appointment of conflict-free counsel.

End of Ground

11. If any of the grounds listed in 10 were not previously presented on your direct appeal, state briefly what grounds were not so presented, and give your reasons why they were not so presented:

12. Do you have any petition, application, appeal, motion, etc. now pending in any court, either state or federal, as to the judgment under attack? No

13. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked in this matter.

(a) At preliminary hearing and pre-trial: James R. Mitchell and Kate Bradford, Office of the Public Defender, Sixth Judicial Circuit, 14250 49th, Clearwater FL 33762

(b) At plea and sentencing: James R. Mitchell and Kate Bradford, Office of the Public Defender, Sixth Judicial Circuit, 14250 49th, Clearwater FL 33762

(c) On appeal: Yes

(d) In any postconviction proceeding: pro-se

WHEREFORE, Defendant prays that this Honorable Court grant all relief to which he may be entitled in this proceeding, including but not limited to vacating the judgment and sentence; or hold an evidentiary hearing with the appointment of conflict-free counsel. Such other and further relief as the Court deems just and proper as is consistent with the relief sought in the instant motion.

OATH

Under penalties of perjury I declare that I have read the foregoing motion for postconviction relief and that the facts stated in it are true.

Dated: 8-1, 2012

/s/ Willie Safford

Willie Safford, DC # 243373 pro-se
Suwannee C. I. Annex
5796 U.S. Hwy 90
Live Oak, FL 32060

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Appeal

v.

Criminal Division
Case No: CRC 10-09375CFANO
UCN: 522010CF009375XXXXNO

WILLIE SAFFORD,
Defendant.

0032504

Exhibit (B)

FILED
CRIMINAL JUSTICE CENTER
2013 FEB 13 AM 11:13
KEN BURKE
CLERK OF CIRCUIT COURT

MOTION FOR POSTCONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

1. This motion must be legibly handwritten or typewritten, signed by the Defendant, and contain either the first or second oath set out at the end of this rule. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

2. Additional pages are not permitted except with respect to the facts that you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted in support of your legal claims (as opposed to your factual claims), they should be submitted in the form of a separate Memorandum of Law. This Memorandum should be submitted in the form of a separate Memorandum of Law. This memorandum should have the same caption as the motion.

3. No filing fee is required when submitting a motion for post-conviction relief.

4. Only the judgment of one case may be challenged in a single motion for post-conviction relief. If you seek to challenge judgments entered in different cases, or different courts, you must file separate motions as to each such case. The single exception to this is if you are challenging the judgments in different cases that were consolidated for trial. In this event, show each case number involved in the caption.

5. Your attention is directed to the facts that you must include all grounds for relief, and all facts that support such grounds, in the motion you file seeking relief from any judgment of conviction.

6. When the motion is fully completed, the original must be mailed to the Clerk of Court FROM THE COUNTY WHERE THE SENTENCE WAS IMPOSED.

DATE: 2/6/13

MOTION

1. Name and location of the court that entered the judgment of conviction under attack: CIRCUIT COURT, SIXTH JUDICIAL, PINELLAS COUNTY.

2. Date of judgment of conviction: MAY 21, 2011.

3. Length of sentence: THIRTY YEARS (30) AS A VIOLENT CAREER CRIMINAL AND MINIMUM FIFTEEN (15) YEARS AS A (PRR) IN DOC

4. Nature of offense(s) involved (all counts): COUNT 1 AGGRAVATED BATTERY.

5. What was your plea? (Check one only)

   (a) Not guilty X
   (b) Guilty ____
   (c) Nolo Contendere ____
   (d) Not Guilty by reason of Insanity ____

If you entered one plea to one count and a different plea to another count, give details: ____

6. Kind of trial (Check one only)

   (a) Jury X

   (b) Judge only without jury ____

7. Did you testify at the trial or at any pretrial hearing?

Yes X No ____

If yes, list each such occasion: I TESTIFIED AT TRIAL

8. Did you appeal from the judgment of conviction? Yes X No ____

9. If you did appeal, answer the following:

(a) Name of court: DISTICT COURT OF APPEAL SECOND DISTICT LAKELAND FEARIDA

(b) Result: AFFIRMED

(c) Date of result: FEBURARY 24, 2012

(d) Citation (if known): ____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in this court?

Yes X No ____

11. If the answer to number 10 was "yes", give the following information (applies only to proceedings in this court):

(a)(1) Nature of proceedings: 3.850 MOTION

(2) Grounds Raised: Six Grounds

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.? Yes ____ No X

(4) Result: THE MOTION WAS DENIED

(5) Date of result: JANUARY 28, 2013

(b) As to any second petition, application, motion, etc. give the same information:

(1) Nature of proceeding: _____

_____

_____

(2) Grounds raised: _____

_____

_____

(3) Did you ever receive an evidentiary hearing on your petition, application, motion, etc.? Yes ____ No ____

(4) Result: _____

(5) Date of result: _____

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filled any petitions, motions, etc., with the respect to this judgment in any other court?

Yes ____ No ____

13. If your answer to number 12 was "yes ", give the following information:

(a)(1) Name of court: _____

(2) Nature of proceeding: _____

_____

(3) Grounds raised: _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(b) As to any second petition, application, motion, etc., give the same information:

(1) Name of court: _____

(2) Nature of proceedings: _____

_____

_____

(3) Grounds raised: _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(c) As to any third petition, application, motion, etc., give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

_____

_____

(3) Grounds raised: _____

_____

_____

(4) Did you receive any evidentiary hearings on you petition, application, motion, etc.? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

For your information, the following is a list of the most frequently raised grounds for post-conviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds that you may have other than those listed. However you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the court if you merely check (a) through (i).

(a) Conviction obtained by a plea of guilty or nolo contendere that was unlawfully induced or not made voluntarily with understanding of the nature of the charge and consequences of the plea.

(b) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(c) Conviction obtained by a violation of the protection against double jeopardy.

(d) Denial of effective assistance of counsel.

(e) Denial of right of appeal.

(f) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(g) Sentence in excess of maximum authorized by law.

(h) Newly discovered evidence.

(i) Changes in the law that would be retroactive.

A. Ground 1: DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE IN VIOLATION OF THE FIFTH, SIX AND FOURTENTH

Supporting FACTS (tell your story briefly without citing cases or law):

DEFENSE COUNSEL FAILED TO INVESTIGATE THE CRIME SCENE! IF THE DEFENSE COUNSIL WOULD'VE SENT AN INVESTORGATOR TO THE HOUSE AT 2255 TRELANE AVE, HE WOULD'VE BEEN ABLE TO COME UP WITH WITNESSES ON BEHALF OF THE DEFENSE, AND THAT COULD'VE GAVE MY TESTIMONY A CHANCE WITH THE JURY.

B. Ground 2: DEFENCE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INCONSISTANT STATEMENTS SEE ATTACHED PAGES A.1-4

Supporting FACTS (tell your story briefly without citing cases or law):

DEFENSE COUNSEL FAILED TO REDIRECT WITNESSES JERRY GAY AND ROBERT SCHARN AFTER THERE TESTIMONY, A REDIRECT OF THESE TWO WITNESSES WOULD HAVE SHOWN THE TWO DIFFERENCES OF TESTIMONY. AND WOULD'VE CONVINCED THE JURY THAT THEY WERE FABRICATING. ATTACHED PAGES SEE B. 1-4.

C. Ground 3: DEFENCE COUNSEL WAS INEFFECTIVE FOR NOT TAKING TRANSCRIBED DEPOSITIONS OF VICTIM AND WITNESSES

Supporting FACTS (tell your story briefly with out citing cases or law):

I THE DEFENDANT WAS A CLIENT OF COUNSEL FOR ABOUT TEN MONTHS AND IN THAT TIME, NEVER RECEIVED ANY DEPOS FROM DEFENCE COUNSEL, DEFENCE COUNSEL PROCEEDED TO TRIAL WITHOUT HAVING TRANSCIBED DEPOS OR TAKING DEPOS PERIOD. SEE ATTACHED PG. 1-4

D. Ground 4: DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO GET PSYCH RECORDS AND HEALTH RECORDS AND SOCIAL SERVICE RECORDS FOR EVIDENCE FOR DEFENCE PURPOSES.

Supporting FACTS (tell your story briefly with out citing cases or law):

BY DEFENCE COUNSEL FAILING TO BRING FOURTH THE MATTER OF ME THE DEFENDANTS MENTAL DISORDER, WHICH COULD HAVE RESULTED IN DEFENDANTS GETTING RECORD FROM PLACES SHOWING, THAT OF THE TIME OF THE ALLEGED INCIDENT, THAT I THE DEFENDANT WAS UNDERGOING TREATMENT FOR A MENTAL DISORDER. SEE ATTACHED PAGES 1-4

15. If any of the grounds listed in 14 A,B,C, and D were not previously presented on your direct appeal, state briefly what grounds were not so presented:

Exhibit ([redacted])(I)

Defendants second motion for postconviction relief was denied in the lower tribunal on 8/8/2013. After the denial, Defendant had placed petition for writ of Habeas Corpus 7/22/2014. That petition was filed by Defendant and signed by magistrate judg. 9/10/2014.

10/28/2014 Response to that petition for writ of Habeas Corpus By state of Florida (Harbelt, SonyA) This is when Defendant had learned the fact, that Ground II in Mr. Shaw's Initial Breif as well as ground III hadint been breifed as an federal Constitutional claim! in the state court. And defendant had also learned, (that Defendant could not raise the claim in state Court because Defendant was not entitled to an second appeal and claims which can be raised on direct appeal are not cognizable in postconviction motion in Florida.)
At this point, defendants chance to attact the fact that those two claims were not exhausted by (appellant counsel) or (defense counsel) was expired! And as Defendant has stated, Defendant is not an Attorney and Defendant wasint aware of the fact that Mr. James mitchel hadint exhausted this claim (self-defense) in the state court Lower tribunal nor did defendant know that Jack W. Shaw hadint exhausted the claims (self-defense) or a (fist is not a deadly weapon if Defendant would've known, Defendant would've attacted the matter.., But as Defendant has stated, it was just found out through Dudiligence to late!

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE J. SAFFORD,

Petitioner,

v. Case. No. 8:14-cv-1759-T-27MAP

SECRETARY, Department of Corrections,

Respondent.
_____/

(Exhibit "I")

LIST OF EXHIBITS

Exhibit	Description
1	Information Pinellas County case no. 10-CF-9375
2	Trial Transcript
3	Verdict
4	Judgment and Sentence
5	Initial Brief 2DCA Case No. 2D11-2625
6	Answer Brief 2DCA Case No. 2D11-2625
7	Slip Opinion 2DCA Case No. 2D11-2625
8	Motion for Postconviction Relief
9	Order Striking in Part and Reserving Ruling in Part on Defendant's Motion for Postconviction Relief
10	Order Denying Defendant's Motion for Postconviction Relief

11	Slip Opinion 2DCA Case No. 2D13-864
12	Mandate 2DCA Case No. 2D13-864
13	Motion for Postconviction Relief
14	Order Striking in Part and Reserving Ruling in Part on Defendant's Motion for Postconviction Relief
15	Amended Claim One
16	Order Denying Defendant's Motion for Postconviction Relief
17	Initial Brief 2DCA Case No. 2D13-4116
18	Slip Opinion 2DCA Case No. 2D13-4116
19	Mandate 2DCA Case No. 2D13-4116

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE J. SAFFORD,

Petitioner,

v. **Case. No. 8:14-cv-1759-T-27MAP**

SECRETARY, Department of Corrections,

Respondent.
_____/

RESPONDENT'S NOTICE OF FILING EXHIBITS

COMES NOW, the Respondent, by and through the undersigned counsel, and gives notice to this Honorable Court of Respondent's filing exhibits to the response in the above styled cause under separate cover by paper submission.

Respectfully submitted,

PAMELA JO BONDI,
ATTORNEY GENERAL

/s Sonya Roebuck Horbelt
SONYA ROEBUCK HORBELT
Assistant Attorney General
Florida Bar No. 0937363
Office of Attorney General
3507 E. Frontage Rd #200
Tampa, FL 33607
813-287-7900
Sonya.Horbelt@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 28, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that true and correct copies of the foregoing document and the notice of electronic filing (sans exhibits) have been furnished by U.S. mail to the following non-CM/ECF participant: Willie J. Safford, DOC# 243373, Lake Correctional Institution, 19225 U.S. Highway 27, Clermont, Florida 34715-9025.

s/ Sonya Roebuck Horbelt
COUNSEL FOR RESPONDENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE J. SAFFORD,

Petitioner,

v. Case. No. 8:14-cv-1759-T-27MAP

SECRETARY, Department of Corrections,

Respondent.
_____/

LIST OF EXHIBITS

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14	Order Striking in Part and Reserving Ruling in Part on Defendant's Motion for Postconviction Relief
15	Amended Claim One
16	Order Denying Defendant's Motion for Postconviction Relief
17	Initial Brief 2DCA Case No. 2D13-4116
18	Slip Opinion 2DCA Case No. 2D13-4116
19	Mandate 2DCA Case No. 2D13-4116

Answers to Complaints

8:14-cv-01759-JDW-MAP Safford
v. State of Florida

HABEAS

U.S. District Court

Middle District of Florida

Notice of Electronic Filing

The following transaction was entered by Horbelt, Sonya on 10/28/2014 at 1:08 PM EDT and filed on 10/28/2014

Case Name: Safford v. State of Florida
Case Number: 8:14-cv-01759-JDW-MAP
Filer: State of Florida
Document Number: 6

Docket Text:
RESPONSE to [1] Petition for writ of habeas corpus by State of Florida. (Attachments: # (1) Appendix Exhibit List)(Horbelt, Sonya)

8:14-cv-01759-JDW-MAP Notice has been electronically mailed to:

Sonya Roebuck Horbelt sonya.horbelt@myfloridalegal.com, CrimAppTpa@myfloridalegal.com

8:14-cv-01759-JDW-MAP Notice has been delivered by other means to:

Willie J. Safford
243373
Lake Correctional Institution
19225 US Hwy 27
Clermont, FL 34715-9025

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1069447731 [Date=10/28/2014] [FileNumber=12934590-0] [9c34b6e9e99913c1e5e3e091469f02d18e8e09bcc3ed8a603b8940179c7869ba45eb7fbef0539e493a999dca6e4a85ec7cab7f9777e55078711e619d2d790efe]]
Document description: Appendix Exhibit List
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1069447731 [Date=10/28/2014] [FileNumber=12934590-1] [49e32bb3385348ba162e8c48a038f5e4ca6fe904adaa5d9c897660fdc7bc86971ba729672e51abd9016ae6711dacd0fffd2e2ad9acdf4ae467ae961b45bda9c7]]

Notices

8:14-cv-01759-JDW-MAP Safford
v. State of Florida

HABEAS

U.S. District Court

Middle District of Florida

Notice of Electronic Filing

The following transaction was entered by Horbelt, Sonya on 10/28/2014 at 1:09 PM EDT and filed on 10/28/2014

Case Name: Safford v. State of Florida
Case Number: 8:14-cv-01759-JDW-MAP
Filer: State of Florida
Document Number: 7

Docket Text:
NOTICE by State of Florida re [6] Response to habeas petition *notice of filing paper exhibits* (Attachments: # (1) Appendix Exhibit List)(Horbelt, Sonya)

8:14-cv-01759-JDW-MAP Notice has been electronically mailed to:

Sonya Roebuck Horbelt sonya.horbelt@myfloridalegal.com, CrimAppTpa@myfloridalegal.com

8:14-cv-01759-JDW-MAP Notice has been delivered by other means to:

Willie J. Safford
243373
Lake Correctional Institution
19225 US Hwy 27
Clermont, FL 34715-9025

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1069447731 [Date=10/28/2014] [FileNumber=12934593-0] [405abc879e4da161dc3677e1baf8c9b862273a0f8c18ec525f8107c8fe9dc11d7885e0b44cbc63a19937433887f02ef98d32eafeaaca9c904ecdc0832c78069b]]
Document description: Appendix Exhibit List
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1069447731 [Date=10/28/2014] [FileNumber=12934593-1] [7626d48a2dc9f33823a15eccbd08c9a7e06432425f103482e7612842395b919b3ece950940369e5d3cbd1dcedba50247b8d8db41992b0026088d20d3dde130a3]]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE J. SAFFORD,

Petitioner,

v. **CASE NO. 8:14-cv-1759-T-27MAP**

SECRETARY, Department of Corrections,

Respondent.

_____/

RESPONSE TO PETITION

COMES NOW the Respondent, **Secretary of the Florida Department of Corrections,** by and through the undersigned Assistant Attorney General, and files this response to the petition for writ of habeas corpus. Respondent submits the petition should be denied for the following reasons.

