EXHIBIT A

"Appendix A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14409-E

JONATHAN GODWIN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

To merit a certificate of appealability, Jonathan Godwin 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. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Godwin has failed to make the requisite showing, the motion for a certificate of appealability is DENIED. His motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

EXHIBIT B

"Appendix B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JONATHAN GODWIN,

Applicant,

v. CASE NO. 8:16-cv-2253-T-23SPF

SECRETARY, Department of Corrections,

Respondent.
_____/

ORDER

Godwin applies under 28 U.S.C. § 2254 for the writ of habeas corpus (Doc. 1) and challenges his convictions both for robbery with a firearm and for false imprisonment with a firearm, for which Godwin is imprisoned for life. Numerous exhibits ("Respondent's Exhibit __") support the response. (Doc. 7) The respondent admits the application's timeliness (Response at 3, Doc. 7) but argues that some grounds are unexhausted or procedurally defaulted.

I. BACKGROUND[1]

On July 5, 2006, at 2:15 am Godwin and another man entered the "Pleasure Time" lingerie modeling establishment and, while threatening with a firearm, demanded money from the three women inside the business. One of the women

[1] This summary of the facts derives from the state's and Godwin's briefs on direct appeal. (Respondent's Exhibits 2 and 3)

attempted to flee but was captured. Godwin struck one woman in the face with the firearm. When the women were unable to produce a key for the safe, one victim offered her purse, which Godwin took and fled in a car.

The women called the police and provided a description of both the robbers and the car. A few minutes later an officer stopped a car that matched the description, and the two occupants matched the description of the assailants. During a brief search of the car the officer found papers that displayed the name of one of the victims, which name was provided in a radio transmission. Two of the victims were transported to the cite of the traffic stop and positively identified Godwin and the other occupant as the two assailants. About a week later the police searched the car, which was secured in an impound lot, and beneath the rear seat an officer found a firearm that matched the victims' description of the firearm used in the robbery.

Despite the trial court's repeated attempts to dissuade him, Godwin persisted in proceeding *pro se*. Nevertheless, the trial court appointed stand-by counsel.[2] Godwin moved under the Fourth Amendment to suppress evidence obtained from the traffic stop. After an evidentiary hearing, the trial court denied the motion to suppress.[3] Although having earlier advised the trial court that the state would not offer a plea bargain (the prosecutor represented that Godwin had prior convictions for attempted first degree murder, robbery with a firearm, and burglary), the state

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[2] Both the trial court and the parties identified stand-by counsel as "ghost" or "shadow" counsel.

[3] The denial of the motion to suppress is the subject of ground one in this action.

offered before *voir dire* to resolve all charges for the mandatory minimum sentence of ten years' imprisonment. The trial judge stated that he would both agree to that sentence and grant credit for time served, but Godwin rejected the offer despite knowing that he could receive life imprisonment. (Respondent's Exhibits 7 at 85 and 11 at 26–28) Immediately after accepting the verdict and excusing the jury, the trial judge (1) noted that Godwin had "absolutely terrorized" the three women, (2) commented that "I don't have a doubt in my mind that you did it — I don't have the first doubt — not after what I heard here," and (3) sentenced Godwin to life imprisonment because "you should not be out on the streets I don't think ever again, and I mean that." (Respondent's Exhibit 19 at 674–76) However, after realizing that he had not again reviewed with Godwin his right to counsel at sentencing, the trial judge appointed counsel to represent Godwin at a re-sentencing, which occurred a few days later. At the re-sentencing the trial judge recalled (1) that a victim experienced "absolute fear" of Godwin "when she broke down in tears" while testifying under Godwin's examination and (2) that Godwin "beat that woman about the head and about the face with a firearm[, which] could have caused permanent damage to her." (Respondent's Exhibit 11 at 242–43) The judge again sentenced Godwin to life imprisonment. (Id. at 209 and 243)

II. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this proceeding. *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209, 1210 (11th Cir. 1998), *cert. denied*, 531 U.S. 840 (2000). Section 2254(d), which creates a highly

deferential standard for federal court review of a state court adjudication, states in pertinent part:

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

Williams v. Taylor, 529 U.S. 362, 412–13 (2000), explains this deferential standard:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

"The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, . . . an unreasonable application is different

from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 693 (2002). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). *See White v. Woodall*, 572 U.S. 415, 427 (2014) ("The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question . . . .") (citing *Richter*); *Woods v. Donald*, 575 U.S. 312, 316 (2015) ("And an 'unreasonable application of' those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice.") (citing *Woodall*, 572 U.S. at 419). *Accord Brown v. Head*, 272 F.3d 1308, 1313 (11th Cir. 2001) ("It is the objective reasonableness, not the correctness *per se*, of the state court decision that we are to decide."). The phrase "clearly established Federal law" encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. at 412.