Respondent denies Petitioner is being illegally restrained and denies each and every allegation in the instant petition indicating in any manner that Petitioner is entitled to relief from this Court. Respondent holds Petitioner in lawful custody pursuant to judgments and sentences rendered in the Sixth Judicial Circuit in and for Pinellas County, Florida in Case No. 10-CF-9375.

I. Procedural History

Petitioner, Willie Safford, was charged by information with aggravated battery with the use of a deadly weapon or the infliction of great bodily harm. (Ex. 1). He was tried by jury (Ex. 2) and convicted as charged (Ex. 3). He was found to be a habitual felony offender, a prison releasee reoffender, and a

violent career criminal and sentenced to a minimum mandatory term of thirty years in prison. (Ex. 4).

Direct Appeal

Petitioner pursued a direct appeal and his attorney, Jack W. Shaw, Jr., filed an initial brief raising three issues: 1) Whether the trial court erred in denying petitioner's motion for judgment of acquittal as to aggravated battery; 2) Whether the trial court erred in refusing to instruct the jury on self-defense; and 3) Whether the trial court abused its discretion in refusing to instruct the jury that a fist is not a deadly weapon. (Ex. 5). The State filed an answer brief. (Ex. 6). On February 24, 2012, the Second District Court of Appeal (Judges Silberman, Casanueva, and Davis) affirmed without opinion. (Ex. 7). Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012)(2D11-2625).

Collateral Proceedings

First Motion for Postconviction Relief

On August 1, 2012, petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (Ex. 8). On November 28, 2012, the state circuit court entered an order striking petitioner's motion in part, reserving ruling in part, and allowing petitioner thirty days to amend insufficient claims. (Ex. 9). On January 29, 2013, the circuit court entered a final order denying the motion. (Ex. 10). On November 22, 2013, the Second District Court of Appeal (Judges Casanueva, Kelly, and Crenshaw) affirmed without opinion. (Ex.

11). Safford v. State, 127 So. 3d 514 (Fla. 2d DCA 2013). Mandate issued December 19, 2013. (Ex. 12).

Second Motion for Postconviction Relief

On February 13, 2013, petitioner filed a second rule 3.850 motion for postconviction relief. (Ex. 13). On June 17, 2013, the state circuit court entered an order striking the motion in part and reserving ruling in part. (Ex. 14). Petitioner then filed an amended claim one. (Ex. 15). On August 9, 2013, the circuit court entered an order denying petitioner's motion. (Ex. 16). Petitioner appealed and filed an initial brief. (Ex. 17). On June 20, 2014, the Second District Court of Appeal (Judges LaRose, Khouzam, and Sleet) affirmed without opinion. (Ex. 18). Safford v. State, 2014 WL 2801782 (Fla. 2d DCA 2014). Mandate issued July 15, 2014. (Ex. 19).

Present Petition

The present federal petition was provided to prison officials for mailing on July 18, 2014.

II. Timeliness of the Petition

The petition is timely under the one-year limitation period of 28 U.S.C. § 2244(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). According to the AEDPA, a person in custody pursuant to the judgment of a state court has one year from the date his judgment became final to file a §2254 federal habeas petition. However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim

is pending shall not be counted toward" the limitation period. 28 U.S.C. §2244(d)(2).

Petitioner's convictions and sentences were affirmed by the state appellate court on February 24, 2012. Because petitioner did not petition the United States Supreme Court for certiorari review, his judgment became final when the time for seeking such review expired 90 days later on May 24, 2012. See Supreme Court Rule 13(3); Gonzalez v. Thaler, --- U.S. ----, ----, 132 S.Ct. 641, 653 54 (2012). Petitioner then had one year, absent any tolling, within which to file his federal habeas petition.

On August 1, 2012, sixty-nine (69) days after his judgment became final, petitioner filed his first rule 3.850 motion for postconviction relief, thereby tolling 296 days of the time within which to file his federal petition. That motion remained pending until the appellate mandate issued on December 19, 2013. In the meantime, petitioner filed his second rule 3.850 motion on February 13, 2013. The mandate relating to that motion issued on July 15, 2014. Petitioner then had 296 days within which to file his federal habeas petition, making the federal petition due on or before May 7, 2015. Thus, the instant petition, provided to prison officials for mailing on July 18, 2014, is timely. However, the motion should be denied because the grounds raised by petitioner are without merit.

III. Governing principles

A. Exhaustion and procedural default

Prior to seeking relief in federal court from a state court conviction and sentence, a habeas petitioner is required first to exhaust his federal claims by presenting them to the state courts. 28 U.S.C. § 2254(b)(1)(A); Medellin v. Dretke, 544 U.S. 660, 666, 125 S.Ct. 2088, 161 L.Ed.2d 982 (2005). If a petitioner fails to properly exhaust a claim, and can no longer do so because state procedural rules would now preclude review of the claim, the claim is procedurally defaulted and barred from review in federal court. Keeney v. Tamayo-Reyes, 504 U.S. 1, 7, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991).

B. AEDPA's deferential standard

AEDPA "restricts the circumstances under which a federal habeas court may grant relief to a state prisoner whose claim has already been 'adjudicated on the merits.'" Johnson v. Williams, --- U.S. ----, 133 S.Ct. 1088, 1091, 185 L.Ed.2d 105 (2013)(citing 28 U.S.C. § 2254(d)). Pursuant to AEDPA's demanding standard, the petitioner may gain relief only if the state-court decision he assails "was contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent, or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. S 2254(d)(1), (2).

IV. Response

GROUND ONE

In ground one, petitioner asserts that the trial court erred in denying defense counsel's motion for judgment of acquittal on the aggravated battery charge because the evidence was insufficient to prove either that the barstool used to batter the victim was a deadly weapon or that the victim suffered great bodily harm. This claim was raised as ground one in petitioner's initial brief on direct appeal and is exhausted for federal habeas purposes. However, the claim is without merit.

The clearly established federal law which applies to a claim of insufficient evidence is Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). According to Jackson, in order to obtain habeas corpus relief, a petitioner must establish that upon evidence adduced at trial viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof beyond a reasonable doubt. Petitioner has failed to make this showing and the state court's denial of relief was neither contrary to nor an unreasonable application of any clearly established federal law.

As the State argued in its answer brief on direct appeal:

> [Petitioner] contends herein that the evidence was insufficient on the alternate theories basing the conviction for aggravated battery, vis-à-vis: (1) that the barstool was not a deadly weapon; and (2) that the victim did not suffer the requisite injury. The State disagrees, and contends that the evidence was sufficient as to both theories.

> As to the theory of aggravated battery by use of a deadly weapon, a deadly weapon is 1) any instrument which, when it is used in the ordinary manner contemplated by its design and construction will or is likely to cause great bodily harm, or 2) any instrument likely to cause great bodily harm because of the way it is used during a crime. E.g., Nguyen v. State, 858 So. 2d 1259, 1260 (Fla. 1st DCA 2003). With regard to the latter, and as applied hereto, a barstool used to strike someone in the head, while the victim's back was toward the perpetrator, with enough force to break one of its legs, is more than sufficient evidence for the jury to determine if the barstool was utilized as a deadly weapon. See L.R.W. v. State, 848 So. 2d 1263 (Fla. 5th DCA 2003) (aggravated assault with a deadly weapon affirmed where juvenile was holding a chair over the victim's head and menacing the victim). Cf. P.R. v. State, 782 So. 2d 509 (Fla. 2d DCA 2001). Compare J.A. v. State, 697 So. 2d 969 (Fla. 3d DCA 1997) (stool was not deadly weapon for aggravated assault where juvenile held the chair close to his chest at all times and did not use the stool in an aggressive manner at any time).
>
> As to the theory of aggravated battery by the requisite injury, the evidence established, in the light most favorable to the State, that [petitioner], by punching the victim, broke the victim's nose in multiple places resulting in permanent displacement of his nose and for which treatment was sought the next day. Such is sufficient for the jury to determine if the victim suffered the requisite injury. See Owens v. State, 289 So. 2d 472 (Fla. 2d DCA 1974).

(Ex. 6, pp. 7-9). Based on the evidence presented at trial, as summarized in the State's direct appeal brief, it was objectively reasonable for the state courts to conclude that there was sufficient evidence for a rational juror to find beyond a reasonable doubt that the barstool was used as a deadly weapon and/or that the victim suffered great bodily harm, and the denial

of relief on this claim was neither contrary to nor an unreasonable application of any clearly established federal law. Nor has petitioner shown that it was based on an unreasonable determination of the facts in light of the evidence presented at trial. Petitioner is entitled to no relief on this claim.

GROUND TWO

In ground two, petitioner asserts that the trial court erred in refusing to instruct the jury on self-defense. Although petitioner raised this claim in ground two of his initial brief on direct appeal, he did not present the issue as a federal claim. He cited only state case law and made no claim of a violation of his federal constitutional rights. However, to properly exhaust a federal claim, a state prisoner must "fairly present" his federal claim in each appropriate state court in a manner which would alert that court to the claim's federal nature. See Baldwin v. Reese, 541 U.S. 27, 124 S.Ct. 1347, 1350, 158 L. Ed. 2d 64 (2004); Duncan v. Henry, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995). Because petitioner did not brief this claim as a federal constitutional claim in the State court, the claim has not been properly exhausted. Petitioner cannot now raise this claim in state court because he is not entitled to a second appeal and claims which can be raised on direct appeal are not cognizable in postconviction motions in Florida. See Florida Rule of Criminal Procedure 3.850(c) ("This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if

properly preserved, on direct appeal of the judgment and sentence.") Also, any postconviction motion raising the claim now would be untimely. Thus, this claim is procedurally barred.

Moreover, for the reasons set forth in the State's answer brief on direct appeal (Ex. 6, pp. 10-11), the trial court properly refused to give an instruction on self-defense and the state courts' denial of relief on this claim was neither contrary to nor an unreasonable application of any clearly established federal law. Petitioner is entitled to no relief on this claim.

GROUND THREE

In ground three, petitioner asserts that the trial court abused its discretion in refusing to instruct the jury that a fist is not a deadly weapon. Although petitioner raised this claim in ground three of his initial brief on direct appeal, he did not present the issue as a federal claim. He cited only state case law and made no claim of a violation of his federal constitutional rights. Thus, no federal claim relating to the trial court's refusal to give the requested instruction has been exhausted. Petitioner cannot now raise such a claim in state court because he is not entitled to a second appeal, claims which can be raised on direct appeal are not cognizable in a postconviction motion, and any postconviction motion would now be untimely. Thus, any federal claim relating to this ground is procedurally barred.

Furthermore, petitioner does not identify any federal constitutional provision or law which was violated by the absence

of an instruction that a fist is not a deadly weapon. "But it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." Wilson v. Corcoran, 131 S.Ct. 13, 16 (2010).

Moreover, for the reasons set forth in the State's answer brief on direct appeal (Ex. 6, p. 12), the trial court properly denied the defense request for a special instruction and the state courts' denial of relief on this claim was neither contrary to nor an unreasonable application of any clearly established federal law. Petitioner is entitled to no relief on this claim.

GROUND FOUR

In ground four, petitioner asserts that the trial court erred in allowing a juror who had not been questioned during jury selection to be seated on the jury. This claim was not raised in the state courts and is unexhausted and procedurally barred. It is also waived because petitioner stated at trial that he was satisfied with the jury selected. (Ex. 2, p. 140). Furthermore, petitioner has not asserted any federal constitutional violation. Moreover, petitioner's claim is without merit because the record shows that the entire jury venire was questioned (Ex. 2, pp. 1-127) and neither Florida law nor the federal constitution require that every prospective juror be individually questioned or provide audible responses to the general questioning. For all of these reasons, petitioner is entitled to no relief on this claim.

WHEREFORE, based upon the foregoing reasons, Respondent respectfully asks this Honorable Court to deny the petition.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Sonya Roebuck Horbelt
SONYA ROEBUCK HORBELT
Assistant Attorney General
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 28, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that true and correct copies of the foregoing document and the notice of electronic filing have been furnished by U.S. mail to the following non-CM/ECF participant: Willie J. Safford, DOC# 243373, Lake Correctional Institution, 19225 U.S. Highway 27, Clermont, Florida 34715-9025.

/s/ Sonya Roebuck Horbelt
COUNSEL FOR RESPONDENT

Exhibit [redacted] (J)

In the United States Court of Appeals For the Eleventh Circuit. Appeal No. 17-11619-G. Defendant Had moved this court for a COA and Leave to proceed on Appeal. IFP. which this Court Reveiwed the Grounds from the Post conviction relief 3.850 8/6/2012 and 2/13/2013, this Court Had also Reveiwed Claims 2 and 3 from the D.C.A, and this court went along with what the Assistant Attorney General had placed in the response to Petitioner. That claims 2-3 on Direct Appeal, (Did not raise them in terms of Federal constitution Rights.) And Defendants motion for a COA was Denied. 11/1/2017 THIS court Did Express that Counsel and pro "se parties are advised that pursuant to 11th Cir. R. 27-2 A motion to Reconsider, vacate, or modify an order must be filed with in 21 days of the entry of such order. Defendant Hadn't put forth any motion within that 21 days because of the fact claims 2-3 were dead issues Do to the fact that (Defense Counse) in the lower tribunal hadn't placed them claims as (Constitutional Right violations) as didn't (Appelant Counsel) in the D.C.A,

(DEFENSE COUNSEL) KNEW THAT THIS GROUND WAS AN (REVERSIBLE ERROR) AS HE HAD STATED TO THE JUDGE AT (T:389) BUT STILL HADNT EXHAUSTED THE CLAIM OR RECOMMENDING THAT THE CLAIM WAS AN (CONSTITUTIONAL VIOLATION) TO THE (APPELLANT COUNSEL SO THAT IT WOULD BE EXHAUSTED.' (DEFENSE COUSEL) BY NOT STATING THE CLAIM AS AN (CONSTITUTIONAL VIOLATION) TO THE (APPELLANT COUNSEL)", APPELLANT COUNSEL WENT ALONG WITH NOT PLACING THE GROUND AS AN (CONSTITUTIONAL VIOLATION)! THIS CLAIM COULD'VE GOTTEN DEFENDANT RELEIF IN THE D.C.A. DEFENDANTS CASE MAY HAVE BEEN REVERSED AND REMANDED FOR AN NEW TRIAL IF NOT IN THE D.C.A MAYBE IN THE UNITED STATES DISTRICT COURT! DEFENDANT BEING PRO"SE HADNTREALIZED WHAT WAS BEING DONE BY (DEFENSE COUNSEL OR (APPELLANT COUNSEL) BUT DEFENDANT WAS RAILROADED OUT OF THE CHANCE TO GET BACK TO COURT BECAUSE of misconduct of COUNSELS! DEFENDANT HOPE THAT THERE'S SOMETHING CAN BE DONE ABOUT THIS MATTER, BECAUSE DEFENDANT HAS DONE ALL, TO TRY TO GET BACK TO COURT FOR A NEW TRIAL!

OATH

DEFENDANT HAD APPEALED the DECISION of the UNITED STATES DISTRICT COURT MIDDLE DISTRICT AFTER THEY DENIED DEFENDANTS PETITION AND HAD DECLINED TO GRANT AN C.O.A. IT WAS TO LATE TO PUT IN AND ATTACT THE FACT of the (SELF-DEFENSE).

Exhibit (H) (J)

17-11619

Willie J. Safford
#243373
Tomoka CI - Inmate Legal Mail
3950 TIGER BAY RD
DAYTONA BEACH, FL 32124-1098

Exhibit (J) (D)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 01, 2017

Elizabeth Warren
U.S. District Court
801 N FLORIDA AVE
TAMPA, FL 33602-3849

Appeal Number: 17-11619-G
Case Style: Willie Safford v. State of Florida
District Court Docket No: 8:14-cv-01759-JDW-MAP

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

All pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bryon Robinson, G/bjk
Phone #: (404) 335-6185

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11619-G

WILLIE J. SAFFORD, Exhibit (J)

Petitioner-Appellant,

versus

STATE OF FLORIDA,

Respondent-Appellee.

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

ORDER:

Willie J. Safford is a Florida prisoner serving a 30-year sentence after a jury convicted him of aggravated battery. In July 2014, Safford filed the instant petition for habeas corpus, pursuant to 28 U.S.C. § 2254, identifying four claims. The district court denied Safford's petition, and declined to grant a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP"). Safford now moves this Court for a COA and leave to proceed on appeal IFP.

BACKGROUND:

On May 28, 2010, the State Attorney for the Sixth Judicial Circuit of Florida filed a Felony Information against Safford, charging him with aggravated battery, in violation of Fla. Stat. § 784.045(1)(a). The Information charged that Safford "by use of a deadly weapon . . . did actually and intentionally touch or strike" the victim, or, alternatively, that he "did intentionally or knowingly cause great bodily harm."

At trial, the victim, Rodney Hartmyer, testified that he and Safford lived in a rooming house with several other men. On the day of the offense, while some of the residents were drinking beer in the living room, Safford became upset and agitated due to the fact that he did not have any money or beer. Hartmyer told Safford to clam down and offered to give him a beer, but when he turned away, Safford hit him over the head and back with a wooden barstool, breaking one of its legs. Hartmyer fell on his hands and knees, and Safford proceeded to punch him in the nose, causing bleeding. Hartmyer described his injures as red marks, swelling, a "knot" on his head, and a broken nose. Dr. Girgis, the physician who treated Hartmyer the next day, testified that Hartmyer suffered a contusion to the back of his head. She further testified that he suffered comminuted nasal bone fractures and that the soft tissue in his nose was swollen.

Safford's attorney moved for a judgment of acquittal at the close of the state's case and at the conclusion of trial. She argued that the state had failed to prove that (1) the barstool was used as a deadly weapon; (2) Safford intended to cause great bodily harm; and (3) Hartmyer's injuries actually constituted great bodily harm. The state trial court denied both of these motions. The jury returned a verdict of guilty, and the trial court sentenced Safford to 30 years' imprisonment. Safford appealed his conviction to the Florida Second District Court of Appeal ("DCA"), raising several issues, including whether the trial court erred in denying his motion for judgment of acquittal. The DCA *per curiam* affirmed Safford's conviction without an opinion.

Safford subsequently filed a counseled motion for post-conviction relief under Fla. R. Crim. P. 3.850, alleging that trial counsel was ineffective for failing to: (1) conduct a reasonable pre-trial investigation; (2) sufficiently argue for a judgment of acquittal; (3) assert Safford's speedy trial rights; (4) request a jury instruction on the distinctions between serious, moderate, and slight injury; and (5) object to inconsistent statements. The state habeas court denied the motion, and the DCA *per curiam* affirmed that denial without an opinion.

Safford then filed a second, *pro se* Rule 3.850 motion, alleging that trial counsel was ineffective for failing to: (1) conduct a reasonable pre-trial investigation; (2) object to inconsistent statements; (3) take the depositions of the

victim and other witnesses; and (4) obtain various psychological, health, and social services records. The state habeas court denied the motion, and the DCA *per curiam* affirmed that denial without an opinion.

Safford then filed the instant § 2254 petition and identified the following claims: (1) the state trial court erred in denying the motion for judgment of acquittal, which the district court liberally construed to raise a federal due process claim; (2) the state trial court erred in refusing to instruct the jury on the theory of self-defense; (3) the state trial court abused its discretion in refusing to instruct the jury that a fist was not a deadly weapon; and (4) the trial court erred in jury selection by seating a juror who was not questioned during voir dire. Although not listed as an enumerated ground, the district court also construed Safford's petition as raising a claim for ineffective assistance of counsel, based on trial counsel's failure to file a "motion to compel or sup[p]ress."

The district court entered an order denying Safford's petition. As to Claim 1, the district court found that Safford's contention that the state failed to prove either that Hartmyer suffered great bodily harm, or that the barstool was used as a deadly weapon, was without merit. It concluded that the injuries that Hartmyer suffered fell within the definition of great bodily harm under Florida law. Alternatively, it concluded that the fact that Safford hit Hartmyer with the barstool

with sufficient force to break it indicated that it was used in a way likely to produce death or great bodily harm, and it therefore was used as a deadly weapon.

As to Claims 2, 3, and 4, the district court found that they did not raise federal constitutional claims, and therefore were not cognizable in a federal habeas proceeding. The court further found that, in any case, those claims were unexhausted. Finally, as to Safford's ineffective assistance claim, the district court found that the claim was unexhausted because he failed to raise that specific ineffective assistance claim in his state post-conviction motions, and Safford could not return to state court to file a successive post-conviction motion because it would be untimely.

Safford filed a notice of appeal from the district court's denial of his § 2254 petition. He now seeks a COA and leave to proceed on appeal IFP from this Court.

DISCUSSION:

A COA is required to appeal a final order in a proceeding under § 2254. *See* 28 U.S.C. § 2253(c)(1)(A); *Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013). In order to obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on procedural grounds, a petitioner must show that reasonable jurists would find debatable both

(1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") generally precludes federal courts from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(c). Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quotations omitted) (alteration in original). However, the Supreme Court has held that procedural default will not bar a federal court from hearing a "substantial claim of ineffective assistance" where there was no counsel or ineffective counsel during the state collateral proceeding. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). The petitioner bears the burden of demonstrating that the ineffective-assistance claim that he seeks to raise is a substantial one—that is, that it has "some merit"—before the procedural default can be excused. *Id.* at 14.

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 [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable

determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d). A state court's decision is "contrary to" federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court's factual findings are presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). When the last adjudication on the merits from a state court provides no reasoned opinion, a petitioner's burden under § 2254(d) is to "show[] there was no reasonable basis for the state court to deny relief." *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1235 (11th Cir. 2016) (*en banc*), *cert. granted*, 137 S. Ct. 1203 (2017). (alteration in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)).

Claim 1: Sufficiency of the Evidence

In his first claim, Safford asserted that his due process rights were violated when he was convicted of aggravated battery after the state failed to prove all of the elements of the offense beyond a reasonable doubt. Specifically, he argued that the state failed to prove either that Hartmyer suffered great bodily harm or that the barstool was used as a deadly weapon. He did not contest that he committed

battery on Hartmyer, only that the evidence showed that his actions constituted *aggravated* battery.

To succeed on a sufficiency-of-the-evidence claim in a § 2254 proceeding, the petitioner must establish that, even when the evidence adduced at trial is viewed in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Federal courts may not overturn a state court's rejection of a sufficiency-of-the-evidence claim unless the state court's decision was objectively unreasonable. *Parker v. Matthews*, 567 U.S. 37, 43 (2012).

Under Florida law, aggravated battery may be committed in one of two ways:

> (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, permanent disfigurement; or
>
> 2. Uses a deadly weapon.

Fla. Stat. § 784.045(1)(a). The Information filed by the State Attorney charged Safford under both theories, and the State argued at trial that he could be convicted under either theory.

"Great bodily harm defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery . . . ." *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234 (11th Cir. 2003) (quoting *Coronado v. State*, 654 So.2d 1267, 1270 (Fla. Dist. Ct. App. 1995)). The DCA has held that a victim who suffered a facial fracture, numbness, and pain around the eye and face suffered great bodily harm. *Coronado*, 654 So.2d at 1270. For purposes of Florida's aggravated battery statute, "an object can . . . be found to be a deadly weapon if used or threatened to be used in a way likely to produce death or great bodily harm." *Michaud v. State*, 47 So.2d 374, 376 (Fla. Dist. Ct. App. 2010).

The district court did not arguably err in denying Claim 1. *See Slack*, 529 U.S. at 484. Because the DCA *per curiam* affirmed the state trial court's denial of Safford's motion for acquittal, he bore the burden of showing that there was no reasonable basis for the DCA to deny relief. *Wilson*, 834 F.3d at 1235. Thus, he would have needed to show that it was objectively unreasonable for the DCA to conclude both that Hartmyer suffered great bodily harm and that the barstool was used as a deadly weapon. *Parker*, 567 U.S. at 43. If either conclusion was not objectively unreasonable, there was a reasonable basis for the DCA to deny relief on direct appeal.

First, the conclusion that Hartmyer suffered great bodily injury was not objectively unreasonable. The evidence at trial showed that Hartmyer suffered a contusion, red marks and swelling on his head, along with a bloodied and fractured nose. Given the types of injuries that the DCA has recognized as constituting great bodily harm in the past, it was not objectively unreasonable for the DCA to conclude that Hartmyer's injuries constituted great bodily harm. *Coronado*, 654 So.2d at 1270.

Second, even assuming that Hartmyer's actual injuries did not rise to the level of great bodily harm, the conclusion that Safford used the barstool in a way likely to produce great bodily harm, and thus used it as a deadly weapon, was not objectively unreasonable. The evidence at trial showed that Safford struck Hartmyer on the head and back with enough force that the barstool broke. The jury therefore reasonably could have concluded that, under the circumstances, Safford's use of the bar stool was likely to produce great bodily harm, regardless of whether it in fact caused such harm. *See Michaud*, 47 So.2d at 376.

Accordingly, the state court's denial of Safford's due process claim was not objectively unreasonable. *Parker*, 576 U.S. at 43.

Claims 2-4

As to the remaining enumerated grounds identified in Safford's § 2254 petition, the district court concluded that these claims did not raise federal

constitutional claims, and, alternatively, that they were unexhausted. Claims 2 and 3 relate to the trial court's failure to give certain requested jury instructions, while Claim 4 relates to the trial court's seating a juror who Safford claims he was not given the opportunity to question. While reasonable jurists could debate whether these claims could have been construed to raise federal due process claims, they could not debate whether the claims were procedurally barred.

While Safford did raise Claims 2 and 3 on direct appeal, he did not raise them in terms of his federal constitutional rights. Rather, his appellate brief focused solely on whether the trial court abused its discretion under Florida law by refusing to give the requested instructions. He therefore did not "fairly presen[t] federal claims to the state courts" such that the State had the opportunity to correct the alleged constitutional errors. *Duncan*, 513 U.S. at 365. As to claim 4, Safford failed to raise this claim in either his direct appeal or post-conviction proceedings. Safford would not have been permitted, under Florida law, to file a successive direct appeal, and any successive post-conviction motion would have been untimely. Accordingly, Claims 2, 3, and 4 were barred from federal habeas review.

Ineffective Assistance

While not raised as an enumerated ground, Safford also asserted in his § 2254 petition that trial counsel was ineffective for failing to file a "motion to

compel or sup[p]ress." Safford's petition gives no indication as to what testimony or evidence his attorney should have attempted to compel or suppress.

Because Safford failed to raise this claim in either of his motions for post-conviction relief under Fla. R. Crim. P. 3.850, the district court correctly concluded that it was unexhausted. While he raised several ineffective-assistance claims in his two motions for post-conviction relief, none of them involved an alleged failure to "compel or sup[p]ress." Moreover, he failed to establish the applicability of any exception to overcome procedural default. He does not claim that the attorney who represented him during his first state post-conviction proceeding was ineffective, and, in any case, he failed to demonstrate that his claim for ineffective assistance has any merit. *Martinez*, 566 U.S. at 14. Safford's petition contains only a conclusory allegation, which fails even to identify the specific evidence or testimony that trial counsel should have moved to compel or suppress. Thus, Safford's claim for ineffective assistance, raised for the first time in his § 2254 petition, was barred from federal habeas review. *Duncan*, 513 U.S. at 365.

Conclusion

Based on the existing record, reasonable jurists would not find debatable or wrong the district court's denial of Safford's habeas petition. Accordingly, Safford's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C.

§ 2253(c)(2). His motion for leave to proceed *in forma pauperis* on appeal is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

EXHIBIT [redacted]

After the United States Court of Appeals Eleventh Circuit denied Defendant's C.O.A. Defendant had placed several motions for post conviction, in the lower tribunal, which all were denied, and in doing so, defendant had never raised these claims (The lower tribunal erred in refusing to instruct the jury on the theory of self-defense) or (The lower tribunal abused its discretion in refusing to instruct the jury that a fist is not an deadly weapon) because of the fact, of the Attorney General stating" petitioner cannot now raise these claims in state court because defendant is not entitled to a second appeal and claims which can be raised on direct are not cognizable in postconviction motion in Florida. Also, any Postconviction motion raising the claim now would be untimely. and all defendant motions were claimed to be untimely in the lower tribunal. "as is"!

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

v.

WILLIE SAFFORD,
Person ID: 00324504, Defendant.
_____/

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO

DIVISION: M

ORDER TO SHOW CAUSE

THIS CAUSE came before the Court on the Defendant's *pro se* "Motion for Postconviction Relief 3.850(B) for Newly Discovered Evidence," filed on June 17, 2019. The Court dismissed that motion in a separate order. Having considered the motion, record, and applicable law, this Court finds as follows:

On May 12, 2011, defendant was convicted of one count of aggravated battery. The Court sentenced him to 30 years' imprisonment as a Habitual Felony Offender (HFO), with a 30 year minimum-mandatory as a Violent Career Criminal Offender, and 15 year minimum-mandatory as a Prison Releasee Reoffender. (Ex. A, Judgment and Sentence). Defendant appealed his conviction, and the Second District Court of Appeal affirmed *per curiam*. *See Safford v. State*, 81 So. 3d 427 (Fla. 2d DCA 2012) (table). The mandate issued on March 21, 2012. On November 17, 2017, the Court amended defendant's sentence to strike the HFO designation.

Aside from that amendment to his sentence, since his conviction on May 12, 2011, defendant has filed 11 meritless motions for postconviction relief in this matter. (*See* Ex. B, Docket Pages). And all of the orders that Defendant has appealed have been upheld by the Second District Court of Appeal. The following are the orders that the Court has issued disposing of Defendant's successive filings:

On August 6, 2012, defendant filed his initial motion for postconviction relief, which the Court denied in an order entered on January 29, 2013. (Ex. C); *Safford v. State*, 127 So. 3d 514 (Fla. 2d DCA 2013) (table) (affirmed *per curiam*).

On February 13, 2013, defendant filed a second motion for postconviction relief, which the Court denied in an order entered on August 9, 2013. (Ex. D); *Safford v. State*, 166 So. 3d 783 (Fla. 2d DCA 2014) (affirmed *per curiam*).

On April 25, 2016, defendant filed a third motion for postconviction relief, which the Court denied in an order entered on May 19, 2016. (Ex. E); *Safford v. State*, 229 So. 3d 1232 (Fla. 2d DCA 2017) (table) (affirmed *per curiam*).

On July 20, 2016, defendant filed a fourth motion for postconviction relief, which the Court denied in an order entered on July 29, 2016. (Ex. F).

On April 10, 2017, defendant filed a fifth motion for postconviction relief, which the Court denied in an order entered on May 8, 2017. (Ex. G).

On August 7, 2017, defendant filed a sixth motion for postconviction relief, which the Court denied in an order entered on August 22, 2017. (Ex. H); *Safford v. State*, 242 So. 3d 369 (Fla. 2d DCA 2018) (table) (affirmed *per curiam*).

On February 19, 2018, defendant filed a "Motion for Polygraph Test," which the Court dismissed in an order entered on February 28, 2018. (Ex. I); *Safford v. State*, 252 So. 3d 163 (Fla. 2d DCA 2018) (affirmed *per curiam*).

On November 6, 2018, defendant filed an eighth motion for postconviction relief, which the Court dismissed in an order entered on November 28, 2018. (Ex. J).

On December 7, 2018, defendant filed a ninth motion for postconviction relief, which the Court dismissed in an order entered on December 20, 2018. (Ex. K). The dismissal of defendant' motion is currently pending before the Second District Court of Appeal in appellate case number 2D19-120.

On January 25, 2019, defendant filed a "Motion to Address [the Court] on Defendants Theory of Aggravated Battery," which the Court treated as a motion for post-conviction relief and dismissed in an order entered on February 22, 2019. (Ex. L).

Defendant then filed his eleventh such motion, a "Motion for Postconviction Relief 3.850(B) for Newly Discovered Evidence," on June 17, 2019. The Court dismissed that motion in an order entered on July 9, 2019. (Ex. M).

This Court has an affirmative duty to ensure every citizen's access to courts. *Rivera v. State*, 728 So. 2d 1165, 1166 (Fla. 1998). To that end, this Court also has a duty to ensure that its finite resources are utilized in a way that both enhances judicial efficiency and promotes the interest of justice. *See Lussy v. Fourth District Court of Appeal*, 828 So. 2d 1026, 1027 (Fla. 2002) (noting that "a limitation on Lussy's ability to file would further the constitutional right of access because it would permit this Court to devote its finite resources to the consideration of legitimate

claims filed by others"). Addressing successive claims hinders the Court's ability to address other defendants' meritorious claims in an efficient manner. Defendant's successive, meritless motions have placed a burden on the Clerk of the Circuit Court, court administrative personnel, and this Court such that the administration of justice for other litigants is in danger of being negatively impacted. The Florida Supreme Court has held that any citizen, including a citizen attacking his conviction, that abuses the right to *pro se* access by filing repetitious and frivolous pleadings can be prevented from bringing further attacks on his conviction and sentence. *See Rivera*, 728 So. 2d at 1166 (recognizing the Court's inherent power to bar abusive litigants from continually filing frivolous motions or petitions).

Further, section 944.279, Florida Statutes, sets forth disciplinary procedures applicable to prisoners who make frivolous filings. The Court, *sua sponte*, may inquire whether a frivolous or malicious collateral criminal proceeding has been filed. § 944.279, Fla. Stat. (2016). Under section 944.28(2)(a), such a finding may result in forfeiture of all or part of any accumulated gain time. *Tannehill v. State*, 843 So. 2d 355, 356 (Fla. 3d DCA 2003). It may also result in Department of Corrections' disciplinary proceedings under sections 944.279 and 944.09.