The purpose of federal review is not to re-try the state case. "The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. at 694. A federal court must afford due deference to a state court's decision. "AEDPA

prevents defendants — and federal courts — from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). *See also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("This is a 'difficult to meet,' . . . and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt' . . . .") (citations omitted).

When the last state court to decide a federal claim explains its decision in a reasoned opinion, a federal habeas court reviews the specific reasons as stated in the opinion and defers to those reasons if they are reasonable. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("[A] federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable."). When the relevant state-court decision is not accompanied with reasons for the decision, the federal court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192. The State may contest "the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision . . . ." *Wilson*, 138 S. Ct. at 1192.

In a *per curiam* decision without a written opinion the state appellate court on direct appeal affirmed Godwin's convictions and sentence. (Respondent's Exhibit 4) Similarly, in another *per curiam* decision without a written opinion the state appellate court both denied Godwin's petitions alleging the ineffective assistance of appellate

counsel (Respondent's Exhibits 24, 29 and 33) and affirmed the denial of Godwin's Rule 3.850 motion for post-conviction relief. (Respondent's Exhibit 40)[4] The state appellate court's *per curiam* affirmances warrant deference under Section 2254(d)(1) because "the summary nature of a state court's decision does not lessen the deference that it is due." *Wright v. Moore*, 278 F.3d 1245, 1254, *reh'g and reh'g en banc denied*, 278 F.3d 1245 (11th Cir. 2002), *cert. denied sub nom Wright v. Crosby*, 538 U.S. 906 (2003). *See also Richter*, 562 U.S. at 100 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."), and *Bishop v. Warden*, 726 F. 3d 1243, 1255–56 (11th Cir. 2013) (describing the difference between an "opinion" or "analysis" and a "decision" or "ruling" and explaining that deference is accorded the state court's "decision" or "ruling" even absent an "opinion" or "analysis").

As *Pinholster* explains, 563 U.S. at 181–82, review of the state court decision is limited to the state court record:

> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time, i.e., the record before the state court.

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[4] The appellate court subsequently issued a written opinion (Respondent's Exhibit 41) to explain its reasoning for the claim that is the basis for ground six, sub-ground one in this action.

Godwin bears the burden of overcoming by clear and convincing evidence a state court's fact determination. "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to a finding of fact but not to a mixed determination of law and fact. *Parker v. Head*, 244 F.3d 831, 836 (11th Cir.), *cert. denied*, 534 U.S. 1046 (2001). The state court's rejection of Godwin's post-conviction claims warrants deference in this federal action. (Orders Denying Motion for Post-Conviction Relief, Respondent's Exhibits 46, 48, and 50) Godwin's federal application presents the same grounds of ineffective assistance of counsel that he presented to the state courts.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Godwin claims ineffective assistance of counsel, a difficult claim to sustain. "[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*) (quoting *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)). *Strickland v. Washington*, 466 U.S. 668 (1984), governs an ineffective assistance of counsel claim, as *Sims v. Singletary*, 155 F.3d 1297, 1305 (11th Cir. 1998), explains:

> The law regarding ineffective assistance of counsel claims is well settled and well documented. In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland*,

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 104 S. Ct. 2052.

An applicant must prove both deficient performance and consequent prejudice. *See Strickland*, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); *Sims*, 155 F.3d at 1305 ("When applying *Strickland*, we are free to dispose of ineffectiveness claims on either of its two grounds."). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690. *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." 466 U.S. at 690.

Godwin must demonstrate that counsel's alleged error prejudiced the defense because "[a]n error by counsel, even if professionally unreasonable, does not warrant

setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691. To meet this burden, Godwin must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

Under Section 2254(d) Godwin must prove that the state court's decision "(1) [was] contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or (2) [was] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Sustaining a claim of ineffective assistance of counsel is very difficult because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105. *See also Pinholster*, 563 U.S. 202 (An applicant must overcome this "'doubly deferential' standard of *Strickland* and the AEDPA."); *Nance v. Warden, Ga. Diag. Prison*, 922 F.3d 1298, 1303 (11th Cir. 2019) ("Given the double deference due, it is a 'rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.'") (quoting *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 911 (11th Cir. 2011)), *cert. denied*, 140 S. Ct. 2520 (2020); and *Pooler v. Sec'y, Dep't of Corr.*, 702 F.3d 1252, 1270 (11th Cir. 2012) ("Because we must view Pooler's ineffective counsel claim — which is governed by the deferential *Strickland* test —

through the lens of AEDPA deference, the resulting standard of review is "doubly deferential."), *cert. denied*, 571 U.S. 874 (2013).