The Court expressly warned defendant against filing frivolous, successive claims three times in the last seven months—in its orders dated November 26, 2018, December 18, 2018, and February 22, 2019. (*See* Ex. J, K, L). But because defendant persists in filing meritless motions despite this Court's warnings, **defendant is now ordered to show good cause within 30 days** of this Order why, as a sanction for abusing the judicial system, this Court should not reject any future *pro se* filings in case CRC10-09375CFANO and place them in an inactive file. *See Spencer*, 751 So. 2d at 48 (noting that it is important for courts to provide notice and an opportunity to respond before preventing a *pro se* litigant from bringing further attacks on his conviction and sentence).

Accordingly, it is

ORDERED AND ADJUDGED that Defendant shall file a **written statement** with this Court **within 30 days of the date of this Order,** showing cause why this Court should not bar him from filing any future pleadings, motions, documents or other filings unless signed by a member of The Florida Bar in good standing, and addressing whether he should be subject to disciplinary proceedings for filing frivolous or malicious collateral criminal proceedings. **Failure to file such a statement** within the required time **will result** in entry of an order barring Defendant from filing any future *pro se* pleadings and directing the Clerk of Court to reject all of his *pro se* filings in case CRC10-09375CFANO.

THE DEFENDANT IS HEREBY NOTIFIED that this is **NOT** a final order and he should not file an appeal until such time that a final order is issued.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this _____ day of July, 2019. A true and correct copy of this order has been furnished to the parties listed below.

Philip J. Federico, Circuit Judge

Original Signed

JUL 11 2019

PHILIP J. FEDERICO
Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Hamilton Annex
10650 SW 46th Street
Jasper, Florida 32052-1360

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Motion for Postconviction Relief 3.850(B) for Newly Discovered Evidence" is hereby **DISMISSED.**

DEFENDANT IS NOTIFIED that he has thirty (30) days from the rendition date of this Order to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 8 day of February, 2019. A true and correct copy of this order has been furnished to the parties listed below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Hamilton Annex
10650 SW 46th Street
Jasper, Florida 32052-1360

Exhibit (M) (K)

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

v.

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO
DIVISION: M

WILLIE SAFFORD
SPN: 00324504, Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court upon Defendant's *pro se* Motion for Postconviction Relief, filed August 6, 2012, pursuant to Florida Rule of Criminal Procedure 3.850. Having reviewed the motion, record, and applicable law, the Court finds as follows:

Procedural History

On May 12, 2011, defendant was found guilty by jury of one count of aggravated battery. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 15-year minimum-mandatory as a Violent Felony Offender (VFO), and 30-year minimum-mandatory as a Prison Releasee Reoffender (PRR). (*See Exhibit A: Judgment and Sentence*). Defendant's conviction and sentence were affirmed on appeal; the mandate was issued on March 21, 2012. On August 6, 2012, Defendant filed the instant Motion for Postconviction Relief, raising six claims. On November 27, 2012; this Court entered an order striking Grounds One (b), One (c), and Five as facially insufficient, and granting thirty days' leave to amend, pursuant to Spera v. State, 971 So. 2d 754 (Fla. 2007). The Court reserved ruling on the remaining claims.[1] To date, no amendment has been filed.

Analysis

Defendant's motion raises six claim of ineffective assistance of counsel. To state a facially sufficient claim for ineffective assistance of counsel, a defendant must allege (1) that a specific act or omission by counsel was outside the wide range of reasonable professional assistance, and (2) that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would

[1] The Court's November 27, 2010 Order Striking in Part and Reserving Ruling in Part on Defendant's Motion for Postconviction Relief is hereby incorporated by reference.

EXHIBIT M

CASE SUMMARY
CASE NO. 1009375CFANO

04/12/2019	ORDER *DISMISSING DEFENDANT'S MOTION FOR EXTENSION OF TIME*
04/15/2019	MOTION FOR EXTENSION OF TIME
04/16/2019	COPY OF MOTION FORWARDED TO COURT
04/24/2019	ORDER *DISMISSING DEFENDANT'S MOTION FOR EXTENSION OF TIME*
06/17/2019	MOTION FOR POST CONVICTION RELIEF *3.850 FOR NEWLY DISCOVERED EVIDENCE*
06/18/2019	COPY OF MOTION FORWARDED TO COURT

DATE	FINANCIAL INFORMATION	
	CIRCUIT APPELLANT SAFFORD, WILLIE, JR	
	Total Charges	1,639.80
	Total Payments and Credits	0.00
	Balance Due as of 7/2/2019	**1,639.80**

days after the defendant is sentenced or, if the defendant appealed the judgment and sentence, after the mandate issues from direct appeal. See Fla. R. Crim. P. 3.850(b); Curtis v. State, 870 So. 2d 186 (Fla. 2d DCA 2004). Defendant filed the instant motion more than two years after his judgment and sentence became final in 2012 and it is therefore untimely under that Rule. The Court will therefore consider whether any of Defendant's claims might be appropriately raised under another rule of criminal procedure. See Williams v. State, 113 So. 3d 974, 975 (Fla. 2d DCA 2013) (holding that, when a *pro se* litigant erroneously files a claim pursuant to an inappropriate rule of criminal procedure, then the court should endeavor to address the claim as if it were filed pursuant to the appropriate rule). Defendant's motion raises four claims for relief:

Claim One: Defendant alleges that the trial court erred when it accepted Defendant's waiver of his right to a pre-sentence investigation (PSI). Claims of trial court error must be asserted on appeal and cannot be raised in a postconviction motion. See Henry v. State, 933 So. 2d 28, 29 (Fla. 2d DCA 2006). This claim is therefore denied. See Fla. R. Crim. P. 3.850(f)(1).

Claim Two: Defendant appears to allege in this claim that he did not qualify for sentencing as an HFO, PRR, or VCC. To the extent Defendant alleges that he does not have the requisite convictions to be sentenced as an HFO, PRR, or VCC, his claim is cognizable in a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). See Bover v. State, 797 So. 2d 1246, 1247 (Fla. 2001). A Rule 3.800(a) motion can be raised at any time, but is limited to correcting illegal sentences that can be resolved from the face of the record, without holding an evidentiary hearing. State v. Callaway, 658 So. 2d 983, 988 (Fla. 1995). A sentence is illegal for the purposes of Rule 3.800(a) if it exceeds the maximum statutory penalty provided by law. Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991).

The HFO statue provides, in pertinent part, that a defendant is subject to an extended term of imprisonment if:

> 1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.
> 2. The felony for which the defendant is to be sentenced was committed:
> (. . .)
> b. Within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.
4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph
5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

§ 775.084(1)(a), Fla. Stat. (2009). The record reflects that, at the time the instant offense was committed, Defendant had previously been convicted of at least 13 felonies on eight different dates:

1. CRC87-10974CFANO (November 23, 1987): one count of possession of cocaine
2. CRC86-10560CFANO (April 7, 1987): one count of burglary of a dwelling
3. CRC85-12401CFANO (April 7, 1987): one count of battery on a law enforcement officer and one count of resisting an officer without violence
4. CRC90-13509CFANO (October 24, 1990): one count of resisting arrest with violence
5. CRC94-06330CFANO (September 27, 1994): one count of battery on a law enforcement officer, one count of possession of cocaine, and one count of aggravated stalking
6. CRC95-04214CFANO (May 21, 1996): one count of aggravated stalking
7. CRC99-23089CFANO (January 24, 2001): one count of felony petit theft
8. CRC99-00446CFANO (November 10, 1999): one count of felony battery
9. CRC03-18042CFANO (January 25, 2005): one count of aggravated stalking
10. CRC03-21330CFANO (January 25, 2005): one count of aggravated stalking

His most recent felony convictions were for two counts of aggravated stalking in Pinellas County case numbers CRC03-18042CFANO and CRC03-21330CFANO. Defendant was released from prison sentences for those offenses on November 26, 2008; less than two years before the instant offense was committed in April of 2010. The record further reflects that Defendant was not pardoned or granted any postconviction relief. (*Ex. C: Sentencing Packet.*) The record therefore refutes Defendant's claim that he does not qualify as an HFO.

The PRR statute provides that a defendant must be sentenced to a minimum-mandatory term of imprisonment if the defendant commits an aggravated battery within three years of being released from the Department of Corrections. See § 775.082(9)(a)1., Fla. Stat. (2009). Again, the record reflects that Defendant was released from the Department of Corrections on November 26, 2008, and committed the offense in this case on April 21, 2010. (*Ex. A: Felony Information;*

Claims Three and Four: Defendant alleges that trial counsel was ineffective for proceeding to trial without soliciting a plea offer from the State and for failing to adequately address Defendant's competency. Ineffective assistance of counsel claims must be raised in a timely motion for postconviction relief. See Fla. R. Crim. P. 3.850(a); Steward v. State, 931 So. 2d 133, 134 (Fla. 2d DCA 2006). Defendant's motion is untimely and he has not raised a relevant exception to the timeliness requirement. See Fla. R. Crim. P. 3.850(b). This claim is therefore denied. See Fla. R. Crim. P. 3.850(f)(1).

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Postconviction Relief is hereby **DENIED**.

DEFENDANT IS HEREBY NOTIFIED that he has thirty days from the date of this order to file a notice of appeal, should he choose to do so.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 5 day of May, 2017. A true and correct copy of the foregoing has been furnished to the parties indicated below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, FL 32124-1098

C: Sentencing Packet.) The record therefore refutes Defendant's claim that he does not qualify as a PRR.

The VCC statute provides that a defendant is subject to an extended term of imprisonment if:

> 1. The defendant has previously been convicted as an adult three or more times for an offense in this state or other qualified offense that is:
>   a. Any forcible felony, as described in s. 776.08;
>   b. Aggravated stalking, as described in 784.048(3) and (4)
>   (. . .)
> 2. The defendant has been incarcerated in a state or federal prison.
> 3. The primary felony offense for which the defendant is to be sentenced is a felony enumerated in subparagraph 1. and was committed on or after October 1, 1995, and:
>   (. . .)
>   b. within 5 years after the conviction of the last prior enumerated felony, or within 5 years after the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole, or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for an enumerated felony, whichever is later.
> 4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.
> 5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

§ 775.084(1)(d), Fla. Stat. (2009). To be counted as a prior felony, the felony must be sentenced separately from the current offense and any other felony conviction that is to be counted as a prior felony. § 775.084(5), Fla. Stat. (2009). The record reflects that Defendant was previously convicted of one count of aggravated stalking on September 27, 1994, in case number CRC94-06330CFANO, one count of aggravated stalking on May 21, 1996, in case number CRC95-04214CFANO, and two counts of aggravated stalking on January 25, 2005, in case numbers CRC03-18042CFANO and CRC03-21330CFANO. Defendant was released from his prison sentences in the latter two case numbers on November 26, 2008. The offense in this case, aggravated battery, is a forcible felony under section 776.08, Florida Statutes, and was committed within five years of Defendant's release from prison for a qualifying felony offense. The record further reflects that Defendant was not pardoned or granted postconviction relief for any of his prior convictions. (*Ex. C: Sentencing Packet.*) Defendant therefore qualifies as a VCC and his sentence is not illegal on the basis alleged.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO
DIVISION: M

WILLIE SAFFORD
Person ID: 00324504, Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF (TREATED IN PART AS MOTION TO CORRECT ILLEGAL SENTENCE)

THIS CAUSE came before the Court upon Defendant's *pro se* Motion for Postconviction Relief, filed April 10, 2017, pursuant to Florida Rule of Criminal Procedure 3.850. For the reasons discussed herein, the Court will treat Defendant's motion in part as a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). Having reviewed Defendant's motion, the record, and the applicable law, this Court finds as follows:

Procedural History

On May 28, 2010, Defendant was charged by felony information with one count of aggravated battery. (*Ex. A: Felony Information.*) On May 12, 2011, Defendant was found guilty as charged by a jury. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Prison Releasee Reoffender (PRR), and a 15 year minimum-mandatory as a Violent Career Criminal Offender (VCC). (*Exhibit B: Judgment and Sentence.*) Defendant's conviction and sentence were affirmed on appeal; the mandate was issued on March 21, 2012. Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table).

Analysis

As an initial matter, the Court notes that Defendant has filed his motion pursuant to Florida Rule of Criminal Procedure 3.850. A motion for postconviction relief must be filed within two years of the date the judgment and sentence become final. See Fla. R. Crim. P. 3.850(b). The two year period for filing a motion for postconviction relief begins to run thirty

EXHIBIT

Defendant's claims are duplicative of the Giglio claims raised in his previous motion, the instant motion is successive and the Court is without jurisdiction to rule on it because the court's rulings on those claims are pending appeal. See Brinson v. State, 25 So. 3d 1255, 1256 (Fla. 2d DCA 2010) (holding that a "trial court has concurrent jurisdiction during the pendency of an appeal of a postconviction order to consider a second postconviction motion *that raises new issues unrelated to the issues presented in the motion that is pending on appeal.*") (*emphasis added*).

In an abundance of caution, however, the Court concludes that, even if the instant claims are distinguishable from Defendant's prior pleading, his motion must still be denied. First, it is does not contain the requisite oath. See Fla. R Crim. P. 3.850(c). The last page of the motion contains a typed oath, but it is not signed by Defendant. Second, Defendant's motion is untimely because it has been filed more than two years after his judgment and sentence became final in 2012. See Fla. R. Crim. P. 3.850(b); Saavedra v. State, 59 So. 3d 191, 192 (Fla. 3d DCA 2011) (the two year period for filing a motion for postconviction relief begins to run thirty days after the mandate issues from direct appeal). The Court cannot consider the merits of Defendant's motion unless Defendant establishes an exception to the timeliness requirement, as enumerated in Rule 3.850(b). Defendant's motion does not allege a relevant exception. In sum, Defendant's motion is untimely, facially insufficient, and must be denied. See Fla. R. Crim. P. 3.850(f)(1). Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Postconviction Relief is hereby **DENIED**.

DEFENDANT IS HEREBY NOTIFIED that he has thirty days from the date of this order to appeal, should he choose to do so.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this 28 day of July, 2016. A true and correct copy of the foregoing has been furnished to the persons indicated below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Lake Correctional Institution
19225 US Highway 27
Clermont, FL 34715-9025

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO
DIVISION: M

WILLIE SAFFORD
Person ID: 00324504, Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court upon Defendant's *pro se* Motion for Postconviction Relief, filed July 20, 2016, pursuant to Florida Rule of Criminal Procedure 3.850. Having reviewed Defendant's motion, the record, and the applicable law, this Court finds as follows:

Procedural History

On May 12, 2011, Defendant was found guilty by jury of one count of aggravated battery. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Prison Releasee Reoffender (PRR), and a 15 year minimum-mandatory as a Violent Career Criminal Offender (VCC). (*See Exhibit A: Judgment and Sentence*). Defendant's conviction and sentence were affirmed on appeal; the mandate was issued on March 21, 2012. Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table). On April 25, 2016, Defendant filed an untimely Motion for Postconviction Relief, alleging a claim based on newly-discovered evidence. On May 17, 2016, this Court entered an order denying the motion.[1] (*See Exhibit B: May 17, 2016 Order*). The Court's order is pending appeal before the Second District Court of Appeal in appellate case number 2D16-2447.

Analysis

In the instant motion, Defendant alleges that the State committed a Giglio[2] violation by knowingly presenting the false testimonies of Jerry Gay, Robert Scharn, and Rodney Hartmeyer. Defendant's motion must be denied. As an initial matter, the Court notes that Defendant's previous motion also alleged Giglio claims regarding the same three witnesses. To the extent

[1] The order was docketed on May 19, 2016.
[2] Giglio v. United States, 405 U.S. 150 (1972).

EXHIBIT A

cc: Office of the State Attorney

Willie Safford, DC# 243373
Lake Correctional Institution
19225 U.S. Highway 27
Clermont, FL 34715-9025

newly-discovered just because it was memorialized in a response to a public records request Defendant made after the trial. During a colloquy with the Court on the morning of trial, Defendant acknowledged that depositions were taken, but he did not want a continuance of his speedy trial demand to allow counsel time to obtain transcripts. (*Ex. B: Trial Transcript, pp. 8-10*). Defense counsel advised the Court that he took depositions in the case and that "all but one were taken prior to the Defendant's demand for speedy trial." (*Ex. B: Trial Transcript, p. 10*). Counsel certainly was aware of which witnesses he deposed and he apparently discussed those depositions with Defendant. Defendant cannot now claim that he and counsel were ignorant of which witnesses were deposed.

Second, whether counsel or the State failed to depose a particular witness who testified at trial is not relevant to any material issue at the trial. The purpose of a discovery deposition is to learn and create a record of what the opposing party's witness is going to testify about at trial; parties typically do not depose their own witnesses because they are already aware of the content of that witness's testimony. Neither party is required to take formal depositions and a witness does not have to be deposed to testify at trial. Defendant's conclusion that the State's witnesses were lying just because they were not deposed by the State or defense counsel is completely speculative, illogical, and irrelevant to any material issue at trial. The Court reiterates that defense counsel advised the trial court that he did take depositions in the case, but Defendant himself discouraged counsel from seeking a continuance to have them transcribed because he wanted to demand speedy trial. Defendant fails to establish any relevant exception to the timeliness requirement of Rule 3.850(b) and his motion is denied. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Postconviction Relief is hereby **DENIED**.

DEFENDANT IS HEREBY NOTIFIED that he has thirty days from the date of this order to appeal, should he choose to do so.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 17 day of May, 2016. A true and correct copy of the foregoing has been furnished to the parties indicated below.

COPY

Philip J. Federico, Circuit Judge

claim if it is based on newly discovered facts. Specifically, Defendant claims to have newly-discovered evidence that the State committed a Giglio[1] violation by knowingly presenting the false testimony of several witnesses. When analyzing a claim of newly discovered evidence, this Court must apply the two-prong Jones test. See Robinson v. State, 770 So. 2d 1167, 1169-70 (Fla. 2000); Jones v. State, 591 So. 2d 911, 915-16 (Fla. 1991) (Jones I); Jones v. State, 709 So. 2d 512 (Fla. 1998) (Jones II). First, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Jones, 709 So. 2d at 521 (citing Torres-Arboldea v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994)). "Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Id.

To establish a Giglio claim, a defendant must show (1) that a particular witness's testimony was false, (2) that the prosecutor knew the testimony was false, and (3) that the testimony was material. See Routly v. State, 590 So. 2d 397, 400 (Fla. 1991). Defendant claims that the State knowingly presented false testimony from Jerry Gay, Robert Scharn, and the victim, Robert Hartmyer. Defendant claims his due process rights were violated because the State presented their false testimonies. He does not, however, specify which aspects of each witness's testimony were false or explain the materiality of their testimonies. Defendant's subjective disagreement with the witnesses' testimony does not establish that the State suborned perjury. This claim amounts to pure speculation, which is insufficient to establish a claim for postconviction relief. See Johnson v. State, 921 So. 2d 490, 503-04 (Fla. 2005); Solorzano v. State, 25 So. 3d 19, 23 (Fla. 2d DCA 2009).

Moreover, even if Defendant set forth a facially sufficient Giglio claim, Defendant cannot establish either prong of the Jones test for newly-discovered evidence. Defendant appears to believe that the nature of a Giglio claim necessarily satisfies the newly-discovered evidence exception to filing a timely motion for postconviction relief. A Giglio claim brought in an untimely motion, however, still must satisfy both prongs of the Jones analysis. Defendant's claim is difficult to parse, but it *appears* that he is claiming to have recently discovered via public record requests to the State and his defense counsel that Mr. Hartmeyer and Mr. Scharn were deposed, but Mr. Gay was not. He further appears to argue that this proves the State knew Mr. Gay and other witnesses who were not deposed were lying. First, this information, if true, is not

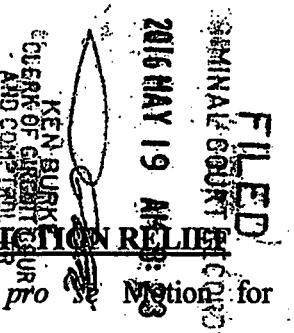
[1] Giglio v. United States, 405 U.S. 150 (1972).

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO
DIVISION: M



WILLIE SAFFORD
Person ID: 00324504, Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court upon Defendant's *pro se* Motion for Postconviction Relief, filed April 25, 2016, pursuant to Florida Rule of Criminal Procedure 3.850. Having reviewed Defendant's motion, the record, and the applicable law, this Court finds as follows:

Procedural History

On May 12, 2011, Defendant was found guilty by jury of one count of aggravated battery. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30-year minimum-mandatory as a Prison Releasee Reoffender (PRR), and a 15-year minimum-mandatory as a Violent Career Criminal Offender (VCC). (*See Exhibit A: Judgment and Sentence*). Defendant's conviction and sentence were affirmed on appeal; the mandate was issued on March 21, 2012. Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table).

Analysis

The two year period for filing a motion for postconviction relief begins to run thirty days after the defendant is sentenced or, if the defendant appeals the judgment and sentence, after the mandate issues from direct appeal. See Fla. R. Crim. P. 3.850(b); Saavedra v. State, 59 So. 3d 191, 192 (Fla. 3d DCA 2011). Defendant's motion has been filed more than two years after his judgment and sentence became final in 2012. Therefore, his motion is untimely and the Court cannot consider its merits unless Defendant establishes an exception to the timeliness requirement, as enumerated in Rule 3.850(b).

To that end, Defendant claims his motion should be considered pursuant to Florida Rule of Criminal Procedure 3.850(b)(1), which permits a defendant to raise an otherwise untimely

EXHIBIT 

state of mind essential to proving the offense. See Chestnut v. State, 538 So. 2d 820 (Fla. 1989); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Walsh v. State, 751 So. 2d 740, 741 (Fla. 1st DCA 2000) (evidence that appellant suffered from bipolar disorder, required medication to treat the disorder, became angry and erratic when he was not taking his prescribed medication, and may not have been taking his medication on the night the offenses were committed, was insufficient to establish an insanity defense); see also Slicker v. State, 941 So. 2d 1191, 1194 (Fla. 2d DCA 2006) (discussing distinction between expert testimony of a psychiatric condition, which is inadmissible, and lay testimony of an emotional state, which is admissible); § 775.027, Fla. Stat. Importantly, Defendant does not allege that he was insane or that counsel was ineffective for failing to pursue an insanity defense; he alleges counsel should have introduced his mental health history to show the jury he lacked the specific intent to harm the victim. The Court cannot find counsel ineffective for failing to introduce inadmissible evidence. Defendant has failed to establish either prong of Strickland and his claim is denied.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Postconviction Relief is hereby **DENIED.**

DEFENDANT IS HEREBY NOTIFIED that he has thirty days from the date of this order to appeal, should he choose to do so.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 8 day of August, 2013. A true and correct copy of the foregoing has been furnished to the parties indicated below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Lake Correctional Institution
19225 U.S. Highway 27
Clermont, FL 34715-9025

reasonable doubt as to Defendant's guilt. (*Exhibit B: Trial Transcript, pgs. 433-34, 437, 446-47, 450-51*). Defendant has failed to establish either prong of Strickland and his claim is denied.

Claim Three

Defendant alleges counsel was ineffective for failing to provide Defendant with copies of deposition transcripts before proceeding to trial. Defendant asserts he was prejudiced by counsel's error because, if he had been able to review the transcripts, he could have assisted counsel with challenging the trial testimony of the deposed witnesses. Specifically, he identifies the victim, Jerry Gay, and Robert Scharn. In the Court's June 13, 2013 order, Defendant's claim was stricken as facially insufficient for failing to allege that the outcome of his trial would have been different if counsel had the depositions transcribed.

In his amended motion, Defendant claims, somewhat paradoxically, that he disagreed with counsel's strategy of self-defense and that counsel's failure to provide the depositions left him defenseless. Defendant's amendment still fails to assert and explain how the outcome of the trial would have been different, but for counsel's deficiency. Defendant's claim remains facially insufficient and is denied with prejudice. See Spera v. State, 971 So. 2d 754, 760 (Fla. 2007). The Court would note that Defendant stated during a colloquy on the morning of trial that he was aware deposition transcripts were not prepared and wished to proceed to trial without the Court considering a continuance. (*Exhibit B: Trial Transcript, pgs. 8-10*). Counsel added that Defendant was aware the depositions were not transcribed when he made a speedy trial demand. (*Exhibit B: Trial Transcript, pg. 10*).

Claim Four

Defendant alleges counsel was ineffective for failing to introduce evidence that Defendant was undergoing psychiatric treatment for depression and schizophrenia at the time of the offense. Defendant argues he was prejudiced by the exclusion of this evidence because the jury could have reached a different verdict if it concluded that Defendant only struck the victim because he was paranoid and believed the victim was going to hurt him. Defendant insists counsel was aware of Defendant's mental health history, but failed to raise it at trial.

Defendant's claim is without merit. Courts have repeatedly held that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent or state of mind essential to proving the offense. See Chestnut v. State, 538 So. 2d 820 (Fla. 1989); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Walsh v. State, 751 So. 2d 740, 741 (Fla. 1st DCA 2000) (evidence that appellant suffered from bipolar disorder, required medication to treat the disorder, became angry and erratic when he was not taking his prescribed medication, and may not have been taking his medication on the night

facially insufficient in its June 13, 2013 order because Defendant failed to explain how the outcome of his trial would have been different if counsel had further investigated this piece of evidence. In his amendment, Defendant indicates that counsel should have elicited testimony from witnesses that the barstool was five years old.

The Court finds that Defendant's amendment fails to cure the pleading defect and Defendant's claim remains facially insufficient. Defendant does not explain why counsel's alleged deficiency was prejudicial and he does not allege that, but for counsel's error, the outcome of his trial would have been different. Therefore, Defendant's claim is denied with prejudice. See Spera v. State, 971 So. 2d 754, 760 (Fla. 2007).

Claim Two

Defendant alleges counsel was ineffective for failing to object to the inconsistent trial testimony of witnesses Jerry Gay and Robert Scharn. He appears to argue that counsel should have questioned each witness on cross-examination about why certain aspects of their testimony differed from other trial witnesses. Specifically, Defendant complains Jerry Gay testified that Defendant called the victim a "cracker," but Robert Scharn did not. He also complains that Jerry Gay, Robert Scharn, and the victim all gave different accounts about how Defendant struck the victim in the face. Defendant contends the outcome of his trial would have been different if counsel had questioned these witnesses about the inconsistencies in their testimony.

Defendant's claim is without merit. The credibility of a witness can be impeached by introducing prior statements of that witness which are inconsistent with the witness's present testimony. See § 90.608(1), Fla. Stat. A witness's credibility may also be attacked by calling another witness to provide proof that material facts are not as testified to by the witness being impeached. See §90.608(5), Fla. Stat. However, Defendant seems to be arguing that counsel should have attempted to impeach each witness by asking him specific questions about the trial testimony of another witness, which is contrary to the rules of evidence.

Furthermore, counsel cannot object to or strike a witness's testimony just because their testimony differs from that of another witness. The jury is the trier of fact and determines the credibility of witnesses. See Brown v. State, 36 So. 3d 826 (Fla. 5th DCA 2010) ("the jury has the ultimate responsibility to apply the facts to the law in a criminal case . . . "). Counsel can highlight discrepancies in testimony when arguing to the jury, but counsel cannot impeach a testifying witness with another witness's testimony in the manner Defendant describes. The record reflects that counsel argued emphatically during closing argument that the State's witnesses gave inconsistent testimony, raising

Defendant did not deny having a physical confrontation with the victim. Rather, the defense theory was that the evidence was insufficient to prove an aggravated battery because the victim's injuries did not constitute great bodily harm or permanent disfigurement and the barstool was not a deadly weapon. (*Exhibit B: Trial Transcript, pgs. 432-40*). Considering the foregoing facts and circumstances, the Court cannot find that counsel was ineffective for failing to call Joe Simon. The Court is likewise unable to find that the testimony Defendant describes would have been so probative as to have altered the outcome of his trial. Having failed to meet both prongs of Strickland, Defendant's claim is denied.

Defendant also argues that counsel should have called eyewitnesses Tim Killian and Ernest Jefferson to testify that Defendant did not punch the victim. The responding police officer, victim, and two eye-witnesses to the offense all testified that the victim's nose was bleeding profusely. (*See Exhibit B: Trial Transcript, pgs. 166-74, 220-22, 285-86, 305*). Officer Liliberte testified that, when he responded to the scene, the victim's shirt was "covered in blood" and there was "blood all over the floor." (*See Exhibit B: Trial Transcript, pgs. 171-74, 178-79*). The victim, Jerry Gay, and Robert Scharn, each testified that Defendant struck the victim on the head with a bar stool and punched him in the face. (*See Exhibit B: Trial Transcript, pgs. 214-18, 284-85, 301-02*). The victim further testified that his nose was broken and his nose is still crooked as a result. (*See Exhibit B: Trial Transcript, pg. 219*). Doctor Beth Girgis testified that she examined the victim after the incident and determined the victim's nose was fractured into pieces. (*See Exhibit B: Trial Transcript, pgs. 258-60*). Defendant testified that he hit the victim's head with the barstool, but denied ever punching the victim. (*Exhibit B: Trial Transcript, pgs. 345-46, 362-65*).

Considering the foregoing testimony, the Court finds Defendant has failed to establish a reasonable probability that the outcome of his trial would have been different if Tim Killian and Ernest Jefferson testified to the facts Defendant alleges. The testimony and physical evidence indicated that the victim received a serious injury to his nose. The victim and two eye-witnesses identified Defendant as the perpetrator of the injury. The officer who responded shortly after the incident observed the victim's injuries, his bloody shirt, and blood at the scene. There was no testimony that the victim received the injury to his face by any means other than his physical altercation with Defendant. Even if counsel was ineffective for failing to investigate or call these witnesses, this Court cannot conclude that their testimony would have been so probative as to have altered the outcome of the trial. Defendant's claim is denied.

(b) Second, Defendant argues that counsel was ineffective for failing to investigate the poor condition of the barstool Defendant used to hit the victim. The Court struck Defendant's claim as

professional norms. Id. The defendant must show a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. See Rutherford v. State, 727 So. 2d 216 (Fla. 1998). If the defendant fails to satisfy one component, the inquiry ends, and the reviewing court need not determine if the defendant has satisfied the other. See Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986).

In a motion for postconviction relief, the defendant bears the burden of establishing a prima facie case based on a legally valid claim. See Griffin v. State, 866 So. 2d 1 (Fla. 2003). Conclusory allegations are insufficient to meet this burden. Id. There is a strong presumption that counsel has rendered adequate assistance in the exercise of reasonable professional judgment. See White v. State, 729 So. 2d 909, 912 (Fla. 1999). The evaluation of an attorney's performance requires consideration of all the circumstances from the attorney's perspective at the time. See Downs v. State, 453 So. 2d 1102, 1106-07 (Fla. 1984). The legal standard for such an evaluation is "reasonably effective counsel, not perfect or error-free counsel." See Tuffeteller v. Dugger, 734 So. 2d 1009, 1022 (Fla. 1999). Each of Defendant's claims is addressed below.

Claim One

Defendant appears to raise two grounds for relief within this claim:

(a) First, Defendant alleges counsel was ineffective for failing to sufficiently investigate three eye-witnesses. Specifically, he identifies Joe Simon, Tom Killain, and Ernest Jefferson. Defendant insists these witnesses were available to counsel and their testimony would have contradicted the victim's version of events, thereby altering the outcome of his trial.

Defendant claims Joe Simon could have testified that he argued with Defendant about beer and that Defendant did not argue with the victim about the beer. The victim and two eye-witnesses testified at trial that Defendant became upset because he did not have any money and the other residents at his boarding house would not share a beer with him. (*Exhibit B: Trial Transcript, pgs. 204-06, 282-84, 296-99*). When the victim entered the room and tried to calm Defendant down, Defendant hit the victim with a barstool and punched the victim in the face. (*Exhibit B: Trial Transcript, pgs. 212-14,284-85, 300-02*). Defendant testified that he and Joe Simon argued about beer, but he hit the victim with the barstool because the victim said something offensive to him. (*Exhibit B: Trial Transcript, pgs. 340, 344, 362-63*).

Defendant does not explain, and it is not apparent from the record, how Joe Simon's testimony that Defendant did not argue with the victim about beer is relevant or contradictory to any material issue at the trial. None of the witnesses testified that Defendant was arguing with the victim about beer and

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

v.

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO
DIVISION: M

WILLIE SAFFORD
SPN: 00324504, Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court upon Defendant's *pro se* Motion for Postconviction Relief, filed February 13, 2013, and Amended Motion for Postconviction Relief, filed July 15, 2013, pursuant to Florida Rule of Criminal Procedure 3.850. Having reviewed Defendant's motion and amendment, the record, and applicable law, this Court finds as follows:

Procedural History

On May 12, 2011, Defendant was found guilty by jury of one count of aggravated battery. On the same date, he was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 15-year minimum-mandatory term as a Violent Felony Offender (VFO), and 30-year minimum-mandatory term as a Prison Releasee Reoffender (PRR). (*Exhibit A: Judgment and Sentence*). Defendant's conviction and sentence were affirmed on appeal; the mandate was issued on March 21, 2012.

Defendant filed the instant motion on February 13, 2013.[1] On June 13, 2013, the Court entered an order striking in part and reserving ruling in part on Defendant's motion because some of his claims were facially insufficient.[2] Defendant filed a timely amendment on July 15, 2013.