The state court summarily denied some of Godwin's claims of ineffective assistance of counsel (both before the state responded to the claims and after a response) and denied other claims after conducting an evidentiary hearing. In each instance the post-conviction court correctly recognized that *Strickland* governs a claim of ineffective assistance of counsel. (Respondent's Exhibits 46 at 137, 48 at 161, and 50 at 364) Consequently, Godwin cannot meet the "contrary to" test in Section 2254(d)(1). Godwin instead must show that the state court unreasonably applied *Strickland* or unreasonably determined the facts. In determining "reasonableness," a federal application for the writ of habeas corpus authorizes determining only "whether the state habeas court was objectively reasonable in its *Strickland* inquiry," not independently assessing whether counsel's actions were reasonable. *Putnam v. Head*, 268 F.3d 1223, 1244, n.17 (11th Cir. 2001), *cert. denied*, 537 U.S. 870 (2002). The presumption of correctness and the highly deferential standard of review requires that the analysis of each claim begin with the state court's analysis.

Ground One:

Godwin challenges the admissibility of incriminating evidence discovered following the stop of the car he was driving. Godwin asserts his claim as follows:

> Petitioner's Fourth and Fourteenth U.S.C.A. right against unreasonable search and seizure under Terry v. Ohio, 392 U.S. 1 (1967), was violated by evidence obtained as a result of a stop

> of Petitioner's vehicle, where the information relied upon by the stopping officer was not sufficient to justify the stop, and/or where the stopping officer's testimony regarding what he knew and when he knew it was proven to be false and/or misleading.

Although as phrased above Godwin's ground might contest the lawfulness of the initial stop, Godwin conceded during the hearing on the motion to suppress that the officer had probable cause to stop his car. (Godwin's Exhibit H, Doc. 1-15 at 2–3) Godwin stipulates in his application that he conceded the lawfulness of the stop. "Petitioner conceded the stop based on the officers' testimony in a strategic move to strengthen his argument that the search exceeded the bounds of Terry." (Doc. 1 at 5) Consequently, in ground one Godwin challenges only the scope of the search, not the lawfulness of the stop.

Godwin's challenge is limited to the trial court's pre-trial denial of his motion to suppress the fruits of a search. Godwin cannot pursue a Fourth Amendment claim in a federal court if he had an opportunity for a full and fair review in the state court. "[W]e conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976). For the preclusion under *Stone* to apply, the state court

must issue findings of fact, as *Hern v. Florida*, 326 F. App'x 519, 522 (11th Cir. 2009),[5] explains:

> A state does not afford a defendant a full and fair opportunity to litigate the validity of a search under the Fourth Amendment when the state courts fail to make essential findings of fact. In *Tukes v. Dugger*, we addressed whether *Stone* foreclosed review of the validity of a search when the defendant presented his argument but the state courts failed to make findings of fact to resolve that argument. 911 F.2d 508, 513–14 (11th Cir. 1990). We concluded that the state courts had failed to afford the defendant a full and fair opportunity to litigate the validity of the search when they did not make findings of fact about whether the defendant had invoked his right to counsel or was in custody when he consented to the search of his home. We stated, "The trial court's failure to make explicit findings on matters essential to the fourth amendment issue, combined with the fact that the state appellate court issued only a summary affirmance, precludes a conclusion in this case that the state provided the meaningful appellate review necessary to erect a *Stone v. Powell* bar to our review of the claim." *Id.* at 514.

Godwin attached to his application a portion of the transcript of the pre-trial motion to suppress during which the trial court issued the following findings of fact (Godwin's Exhibit A, Doc. 1-15 at 12–13):

> I'll make the following findings: That there was a robbery, that the women stopped law enforcement, immediate BOLO went out. The BOLO gave a description of a vehicle that's a General Motors type vehicle, 4-door. It was called an Oldsmobile; it turned out to be a General Motors Cadillac. There was probable cause to stop, as stated by Mr. Jonathan Godwin. At the stop, Officer Trick found that the driver was sweating profusely. He searched the vehicle. A plastic bag, garbage type bag was seen. A second BOLO went out with the name Katrina Winkler. It went out and the articles found in the bag had the name of the Katrina Winkler. There was a cursory search for a weapon. The people were removed from the

[5] "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. Rule 36-2.