Analysis

Defendant's motion raises four claims of ineffective assistance of counsel. When alleging ineffective assistance of counsel, the defendant must prove (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defendant. See Strickland v. Washington, 466 U.S. 668 (1984). The act or omission of counsel must fall below a standard of reasonableness under

[1] Defendant filed a previous 3.850 motion for postconviction relief on August 6, 2012, which this Court denied on January 28, 2013. Because the instant motion is timely and raises new claims, the Court has found it appropriate to address the merits of Defendant's claims.

[2] The Court's June 13, 2013 Order Striking in Part and Reserving Ruling in Part on Defendant's Motion for Postconviction Relief is hereby incorporated by reference.

EXHIBIT

ORDERED AND ADJUDGED that Defendant's Motion for Postconviction Relief is hereby **DENIED**.

DEFENDANT IS HEREBY NOTIFIED that he has thirty days from the date of this Order to appeal, should he choose to do so.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 23 day of Jan, 2013. A copy of the foregoing has been furnished to the parties indicated below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Suwannee Correctional Institution
5964 U.S. Highway 90
Live Oak, FL 32060

victim suffered any harm. The instruction provided that the jury could find Defendant guilty if it found that, during the commission of a battery, Defendant **either** (a) intentionally or knowingly caused great bodily harm, permanent disability or disfigurement, **or** (b) used a deadly weapon. (*See Exhibit E: Jury Instructions*) (**emphasis added**). Therefore, the jury could have found Defendant guilty of aggravated battery without finding that the victim suffered any particular type of harm. Consequently, even if counsel were ineffective for failing to request the instruction Defendant requests, Defendant cannot establish a reasonable probability that such an instruction would have resulted in a different jury verdict; the jury did not have to find that the victim sustained any time of injury in order to find Defendant guilty of aggravated battery. Considering the foregoing, Defendant's claim is denied.

Ground Five

Defendant alleges that counsel was ineffective for failing to object to inconsistent statements made by State witnesses. He contends that counsel failed to impeach the witnesses with statements they made on the day of the alleged offense. He claims there is a reasonable probability that the outcome of the proceedings would have been different because, had counsel impeached the witnesses, the jury would have been made aware of the contradictions in the witnesses' statements and would have heard testimony favorable to Defendant's version of events.

On November 27, 2012, the Court struck Defendant's claim for failure to specify which witness counsel should have impeached, failure to allege which specific testimony counsel should have attacked, and failure to explain how counsel's impeachment of that testimony would have altered the outcome of the proceedings. To date, no amendment has been filed. Accordingly, Defendant's claim is denied with prejudice. See Spera v. State, 971 So. 754, 760 (Fla. 2007).

Ground Six

Defendant alleges that the cumulative effect of counsel's errors prejudiced the outcome of the proceedings in that, but for the errors, the outcome would have been different. Considering the foregoing, Defendant's claim is denied.

Accordingly, it is

Ground Four

Defendant alleges that counsel was ineffective for failing to request a jury instruction that distinguished between "serious," "moderate," and "slight" injury. He argues that, had counsel requested this instruction, the outcome of the trial would have been different because the jury would have convicted Defendant on the lesser-included crime of simple battery because the victim's injuries were "not so serious as to constitute great bodily harm, permanent disability, or disfigurement."

The record reflects that the Court instructed the jury on the charged offense of aggravated battery, as well as the lesser-included offenses of felony battery and battery. (*See Exhibit B: Trial Transcript, pgs. 460-61*). The aggravated battery instruction provided that the State had to prove two elements beyond a reasonable doubt: (1) that Defendant intentionally touched or struck the victim against his will; and (2) that in committing the battery, Defendant **either** (a) intentionally or knowingly caused great bodily harm, permanent disability or disfigurement, **or** (b) used a deadly weapon. (*See Exhibit E: Jury Instructions*) (**emphasis added**). The felony battery instruction provided that the State must prove that Defendant (1) actually and intentionally touched or struck the victim against his will, and (2) that Defendant caused great bodily harm, permanent disability, or disfigurement. (*See Exhibit E: Jury Instructions).* The battery instruction provided that the State had to prove that Defendant intentionally touched or struck the alleged victim against his will. (*See Exhibit E: Jury Instructions*).

Defendant contends that the jury should have been instructed on "serious," "moderate," and "slight" injury, because the jury may have found that the victim's injuries were not significant enough to support an aggravated battery conviction. Defendant's claim is without merit. The instruction for aggravated battery clearly specified that the injury had to constitute "great bodily harm, permanent disability, or disfigurement." An instruction on "serious," "moderate," or "slight" injury would be erroneous and contrary to the statutory language, as presented in the jury instruction. See § 784.045, Fla. Stat. If the jury found that the victim's injuries did not result in great bodily harm, permanent disability, or disfigurement, the jury could have found Defendant guilty of the lesser-included offense of battery or found Defendant not guilty of any offense. Counsel is not ineffective for failing to request an erroneous instruction and Defendant cannot demonstrate that he was prejudiced by the exclusion of such an instruction.

Moreover, the aggravated battery instruction did not even require the jury to find that the

speedy trial. He claims that he was prejudiced because, had counsel filed the motion, it would have been successful and Defendant would have been entitled to dismissal of the charges.

The record indicates that Defendant's speedy trial rights were waived on September 28, 2010. The waiver was reaffirmed on October 26, 2010. However, counsel subsequently filed a written demand for speedy trial on March 17, 2011, pursuant to Florida Rule of Criminal Procedure 3.191(b).[2] (*See Exhibit C: Demand for Speedy Trial*). On May 9, 2011, he filed a Notice of Expiration of Speedy Trial Time, indicating that more than fifty days had passed since Defendant's Demand for Speedy Trial was filed. (*See Exhibit D: Notice of Expiration of Speedy Trial Time*). Upon the filing of a proper notice of expiration of speedy trial time, the State must bring a defendant to trial within fifteen days. See Fla. R. Crim. P. 3.191(p)(3). If the defendant is not brought to trial within the applicable time period through no fault the defendant, he or she shall be discharged from crime. See id. The record reflects that Defendant was brought to trial on May 11, 2011; two days after counsel filed the notice of expiration of speedy trial time.

Defendant's claim that counsel failed to file a motion to dismiss based on the expiration of speedy trial time is without merit. It is clear from the record that counsel did in fact demand a speedy trial on Defendant's behalf and filed a proper notice of expiration of the speedy trial time. It is also clear from the record that Defendant was brought to trial within the 15 day period allotted for the State to bring Defendant to trial after such a notice is filed. Accordingly, counsel had no basis to move for a dismissal of charges on speedy trial grounds and was not ineffective for failing to do so. This claim is denied.

To the extent Defendant may be arguing that counsel should not have initially waived Defendant's right to speedy trial, his claim remains meritless. Counsel has the right to waive speedy trial on a defendant's behalf, even if it is done without consulting the client or is done against the client's wishes. See Fla. R. Crim. P. 3.191; State v. Earnest, 265 So. 2d 397, 401 (Fla. 1st DCA 1972) ("[a] defendant's right to be tried within 180 days from the time information is filed against him is procedural right, as distinguished from substantive right, and may be waived by the defendant's attorney without the necessity of securing the defendant's prior informed consent."); State v. Abrams, 350 So. 2d 1104 (Fla. 4th DCA 1977). Counsel was not ineffective for initially waiving Defendant's speedy trial rights. This claim is denied.

---

[2] See State v. Gibson, 789 So. 2d 1155, 158 n.2 (Fla. 5th DCA 2001) ("Once speedy trial is waived, the accused continues to have available the right to demand speedy trial pursuant to rule 3.191(b) (. . .)).

that "Defendant's opening statements was [sic] not made for strategy purposes but rather because of the lawyer's ineptitude." On November 27, 2012, the Court struck Defendant's claim as facially insufficient for failure to specify what aspects of counsel's trial strategy were erroneous and for failing to explain how he was prejudiced by counsel's particular failures. To date, no amendment of this claim has been filed. Accordingly, Defendant's claim is denied with prejudice. Spera v. State, 971 So. 754, 760 (Fla. 2007).

Ground Two

Defendant alleges that counsel was ineffective for failing to make a sufficient argument for judgment of acquittal. Defendant argues that he was prejudiced by counsel's "boilerplate motion" for judgment of acquittal because counsel failed to argue that the bar stool Defendant was alleged to have used to strike the victim did not qualify as a deadly weapon for purposes of the aggravated battery statute. Defendant maintains that, had counsel properly argued that point of law, the outcome of the proceedings would have been different in that Defendant would have been acquitted of the charged offense.

Defendant's claim is refuted by the record. Defense counsel moved for a judgment of acquittal at the conclusion of the State's case. (*See Exhibit B: Trial Transcript, pg. 326*). Counsel specifically argued that the State had not provided sufficient evidence that the barstool in question was actually used as a deadly weapon. (*See Exhibit B: Trial Transcript, pgs. 326-27*). He argued that the State had not presented evidence that the barstool was used in a manner that resulted in great bodily harm. (*See Exhibit B: Trial Transcript, pgs. 326-27*). He specifically argued that the testimony about the victim's injuries did not "rise to the level of great bodily harm" and that the State did not provide evidence that Defendant intended to cause great bodily harm or permanent disfigurement. (*See Exhibit B: Trial Transcript, pgs. 327-28*). Counsel provided case law to the Court on the subject. (*See Exhibit B: Trial Transcript, pg. 329*).

It is apparent from the record that Counsel's argument specifically addressed the points Defendant now complains counsel should have raised. The fact that the Court did not rule in Defendant's favor does not, in and of itself, mean that counsel's representation was deficient. Accordingly, this Court cannot find that counsel was ineffective and this claim is denied.

Ground Three

Defendant alleges that counsel was ineffective for failing to file a motion to dismiss after the time for speedy trial expired. He states that he advised counsel he did not want to waive his right to a

Moreover, Defendant is unable to demonstrate that he was prejudiced by the exclusion of additional medical reports. The responding police officer, victim, and two eye-witnesses to the offense all testified at trial that the victim was bleeding profusely from his nose. (*See Exhibit B: Trial Transcript, pgs. 166-74; 220-22; 285-86; 305*). Officer Liliberte testified that, when he responded to the scene, the victim's shirt was "covered in blood" and there was "blood all over the floor." (*See Exhibit B: Trial Transcript, pgs. 171-74; 177*). The victim testified that Defendant struck him on the head with a bar stool and punched him in the nose. (*See Exhibit B: Trial Transcript, pgs. 214-18*). He further testified that his nose was broken and that his nose is still crooked as a result. (*See Exhibit B: Trial Transcript, pg. 219*). Doctor Beth Girgis testified that she examined the victim after the incident and determined that the victim's nose was fractured into pieces. (*See Exhibit B: Trial Transcript, pgs. 258-60*).

Considering the testimony at trial, particularly the medical testimony, it is highly unlikely that further medical reports regarding the victim's injuries would have been helpful to Defendant. Multiple witnesses testified that Defendant's nose and clothes were covered in blood; the examining physician testified that Defendant's nasal bone was fractured into multiple pieces; and the victim testified that his nose is crooked as a result of his injuries. Even if counsel were ineffective in failing to pursue further medical reports of the victim's injuries, this Court cannot conclude that such reports would have been so probative as to have altered the outcome of Defendant's trial. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Accordingly, Defendant's claim is denied.

(b) Next, Defendant alleges that counsel failed to obtain "official-record information." He states that, had counsel performed an adequate pre-trial investigation, he would have discovered this information that "would prove [Defendant] was entitled to discharge." Defendant argues that he was prejudiced by counsel's failure because he would have been entitled to dismissal of the charges. He further indicates that counsel had a "do nothing" strategy, which deprived Defendant of a fair trial. On November 27, 2012, the Court struck Defendant's claim as facially insufficient for failure to specify what exactly the "official-record information" is and how it would prove that Defendant was entitled to have the charges dismissed. To date, no amendment of this claim has been filed. Accordingly, Defendant's claim is denied with prejudice. Spera v. State, 971 So. 754, 760 (Fla. 2007).

(c) Lastly, Defendant appears to claim that he was prejudiced by defense counsel's "unorthodox trial tactics," which hindered Defendant's opportunity to present an adequate defense. He also states

have been different. See Strickland v. Washington, 466 U.S. 668, 687 (1984). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Valle v. State, 778 So. 2d 960, 965-66 (Fla. 2001). If the defendant fails to satisfy one prong, the reviewing court need not determine whether the defendant has satisfied the other. See Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986). In a motion for postconviction relief, the defendant bears the burden of establishing a prima facie case based on a legally valid claim. See Griffin v. State, 866 So. 2d 1 (Fla. 2003). Conclusory allegations are insufficient to meet this burden. Id.

The evaluation of an attorney's performance requires consideration of all the circumstances from the attorney's perspective at the time. See Downs v. State, 453 So. 2d 1102, 1106-07 (Fla. 1984). The legal standard for such an evaluation is "reasonably effective counsel, not perfect or error-free counsel." See Tuffeteller v. Dugger, 734 So. 2d 1009, 1022 (Fla. 1999). There is a strong presumption of reasonableness that must be overcome with any given ineffectiveness claim. See Downs, 453 So. 2d at 1108. Each of Defendant's claims is discussed below.

Ground One

Defendant appears to raise three separate issues with regard to counsel's representation within this ground. Defendant alleges that, had counsel conducted an adequate pre-trial investigation and not used "unorthodox" trial strategies, the outcome of Defendant's trial would have been different. Each of Defendant's claims is addressed below:

(a) First, Defendant alleges that counsel was ineffective for failing to conduct a "reasonable" pre-trial investigation.. He claims that counsel would have discovered medical records that prove the victim was "not in dire need of medical assistance." He maintains that, had counsel presented these records, the outcome of the proceedings would have been different. Defendant argues that the severity of the victim's injuries was relevant to the trial in that the defense strategy was to argue that Defendant was only guilty of the lesser-included charge of simple battery because the victim did not sustain the type of injury necessary to support an aggravated battery conviction.

Defendant's claim is without merit. Defendant's claim is entirely speculative. Speculation cannot form the basis for post-conviction relief. Johnson v. State, 921 So. 2d 490, 503-04 (Fla. 2005); Solorzano v. State, 25 So. 3d 19, 23 (Fla. 2d DCA 2009). He does not identify what medical records counsel would have discovered or how they would have shown that the victim did not require medical assistance; he merely claims that such records exist. Accordingly, Defendant's claim is denied as speculative.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO
DIVISION: M

WILLIE SAFFORD
Person ID: 00324504, Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court upon Defendant's *pro se* Motion for Postconviction Relief, filed August 7, 2017, pursuant to Florida Rule of Criminal Procedure 3.850. Having reviewed Defendant's motion, the record, and the applicable law, this Court finds as follows:

Procedural History

On May 28, 2010, Defendant was charged by felony information with one count of aggravated battery. On May 12, 2011, Defendant was found guilty as charged by a jury. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Prison Releasee Reoffender (PRR), and a 15 year minimum-mandatory as a Violent Career Criminal Offender (VCC). (*Exhibit A: Judgment and Sentence.*) Defendant's conviction and sentence were affirmed on appeal; the mandate was issued on March 21, 2012. Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table).

Analysis

As an initial matter, the Court notes that Defendant has filed his motion pursuant to Florida Rule of Criminal Procedure 3.850. A motion for postconviction relief must be filed within two years of the date the judgment and sentence become final. See Fla. R. Crim. P. 3.850(b). The two year period for filing a motion for postconviction relief begins to run thirty days after the defendant is sentenced or, if the defendant appealed the judgment and sentence, after the mandate issues from direct appeal. See Fla. R. Crim. P. 3.850(b); Curtis v. State, 870 So. 2d 186 (Fla. 2d DCA 2004). Defendant filed the instant motion more than two years after his judgment and sentence became final in 2012 and it is therefore untimely unless Defendant can

EXHIBIT [redacted]

establish one of the timeliness exceptions enumerated in Rule 3.850(b). To that end, Defendant appears to allege that his motion is timely pursuant to Rule 3.850(b)(1), which permits a defendant to raise an otherwise untimely claim if it is based on newly discovered facts. Defendant submits that he has newly discovered evidence that three eye witnesses, Rodney Hartmyer, Jerry Gay, and Robert Scharn lied at trial. Defendant attaches the complaint/arrest affidavit, which he argues is inconsistent with the witness's statements because it does not indicate that Defendant punched the victim. When analyzing a claim of newly discovered evidence, this Court must apply the two-prong Jones test. See Robinson v. State, 770 So. 2d 1167, 1169-70 (Fla. 2000); Jones v. State, 591 So. 2d 911, 915-16 (Fla. 1991) (Jones I); Jones v. State, 709 So. 2d 512 (Fla. 1998) (Jones II). First, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." Jones, 709 So. 2d at 521 (citing Torres-Arboldea v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994)). "Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Id.