> vehicle. They were handcuffed, placed in the back of law enforcement's vehicles, separate ones. I find that there was sufficient ground to search, that it was a valid legal search.

Although he proceeded *pro se* during both pre-trial and trial proceedings, Godwin was represented by counsel on direct appeal, and the sole issue raised in the initial brief challenged the trial court's denial of the motion to suppress. (Respondent's Exhibit 3) The applicability of a bar from federal review under *Stone* is addressed in conjunction with his claim of ineffective assistance of appellate counsel, which is discussed next.

Sub-Ground One:

As a separate component of ground one, Godwin alleges that appellate counsel rendered ineffective assistance by not ensuring that the record on appeal was complete, specifically, appellate "counsel[ ] fail[ed] to supplement the record with the trial court's findings and rulings on the motion to suppress." (Doc. 1 at 6) Godwin exhausted this claim in his first petition alleging that he was denied the effective assistance of counsel on appeal. (Respondent's Exhibit 21, Claim 2)

Strickland governs a claim of ineffective assistance of appellate counsel for an attorney's representation in a state appellate court. *Overstreet v. Warden*, 811 F.3d 1283, 1287 (11th Cir. 2016). "The standards applicable to [a defendant]'s claims of ineffectiveness against trial counsel apply equally to the charges leveled against his appellate lawyer." *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001), *cert. denied*, 535 U.S. 926 (2002).

Strickland, 466 U.S. at 690, explains that "strategic choices . . . are virtually unchallengeable." *Accord Nance v. Warden, Ga. Diag. Prison*, 922 F.3d 1298, 1303 (11th Cir. 2019) ("[I]t is rarer still for merit to be found in a claim that challenges a strategic decision of counsel."), *cert. denied*, 140 S. Ct. 2520 (2020). Godwin admits that his appellate attorney's decision not to supplement the appellate record was a strategic or tactical decision (1) by representing that counsel "was aware that the record on appeal omitted the trial court's factual findings and rulings to the motion to suppress" and (2) by acknowledging that "[a]ppellate counsel's letter to Petitioner shows that his failure to supplement the record with the trial court's findings were tactical." (Doc. 13 at 6) In a letter sent to Godwin with a copy of the initial brief, appellate counsel explains his reasoning for not supplementing the record as Godwin had requested (Godwin's Exhibit B, Doc. 1-6 at 2–3) (italics original):

> Some thoughts on your case and this appeal[:]
>
> There is only one issue that matters in your entire case: the failure to suppress evidence as result of an unlawful stop. Based on the testimony which *you* solicited from the witnesses, everything else is harmless error.
>
> - If the stop is unlawful — all evidence is suppressed, including the identifications by the victims at the scene of the stop, and this case would have never gone to trial. The State cannot argue such to be harmless error.
>
> - If the stop is good, all the evidence comes in: the yellow bag and contents and the identifications at the scene. Considering that through your own questions, you actually introduced sufficient evidence to convict yourself, the State can show any other error to be harmless.

Thus, the stop is critical. However, you may have given away this issue also:

- In your motion to suppress the evidence, you argued that the search of your person was illegal under *Terry*. While that may be good law, nothing was found during the search of *your person*, and even in your motion, you indicate you gave the officers permission to search your car. Additionally, both cops at the scene testify you gave permission to search the car.

- At the beginning of the suppression hearing, you *conceded* the issue: "The BOLO gave him probable cause to stop my vehicle." (I. T.166) (enclosed)

- The BOLO incorrectly indicated you were in a dark or black car, but during closing argument, you managed to effectively "testify" that it *may have looked blue* depending on lighting. (VI. T .640) (enclosed)

Your concession that the stop was legal (I. T .166), means that the search incident to the stop was legal for two reasons: First, you admit in your motion that you gave permission for the search and two cops say you gave permission; Second, the police would have been able to search the car subsequent to the show-up ID by the victims. Either way, if the stop is legal, the search becomes harmless. Having said that, your concession may end up being the basis for a *per curium affirmance*. Nonetheless, the bad stop argument is the only thing that can win you a new trial.