Defendant's motion fails to satisfy either prong of the Jones test. First, the complaint/arrest affidavit was filed in the court file the day after Defendant's arrest. Information that is available to counsel in the court file cannot be newly-discovered. As for the second prong, this information is not such that it would produce an acquittal on retrial. The complaint/arrest affidavit is not required to include or attach witness statements and is not a charging document; it is merely an affidavit that law enforcement had probable cause to make an arrest. Any statements or omissions from an arrest affidavit are not admissible at trial. See § 90.803(8), Fla. Stat.; Burgess v. State, 831 So. 2d 137, 140-41 (Fla. 2002). Additionally, while Defendant contends that the three witness's statements were inconsistent with one another, the police reports attached to his own motion reflect that each of the witnesses stated that Defendant hit the victim in the head with a barstool and punched the victim in the face. This is entirely consistent with each witness's testimony at trial. (*See Exhibit B: Trial Transcript, pgs. 214-18, 285, 301-02*). Thus, even if admissible, the arrest/complaint affidavit and the other documents attached to Defendant's motion could not have impeached any witness or affected the outcome of the trial. Defendant's motion fails to establish a newly-discovered evidence exception to the time bar and is denied with prejudice. See Fla. R. Crim. P. 3.850(f)(1).

SECOND WARNING

As is outlined in the procedural history above, Defendant has filed a **large** number of meritless postconviction motions, each of which were denied or dismissed, and, when appealed, *per curiam* affirmed on appeal. See Safford, 127 So. 3d 514 (Fla. 2d DCA 2013), Safford, 166 So. 3d 783 (Fla. 2d DCA 2014), Safford, 229 So. 3d 1232 (Fla. 2d DCA 2017), Safford, 242 So. 3d 369 (Fla. 2d DCA 2018), Safford, 252 So. 3d 163 (Fla. 2d DCA 2018). This Court has an affirmative duty to ensure that its finite resources are utilized in a way that both enhances judicial efficiency and promotes the interest of justice. See Rivera v. State, 728 So. 2d 1165, 1166 (Fla. 1998) (recognizing the Court's inherent power to bar abusive litigants from continually filing frivolous petitions). Addressing frivolous or successive claims hinders the Court's ability to address other defendants' meritorious claims in an efficient manner. **Defendant is hereby warned that continued frivolous filings may result in an order imposing sanctions that include barring Defendant from future access to this Court.** See Rivera v. State, 728 So. 2d at 1165; Spencer v. State, 751 So. 2d 47 (Fla 1999); Carter v. State, 786 So. 2d 1230 (Fla. 4th DCA 2001). The Florida Supreme Court has held that any citizen, including a citizen attacking his conviction, that abuses the right to *pro se* access by filing repetitious and frivolous pleadings can be prevented from bringing further attacks on his conviction and sentence. See Spencer, 751 So. 2d at 48. Section 944.279, Florida Statutes, sets forth disciplinary procedures applicable to a prisoner filing frivolous or malicious actions or bringing false information before the Court. The Court, on its own motion, may make an inquiry into whether a frivolous or malicious collateral criminal proceeding has been filed. See id. Such a finding may also result in forfeiture of all or part of any accumulated gain time. See Tannehill v. State, 843 So. 2d 355, 356 (Fla. 3d DCA 2003) (citing § 944.28(2)(a), Fla. Stat.); Green v. State, 830 So. 2d 142 (Fla. 3d DCA 2002)). It may also result in Department of Corrections disciplinary proceedings under Sections 944.279 and 944.09, Florida Statutes.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Motion Asking the Court to Resentence Defendant Due to the Prosecutor Not Asking the Jury for the Special Jury Instruction of Aggravated Battery with a Deadly Weapon as to Aggravated Battery" is hereby **DISMISSED.**

DEFENDANT IS NOTIFIED that he has thirty (30) days from the rendition date of this Order to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 18 day of December, 2018. A true and correct copy of this order has been furnished to the parties listed below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, Florida 33955-9701

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

CASE NO.: CRC10-09375CFANO

v.

UCN: 522010CF009375XXXXNO

DIVISION: M

WILLIE SAFFORD,
Person ID: 00324504, Defendant. /

ORDER DISMISSING DEFENDANT'S MOTION FOR POLYGRAPH TEST

THIS CAUSE came before the Court on the Defendant's *pro se* "Motion Asking the Court to Grant Defendant Back to Court for an Polygram Test as of Aggravated Battery," filed on February 16, 2018. Having considered the motion, record, and applicable law, this Court finds as follows:

Procedural History

On May 28, 2010, Defendant was charged with one count of aggravated battery. On May 12, 2011, Defendant was found guilty as charged by a jury. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Violent Career Criminal Offender (VCC), and 15 year minimum-mandatory as a Prison Releasee Reoffender (PRR). (*Exhibit A: Judgment and Sentence*). Defendant's conviction and sentence were affirmed on appeal; the mandate was issued on March 21, 2012. See Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table). On November 17, 2017, Defendant's judgment and sentence was amended to strike his HFO designation. (*Exhibit A*).

Analysis

Defendant's motion requests that this Court allow him to re-appear in court to take a polygraph test to "prove his case of aggravated battery." Defendant asserts that the polygraph test would prove that the witnesses in his case were not being truthful, and would show that he is guilty only of a lesser offense of battery. Defendant asserts that allowing him to take a polygraph test would "give [him] a shot at relief for a New Trial in this matter."

Defendant's motion must be dismissed because it does not request any relief that is available under the Florida Rules of Criminal Procedure. Notwithstanding, Defendant should note that even if he did successfully pass a polygraph test, the results would not admissible to

EXHIBIT A

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Postconviction Relief is hereby **DENIED.**

DEFENDANT IS HEREBY NOTIFIED that he has thirty (30) days from the date of this order to appeal, should he choose to do so.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this 17 day of August, 2017. A true and correct copy of the foregoing has been furnished to the parties indicated below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Tomoka Correctional Institution
3950 Tiger Bay Rd.
Daytona Beach, FL 32124-1098

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

CASE NO.: CRC10-09375CFANO

v. **UCN: 522010CF009375XXXXNO**

DIVISION: M

WILLIE SAFFORD,
Person ID: 00324504, Defendant. /

ORDER DISMISSING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court on the Defendant's *pro se* "Motion Asking the Court to Correct the Charge of Aggravated Battery to an Felony Battery," filed on November 6, 2018. Having considered the motion, record, and applicable law, this Court finds as follows:

Procedural History

On May 28, 2010, Defendant was charged with one count of aggravated battery. On May 12, 2011, Defendant was found guilty as charged by a jury. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Violent Career Criminal Offender (VCC), and 15 year minimum-mandatory as a Prison Releasee Reoffender (PRR). (*Exhibit A: Judgment and Sentence*). Defendant's conviction and sentence were *per curiam* affirmed on appeal. See Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table). The mandate issued on March 21, 2012. On November 17, 2017, Defendant's judgment and sentence was amended to strike his HFO designation. (*Exhibit A*).

Defendant has filed **numerous** postconviction motions in this matter. On August 6, 2012, Defendant filed his initial motion for postconviction relief, which the Court denied in an order entered on January 28, 2013. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 127 So. 3d 514 (Fla. 2d DCA 2013). On February 13, 2013, Defendant filed a second motion for postconviction relief, which the Court denied in an order entered on August 8, 2013. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 166 So. 3d 783 (Fla. 2d DCA 2014). On April 25, 2016, Defendant filed a third motion for postconviction relief, which the Court denied in an order entered on May 17, 2016. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 229 So. 3d 1232 (Fla. 2d DCA 2017). On July 20, 2016, Defendant filed a fourth motion for postconviction relief, which the Court denied in an order entered on July 28, 2016. On April

EXHIBIT [redacted]

prove guilt or innocence at a trial, nor would they provide a sufficient basis to warrant a new trial. See State v. E.J.J., 682 So. 2d 206, 208 (Fla. 5th DCA 1996).

Finally, in an abundance of caution, the Court notes that to the extent Defendant challenges the sufficiency of the evidence to convict him of aggravated battery, such a claim is not cognizable in a postconviction motion and should have been raised on direct appeal. See Cook v. State, 792 So. 2d 1197, 1200-01 (Fla. 2001). Further, to the extent Defendant implies that counsel should have impeached the victim and witnesses at trial; this claim should have been raised in a timely filed Rule 3.850 motion alleging ineffective assistance of counsel. The Court cannot consider Defendant's instant motion under Rule 3.850 because it was filed more than two years after the mandate issued from his direct appeal and is therefore untimely. See Fla. R. Crim. P. 3.850(b); Beaty v. State, 701 So. 2d 856 (Fla. 1997). As Defendant's motion does not request relief available pursuant to any rule of criminal procedure, his motion is dismissed.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Motion Asking the Court to Grant Defendant Back to Court for an Polygram Test as of Aggravated Battery" is hereby **DISMISSED.**

DEFENDANT IS NOTIFIED that he has thirty (30) days from the rendition date of this Order to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 27 day of February, 2018. A true and correct copy of this order has been furnished to the parties listed below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, Florida 33955-9701

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

CASE NO.: CRC10-09375CFANO

v.

UCN: 522010CF009375XXXXNO

DIVISION: M

WILLIE SAFFORD,
Person ID: 00324504, Defendant. /

ORDER DISMISSING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court on the Defendant's *pro se* "Motion Asking the Court to Resentence Defendant Due to the Prosecutor Not Asking the Jury for the Special Jury Instruction of Aggravated Battery with a Deadly Weapon as to Aggravated Battery," filed on December 7, 2018. Having considered the motion, record, and applicable law, this Court finds as follows:

Procedural History

On May 28, 2010, Defendant was charged with one count of aggravated battery. (*Exhibit A: Felony Information*). On May 12, 2011, Defendant was found guilty as charged by a jury. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Violent Career Criminal Offender (VCC), and 15 year minimum-mandatory as a Prison Releasee Reoffender (PRR). (*Exhibit B: Judgment and Sentence*). Defendant's conviction and sentence were *per curiam* affirmed on appeal. See Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table). The mandate issued on March 21, 2012. On November 17, 2017, Defendant's judgment and sentence was amended to strike his HFO designation. (*Exhibit A*).

Defendant has filed **numerous** postconviction motions in this matter. On August 6, 2012, Defendant filed his initial motion for postconviction relief, which the Court denied in an order entered on January 28, 2013. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 127 So. 3d 514 (Fla. 2d DCA 2013). On February 13, 2013, Defendant filed a second motion for postconviction relief, which the Court denied in an order entered on August 8, 2013. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 166 So. 3d 783 (Fla. 2d DCA 2014). On April 25, 2016, Defendant filed a third motion for postconviction relief, which the Court denied in an order entered on May

EXHIBIT

may also result in Department of Corrections disciplinary proceedings under Sections 944.279 and 944.09, Florida Statutes.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Motion Asking the Court to Correct the Charge of Aggravated Battery to an Felony Battery" is hereby **DISMISSED.**

DEFENDANT IS NOTIFIED that he has thirty (30) days from the rendition date of this Order to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 26 day of November, 2018. A true and correct copy of this order has been furnished to the parties listed below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, Florida 33955-9701

appeal. See Beaty v. State, 701 So. 2d 856, 857 (Fla. 1997). Defendant's judgment and sentence became final on or about March 21, 2012, when the mandate issued from his direct appeal. Therefore the instant motion, filed more than six years later, is untimely. Defendant does not allege that his motion falls under an exception enumerated in Rule 3.850(b), nor is any such exception readily apparent to this Court. Further, the Court cannot consider Defendant's motion under Rule 3.800(a), because Defendant's claims relate to his conviction, not his sentence, or are otherwise not cognizable under Rule 3.800(a). See Shortridge v. State, 884 So. 2d 321 (Fla. 2d DCA 2004) (holding that "because the two claims raised by [Defendant] relate to convictions and not sentences, they are not cognizable under rule 3.800(a)"). Consequently Defendant's motion is dismissed.

Notwithstanding, the Court notes that even if Defendant's claim were timely or cognizable, it would be denied. Although Defendant's motion does not specifically cite to Apprendi v. New Jersey, 530 U.S. 466 (2000), Defendant's claim could be interpreted as raising an Apprendi violation based on his apparent belief that his sentence and/or charge was incorrectly enhanced or reclassified from simple battery to aggravated battery without a separate jury finding that the barstool was a deadly weapon. Apprendi requires that facts which would enhance a defendant's sentence above the statutory maximum (other than the fact of a prior conviction) be submitted to a jury and found beyond a reasonable doubt. 530 U.S. at 490. However, no Apprendi violation has occurred because Defendant's charge was not reclassified and his sentence was not enhanced due to Defendant's use of a weapon in this case. (*Exhibit B*). Instead, Defendant was charged with the elements of both theories of aggravated battery, and his sentence was enhanced only due to his VCC and PRR designations, which do not require a jury finding. See id. ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."); see also Robinson v. State, 793 So.2d 891, 893 (Fla. 2001) (holding that the State was not required to prove beyond a reasonable doubt that the defendant had been released from a state correctional facility within three years of his current offense); (*Exhibit A*). Defendant should note that there is no requirement that the jury indicate on the verdict form which theory their conviction stems from. See Lee v. State, 100 So. 3d 1183 (Fla. 2d DCA 2012) (affirming conviction for aggravated battery where the defendant was charged with both theories of aggravated battery and the verdict form did not separate the two theories).

17, 2016. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 229 So. 3d 1232 (Fla. 2d DCA 2017). On July 20, 2016, Defendant filed a fourth motion for postconviction relief, which the Court denied in an order entered on July 28, 2016. On April 10, 2017, Defendant filed a fifth motion for postconviction relief, which the Court denied in an order entered on May 5, 2017. On August 7, 2017, Defendant filed a sixth motion for postconviction relief, which the Court denied in an order entered on August 17, 2017. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 242 So. 3d 369 (Fla. 2d DCA 2018). On February 16, 2018, Defendant filed a "Motion for Polygraph Test," which the Court dismissed in an order entered on February 27, 2018. The dismissal of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 252 So. 3d 163 (Fla. 2d DCA 2018). On August 7, 2017, Defendant filed an eighth motion for postconviction relief, which the Court dismissed in an order entered on November 26, 2018. The instant motion is Defendant's ninth postconviction motion.

Analysis

Initially, the Court notes that Defendant's motion is largely unintelligible and it is difficult to discern what he is arguing. The motion appears to argue that Defendant's aggravated battery conviction should be vacated because the State had a burden to prove that the barstool used in the offense was a deadly weapon, which is a question of fact to be determined by the jury. Defendant argues that the jury rendered only a general verdict and did not make a specific finding that the barstool used in the commission of the offense was a deadly weapon. He argues that the barstool "was necessary to support [his] conviction," and it was error to reclassify his charge and enhance his sentence based on his use of a weapon without a special verdict form reflecting the jury's separate finding that Defendant used a deadly weapon. Defendant appears to argue that without a finding that he actually possessed a weapon, he was not properly convicted of aggravated battery, and was only convicted of felony battery or battery and should be resentenced accordingly.

Defendant's claims constitute a challenge to his aggravated battery conviction. All claims challenging a conviction must be raised in a timely motion for postconviction relief. A motion for postconviction relief must be filed within two years of the date the judgment and sentence become final. See Fla. R. Crim. P. 3.850(b). The judgment and sentence becomes final thirty days after they are entered or, in the event of a direct appeal, when the mandate issues from

"because the two claims raised by [Defendant] relate to convictions and not sentences, they are not cognizable under rule 3.800(a)"); Coughlin v. State, 932 So. 2d 1224 (Fla. 2d DCA 2006) (finding claims asserting double jeopardy are generally not cognizable in a motion pursuant to Rule 3.800(a) because such claims attack both the judgment and sentence, whereas Rule 3.800(a) may only be used to challenge the sentence.); Lopez v. State, 2 So. 3d 1057, 1059 (Fla. 3d DCA 2009) (noting that a double jeopardy challenge of a conviction is not appropriate under Rule 3.800(a)). In light of the foregoing, Defendant's motion is dismissed.