Another problem: I had to make a tactical decision regarding the record on this appeal. Basically, it is clear that the trial court ruled against you because the evidence came in. However, after you conceded the issue (above, I.T.87), the trial court continued the motions hearing until another day — thankfully without ruling. My decision was to *not request the rest of the hearing*. Quite honestly, you did so much damage to your case with your early arguments and in-artful cross-examination, that I felt it in your best interest not to put more of your argument regarding (or conceding) the *unlawful stop* before the DCA.

The above explains that counsel's foregoing supplementing the appellate record was both a strategic or tactical decision and not an unreasonable decision.

Moreover, appellate counsel was limited by Godwin's persistence in proceeding *pro se* and the resultant harmful errors by Godwin, as counsel expressed in his letter to Godwin. *See Chandler v. United States*, 427 F.3d 1305, 1318 (11th Cir.2000) (*en banc*) ("[E]vidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims."), *cert denied*, 531 U.S. 1204 (2001). The *per curiam* denial of Godwin's claim of ineffective assistance of appellate counsel was not an unreasonable application of *Strickland*, and appellate counsel was not ineffective even under a *de novo* review, to which Godwin asserts entitlement.

* * * *

Under *Stone*, 428 U.S. at 494 (italics added), a state must provide "an *opportunity* for full and fair litigation of a Fourth Amendment claim." Godwin was afforded a hearing on his motion to suppress, at which the trial court issued findings of fact and at which Godwin was afforded the benefit of counsel on his direct appeal, during which his counsel both challenged the denial of Godwin's motion to suppress and strategically chose not to supplement the appellate record. "If a state provides the processes whereby a defendant can obtain full and fair litigation of a fourth amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes." *Caver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978).[6] *See also Lawhorn v. Allen*, 519 F.3d 1272 (11th

[6] Unless later superseded by Eleventh Circuit precedent, a Fifth Circuit decision issued before October 1, 1981, binds this court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

Cir. 2008) ("[F]ull and fair consideration in the context of the Fourth Amendment includes at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute . . . .") (internal quotations omitted), *cert. denied*, 562 U.S. 907 (2010). Godwin had an opportunity for a full and fair review in the state courts as required under *Stone* and, even if the state court erred in its decision, the *Stone* bar still applies. *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980) (The *Stone* bar "still applies despite a state court error in deciding the merits of a defendant's [F]ourth [A]mendment claim."). Consequently, the Fourth Amendment claim is barred from federal review.

Ground Three:

Godwin alleges that the state violated his due process rights, as discussed in *Giglio v. United States*, 405 U.S. 150 (1972), by "intentionally solicit[ing] and/or fail[ing] to correct false and/or misleading evidence presented to the jury . . . ." (Doc. 1 at 11) Godwin bases his claim on the testimony by one of the victims, Katrina Winkler. The state post-conviction court denied this claim as follows (Respondent's Exhibit 46 at 139–40) (record citations omitted) (brackets and ellipsis original):

> Defendant alleges that his Fourteenth Amendment Right to Due Process under *Giglio v. United States*, 405 U.S. 150 (1972), was violated. He bases this claim on three specific occurrences. First, Defendant claims that the State knowingly allowed State witness Katrina Winkler to provide false testimony that Defendant was the shorter of two men who robbed her. Defendant argues that the State knew this testimony was false or misleading because the criminal report affidavits show that Defendant is five feet, eight inches tall, while his co-defendant is five feet, five inches tall. Second,

> Defendant argues that the criminal report affidavits show that the co-defendant attacked State witness Katrina Winkler; and not Defendant, contrary to her testimony. Finally, Defendant argues that[,] because Katrina Winkler was unable to identify him in a photo line-up, her later in-court testimony is misleading or false.
>
> To establish a *Giglio* claim that the state intentionally deceived or misled the defendant and the trier of fact by allowing false testimony, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the false testimony was material. *Johnston v. State*, 70 So. 3d 472 (Fla. 2011). In its response, the State argues that the mere fact that a witness may have made conflicting statements does not necessarily mean that her trial testimony was false. The State goes on to note that the trial court addressed Defendant's complaint as to the inconsistency with the evidence of Defendant's height: "It's not perjured testimony . . . [t]hey may think that you are the tall guy. That the short guy did it and the short guy had the gun and you didn't have a gun so you could be a principal to be guilty of robbery with no firearm." The State also notes that the prior statements were available for use during cross-examination, and that Defendant did raise these matters at that time. The State argues that Defendant has not shown that (1) the testimony given was false beyond being inconsistent with some prior statements or (2) that the prosecutor knew that the testimony was false. The State moves to have this claim denied. The Court agrees with the State's argument.