WARNING

As is outlined in the procedural history above, Defendant has filed a large number of meritless postconviction motions, each of which were denied or dismissed, and, when appealed, *per curiam* affirmed on appeal. See Safford, 127 So. 3d 514 (Fla. 2d DCA 2013), Safford, 166 So. 3d 783 (Fla. 2d DCA 2014), Safford, 229 So. 3d 1232 (Fla. 2d DCA 2017), Safford, 242 So. 3d 369 (Fla. 2d DCA 2018), Safford, 252 So. 3d 163 (Fla. 2d DCA 2018). This Court has an affirmative duty to ensure that its finite resources are utilized in a way that both enhances judicial efficiency and promotes the interest of justice. See Rivera v. State, 728 So. 2d 1165, 1166 (Fla. 1998) (recognizing the Court's inherent power to bar abusive litigants from continually filing frivolous petitions). Addressing frivolous or successive claims hinders the Court's ability to address other defendants' meritorious claims in an efficient manner. **Defendant is hereby warned that continued frivolous filings may result in an order imposing sanctions that include barring Defendant from future access to this Court.** See Rivera v. State, 728 So. 2d at 1165; Spencer v. State, 751 So. 2d 47 (Fla 1999); Carter v. State, 786 So. 2d 1230 (Fla. 4th DCA 2001). The Florida Supreme Court has held that any citizen, including a citizen attacking his conviction, that abuses the right to *pro se* access by filing repetitious and frivolous pleadings can be prevented from bringing further attacks on his conviction and sentence. See Spencer, 751 So. 2d at 48. Section 944.279, Florida Statutes, sets forth disciplinary procedures applicable to a prisoner filing frivolous or malicious actions or bringing false information before the Court. The Court, on its own motion, may make an inquiry into whether a frivolous or malicious collateral criminal proceeding has been filed. See id. Such a finding may also result in forfeiture of all or part of any accumulated gain time. See Tannehill v. State, 843 So. 2d 355, 356 (Fla. 3d DCA 2003) (citing § 944.28(2)(a), Fla. Stat.); Green v. State, 830 So. 2d 142 (Fla. 3d DCA 2002)). It

10, 2017, Defendant filed a fifth motion for postconviction relief, which the Court denied in an order entered on May 5, 2017. On August 7, 2017, Defendant filed a sixth motion for postconviction relief, which the Court denied in an order entered on August 17, 2017. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 242 So. 3d 369 (Fla. 2d DCA 2018). On February 16, 2018, Defendant filed a "Motion for Polygraph Test," which the Court dismissed in an order entered on February 27, 2018. The dismissal of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 252 So. 3d 163 (Fla. 2d DCA 2018). The instant motion is Defendant's eighth postconviction motion.

Analysis

Initially, the Court notes that Defendant's motion is largely unintelligible and it is difficult to discern what he is arguing. The motion appears to argue that Defendant was erroneously charged with and convicted of aggravated battery. Defendant admits in his motion that he hit the victim with a barstool, but denies punching the victim. He therefore appears to argue that based on the circumstances of his case, he should have been charged only with felony battery, and not aggravated battery. Defendant also appears to allege that the State "used" double jeopardy against him because he was charged with both the great bodily harm and deadly weapon theories of aggravated battery. He requests that this Court grant him a new trial, or reduce his charge to a felony battery charge.

Defendant's claims constitute a challenge to his aggravated battery conviction. All claims challenging a conviction must be raised in a timely motion for postconviction relief. A motion for postconviction relief must be filed within two years of the date the judgment and sentence become final. See Fla. R. Crim. P. 3.850(b). The judgment and sentence becomes final thirty days after they are entered or, in the event of a direct appeal, when the mandate issues from appeal. See Beaty v. State, 701 So. 2d 856, 857 (Fla. 1997). Defendant's judgment and sentence became final on or about March 21, 2012, when the mandate issued from his direct appeal. Therefore the instant motion, filed more than six years later, is untimely. Defendant does not allege that his motion falls under an exception enumerated in Rule 3.850(b), nor is any such exception readily apparent to this Court.

The Court notes that it cannot consider Defendant's motion under Rule 3.800(a), because Defendant's claims relate to his conviction, not his sentence, or are otherwise not cognizable under Rule 3.800(a). See Shortridge v. State, 884 So. 2d 321 (Fla. 2d DCA 2004) (holding that

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

CASE NO.: CRC10-09375CFANO

v.

UCN: 522010CF009375XXXXNO

DIVISION: M

WILLIE SAFFORD,
Person ID: 00324504, Defendant. /

ORDER DISMISSING DEFENDANT'S MOTION TO ADDRESS THE COURT

THIS CAUSE came before the Court on the Defendant's *pro se* "Motion to Address [the Court] on Defendants Theory of Aggravated Battery," filed on January 25, 2019. Having considered the motion, record, and applicable law, this Court finds as follows:

Procedural History

On May 28, 2010, Defendant was charged with one count of aggravated battery. (*Exhibit A: Felony Information*). On May 12, 2011, Defendant was found guilty as charged by a jury. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Violent Career Criminal Offender (VCC), and 15 year minimum-mandatory as a Prison Releasee Reoffender (PRR). (*Exhibit B: Judgment and Sentence*). Defendant's conviction and sentence were *per curiam* affirmed on appeal. See Safford v. State, 81 So. 3d 427 (Fla. 2d DCA 2012) (Table). The mandate issued on March 21, 2012. On November 17, 2017, Defendant's judgment and sentence was amended to strike his HFO designation. (*Exhibit A*).

Defendant has filed **numerous** postconviction motions in this matter. On August 6, 2012, Defendant filed his initial motion for postconviction relief, which the Court denied in an order entered on January 28, 2013. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 127 So. 3d 514 (Fla. 2d DCA 2013). On February 13, 2013, Defendant filed a second motion for postconviction relief, which the Court denied in an order entered on August 8, 2013. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 166 So. 3d 783 (Fla. 2d DCA 2014). On April 25, 2016, Defendant filed a third motion for postconviction relief, which the Court denied in an order entered on May 17, 2016. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 229 So. 3d 1232 (Fla. 2d DCA 2017). On July 20, 2016, Defendant filed a fourth motion

EXHIBIT [redacted]

for postconviction relief, which the Court denied in an order entered on July 28, 2016. On April 10, 2017, Defendant filed a fifth motion for postconviction relief, which the Court denied in an order entered on May 5, 2017. On August 7, 2017, Defendant filed a sixth motion for postconviction relief, which the Court denied in an order entered on August 17, 2017. The denial of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 242 So. 3d 369 (Fla. 2d DCA 2018). On February 19, 2018, Defendant filed a "Motion for Polygraph Test," which the Court dismissed in an order entered on February 27, 2018. The dismissal of Defendant's motion was *per curiam* affirmed on appeal. See Safford v. State, 252 So. 3d 163 (Fla. 2d DCA 2018). On November 6, 2018, Defendant filed an eighth motion for postconviction relief, which the Court dismissed in an order entered on November 26, 2018. On December 7, 2018, Defendant filed a ninth motion for postconviction relief, which the Court dismissed in an order entered on December 18, 2018. The dismissal of Defendant' motion is currently pending before the Second District Court of Appeal in appellate case number 2D19-120. The instant motion is Defendant's tenth postconviction motion.

Analysis

Defendant's motion appears to argue that his aggravated battery conviction should be vacated because it was obtained through perjured witness testimony. He further requests that he be allowed to take a polygraph test to prove that the witnesses committed perjury, and demonstrate that he should have been charged with or convicted of a lesser degree of felony, or under a single theory of aggravated battery.

Although Defendant states in his motion that he is not challenging his conviction, Defendant's claims amount a challenge to his aggravated battery conviction. All claims challenging a conviction must be raised in a timely motion for postconviction relief.[1] However, the Court is unable to consider the merits of Defendant's motion because it is not properly sworn. Any factual statements or allegations asserted in support of a postconviction motion must be accompanied by a proper oath. See, e.g., Fla. R. Crim. P. 3.987; State v. Shearer, 628 So. 2d 1102, 1103 (Fla. 1993). In fact, Defendant's motion is legally insufficient as is not signed at all. See Fla. R. Jud. Admin. 2.515(b).

[1] The Court cannot consider Defendant's motion under Rule 3.800(a) because his claims relate to his conviction, not his sentence, and are therefore not cognizable under Rule 3.800(a). See Shortridge v. State, 884 So. 2d 321 (Fla. 2d DCA 2004).

Notwithstanding, Defendant's motion would be dismissed even if it was properly signed and sworn because it is untimely. A motion for postconviction relief must be filed within two years of the date the judgment and sentence become final. See Fla. R. Crim. P. 3.850(b). The judgment and sentence becomes final thirty days after they are entered or, in the event of a direct appeal, when the mandate issues from appeal. See Beaty v. State, 701 So. 2d 856, 857 (Fla. 1997). Defendant's judgment and sentence became final on or about March 21, 2012, when the mandate issued from his direct appeal. Defendant acknowledges in his motion that the instant motion, filed almost seven years later, is untimely. He further acknowledges that his motion does not fall under an exception enumerated in Rule 3.850(b).

Finally, as Defendant acknowledges in his motion, his motion is successive. Defendant previously argued that the same witnesses committed perjury and requested that he be allowed to take a polygraph test in his February 19, 2018 "Motion Asking the Court to Grant Defendant Back to Court for an Polygram [sic] Test as of Aggravated Battery," which was dismissed in a final order entered on February 27, 2018. (*Exhibit C: Order, without exhibits*). The dismissal of Defendant's motion was *per curiam* affirmed on appeal. Safford v. State, 252 So. 3d 163 (Fla. 2d DCA 2018). Defendant is not entitled to successive review of claims already decided against him and affirmed on appeal. See State v. McBride, 848 So. 2d 287, 291 (Fla. 2003). In light of the foregoing, Defendant's motion is dismissed.

THIRD WARNING

As is outlined in the procedural history above, Defendant has now filed **10** postconviction motions in this case, each of which were denied or dismissed, and, when appealed, *per curiam* affirmed on appeal. See Safford v. State, 127 So. 3d 514 (Fla. 2d DCA 2013), Safford v. State, 166 So. 3d 783 (Fla. 2d DCA 2014), Safford v. State, 229 So. 3d 1232 (Fla. 2d DCA 2017), Safford v. State, 242 So. 3d 369 (Fla. 2d DCA 2018), Safford v. State, 252 So. 3d 163 (Fla. 2d DCA 2018). This Court has an affirmative duty to ensure that its finite resources are utilized in a way that both enhances judicial efficiency and promotes the interest of justice. See Rivera v. State, 728 So. 2d 1165, 1166 (Fla. 1998) (recognizing the Court's inherent power to bar abusive litigants from continually filing frivolous petitions). Addressing frivolous or successive claims hinders the Court's ability to address other defendants' meritorious claims in an efficient manner. **Defendant is hereby warned that continued frivolous, successive filings may result in an order imposing sanctions that include barring Defendant from future access to this Court.**

See Rivera v. State, 728 So. 2d at 1165; Spencer v. State, 751 So. 2d 47 (Fla 1999); Carter v. State, 786 So. 2d 1230 (Fla. 4th DCA 2001). The Florida Supreme Court has held that any citizen, including a citizen attacking his conviction, that abuses the right to *pro se* access by filing repetitious and frivolous pleadings can be prevented from bringing further attacks on his conviction and sentence. See Spencer, 751 So. 2d at 48. Section 944.279, Florida Statutes, sets forth disciplinary procedures applicable to a prisoner filing frivolous or malicious actions or bringing false information before the Court. The Court, on its own motion, may make an inquiry into whether a frivolous or malicious collateral criminal proceeding has been filed. See id. Such a finding may also result in forfeiture of all or part of any accumulated gain time. See Tannehill v. State, 843 So. 2d 355, 356 (Fla. 3d DCA 2003) (citing § 944.28(2)(a), Fla. Stat.); Green v. State, 830 So. 2d 142 (Fla. 3d DCA 2002)). It may also result in Department of Corrections disciplinary proceedings under Sections 944.279 and 944.09, Florida Statutes.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's "Motion to Address [the Court] on Defendants Theory of Aggravated Battery" is hereby **DISMISSED.**

DEFENDANT IS NOTIFIED that he has thirty (30) days from the rendition date of this Order to file an appeal, should he choose to do so.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 28 day of February, 2019. A true and correct copy of this order has been furnished to the parties listed below.

COPY

Philip J. Federico, Circuit Judge

cc: Office of the State Attorney

Willie Safford, DC# 243373
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, Florida 33955-9701

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

v.

WILLIE SAFFORD,
Person ID: 00324504, Defendant.
_____/

CASE NO.: CRC10-09375CFANO
UCN: 522010CF009375XXXXNO

DIVISION: M

ORDER DISMISSING DEFENDANT'S "MOTION FOR POSTCONVICTION RELIEF 3.850(B) FOR NEWLY DISCOVERED EVIDENCE"

THIS CAUSE came before the Court on the Defendant's *pro se* "Motion for Postconviction Relief 3.850(B) for Newly Discovered Evidence," filed on June 17, 2019. Having considered the motion, record, and applicable law, this Court finds as follows:

PROCEDURAL HISTORY

On May 28, 2010, defendant was charged with one count of aggravated battery. On May 12, 2011, defendant was found guilty as charged by a jury. He was sentenced as a Habitual Felony Offender (HFO) to 30 years' imprisonment, with a 30 year minimum-mandatory as a Violent Career Criminal Offender (VCC), and 15 year minimum-mandatory as a Prison Releasee Reoffender (PRR). (Ex. A, Judgment and Sentence). Defendant appealed his conviction, and the Second District Court of Appeal affirmed *per curiam*. *See Safford v. State*, 81 So. 3d 427 (Fla. 2d DCA 2012) (table). The mandate issued on March 21, 2012. On November 17, 2017, defendant's judgment and sentence was amended to strike his HFO designation.

Since his conviction on May 12, 2011, defendant has filed ten motions for postconviction relief in this matter, none of which have been meritorious.[1] And all of the orders that defendant has appealed have been upheld by the Second District Court of Appeal. The instant motion is defendant's eleventh.

[1] As noted above, defendant did successfully obtain correction of his sentence under Rule 3.800(a) in an order dated November 17, 2017. But none of his motions attacking the underlying conviction have been successful.

EXHIBIT [redacted]

THE MOTION

Defendant's motion suffers from several fatal defects that prevent the Court from considering it.

First, the Court is unable to consider the merits of defendant's motion because it is not properly sworn. Any factual statements or allegations asserted in support of a postconviction motion must be accompanied by a proper oath. *See, e.g.*, Fla. R. Crim. P. 3.987; *State v. Shearer*, 628 So. 2d 1102, 1103 (Fla. 1993). Defendant's motion contains no oath at all. For this reason, the Court cannot consider the motion.

Second, his motion exceeds the page limit. "No motion . . . shall exceed 50 pages without leave of the court upon a showing of good cause." Fla. R. Crim. P. 3.850(d). Defendant's motion, exclusive of attachments, is 68 pages. Defendant does not attempt to seek the court's leave or show good cause why the court should grant leave to file a longer motion. For this reason also, the Court cannot consider the motion.

Notwithstanding, defendant's motion would be dismissed even if it was properly sworn and under 50 pages because it is untimely. A motion for postconviction relief must be filed within two years of the date the judgment and sentence becomes final, unless an exception is invoked. *See* Fla. R. Crim. P. 3.850(b). The judgment and sentence becomes final thirty days after it is entered or, in the event of a direct appeal, when the mandate issues from appeal. *See Beaty v. State*, 701 So. 2d 856, 857 (Fla. 1997). Defendant appears to allege that newly discovered evidence renders his motion timely, under the exception to the time limitations for motions based on newly discovered evidence. Newly discovered evidence must be evidence which is unknown to the defendant and counsel, could not have been ascertained using due diligence, and must be raised within two years of the time that it was discovered or could have been discovered using due diligence. *See* Fla. R. Crim. P. 3.850(b)(1). Defendant, however, appears to be basing his claim on police reports from his case from 2010, which are not newly discovered. (*See* Def. Ex. A, B, C); *see also Zeigler v. State*, 632 So. 2d 48, 50 (Fla. 1993) (public records generally not considered newly discovered evidence). In fact, defendant has included at least some of these reports in prior motions: in his motion filed April 25, 2016, and in his motion filed July 20, 2016—both of which were denied. Because the evidence is not newly discovered, the exception is inapplicable. Thus the Court cannot consider the motion.

OATH

UNDER PENALTIES OF PERJURY AND ADMINISTRATIO FROM THE DEPARTMENT OF CORRECTIONS INCLUDING FOREFEITURE OF GAINTIME IF THIS MOTION IS FOUND TO BE FRIVOLOUS OR MADE IN BAD FAITH. I CERTIFY THAT I UNDERSTAND THE CONTENTS OF THE FOREGOING MOTION, THAT THE FACTS CONTAINED IN THE MOTION ARE TRUE AND CORRECT.

[RELIEF SOUGHT]

THE LOWER TRIBUNAL RECONIZED THESE LEAGAL PRINCIPAL BUT ERRED IN HOLDING THAT THERE WAS NO RECORD TO SUPPORT THE CLAIM OF SELF-DEFENCE. THE CONVICTION SHOULD ACCORDINGLY BE VACATED, AND THE CASE REMANDED FOR A NEW TRIAL.

APPELLANT COUNSEL WAS AWARE THAT THE (SELF-DEFENSE) CLAIM WAS TO BE PRESENTED AS AN CONSTITUTIONAL CLAIM BUT DIDN'T DEFENDANT SHOULD AND WISHES THIS COURT TO RECONSIDER FOR DEFENDANT TO REPLACE THIS PETITION IN THE STATE COURT, FOR (INEFFECTIVE OF APPELLANT COUNSEL.)