Instead of proving falsity, Godwin shows only that the witness's testimony was inconsistent. Moreover, Godwin fails to show that the testimony was material. Under *Giglio*, 405 U.S. at 154, false testimony is material "if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959) (ellipsis original)). "In other words, if there is a reasonable doubt about the effect of the false testimony on the jury verdict, then it may be that there is a reasonable likelihood that the false testimony could have affected the verdict." *Occhicone v. Crosby*, 455 F.3d 1306, 1309

(11th Cir. 2006), *cert. denied*, 549 U.S. 1122 (2007). The allegedly false testimony had no "reasonable likelihood" of affecting the verdict: the stop and search of Godwin's car was lawful; victim-Winkler's papers were found inside of Godwin's car; and two of the victims positively identified Godwin as one of the robbers when the victims were driven to where Godwin's car was stopped. Godwin fails to meet his burden of proving that the state court unreasonably applied *Giglio*.

Godwin also alleges (1) that the prosecutor violated *Giglio* by not disclosing the BOLO recording until after the suppression hearing and (2) that the prosecutor failed to correct the false testimony of Officer Trick about the description of the vehicle as described in the BOLO. First, because the BOLO recording was released to Godwin before trial, the information in the BOLO was available to cross-examine Officer Trick regarding his inconsistent testimony from the suppression hearing. Second, Officer Trick's inconsistent testimony about the description of the vehicle in the BOLO was not — as discussed immediately above — "material."[7]

Lastly, Godwin alleges that two police officers gave conflicting testimony about the procedures used for collecting, preserving, and releasing evidence, in other words, a chain of custody. Godwin contends that one of the officers testified falsely. First, the admissibility of evidence is a matter of state law generally not subject to

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[7] Godwin asserts this same issue as a claim under *Brady v. United States*, 373 U.S. 83 (1963), and *Agurs v. United States*, 427 U.S. 97 (1976), which claim is discussed next as ground three, sub-ground one.

federal review, as *McCullough v. Singletary*, 967 F.2d 530, 535–36 (11th Cir. 1992), *cert. denied*, 507 U.S. 975 (1993), explains:

> A federal habeas petition may be entertained only on the ground that a petitioner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved. *Bronstein v. Wainwright*, 646 F.2d 1048, 1050 (5th Cir. 1981). State courts are the ultimate expositors of their own state's laws, and federal courts entertaining petitions for writs of habeas corpus are bound by the construction placed on a state's criminal statutes by the courts of the state except in extreme cases. *Mendiola v. Estelle*, 635 F.2d 487, 489 (5th Cir. 1981).

Second, the prosecutor did not fail to disclose evidence, and the two officers were subject to cross-examination about the conflicting description of the procedures for collecting and preserving evidence. And third, the inconsistent testimony about the procedures was not — as discussed above — "material." Godwin is entitled to no relief under ground three.

Ground Three, Sub-Ground One:

Godwin alleges that the state violated his due process rights, as delineated in *Brady v. United States*, 373 U.S. 83 (1963), and *Agurs v. United States*, 427 U.S. 97 (1976), by not disclosing, before the suppression hearing, "favorable impeaching evidence regarding the BOLO." (Doc. 1 at 15) Godwin bases his claim on Officer Trick's testimony about the description of the car, which description was inconsistent with the description provided in the recording of the BOLO.[8] The post-conviction

[8] As discussed in the immediately preceding footnote, Godwin also raised this issue as a *Giglio* violation.

court both found this claim procedurally barred and denied this claim on the merits as follows (Respondent's Exhibit 46 at 162–63) (record citations omitted) (brackets and ellipsis original):

> Defendant alleges that his Fourteenth Amendment right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963) was violated by the State's failure to disclose favorable impeaching evidence regarding a BOLO (be on the lookout alert). Defendant alleges that Officer David Trick testified at a pretrial hearing that he received a BOLO from Officer Gary Felice for a large gray Oldsmobile, driven by two black males and including a clothing description. However, after the pretrial hearing, the State turned over a copy of the BOLO, which included the following description: "A large, dark blue Oldsmobile, a blue Oldsmobile, traveling eastbound on Broadway Boulevard and Orient." Defendant complains that the State failed to provide the BOLO before the pretrial hearing, where Defendant could have used it as favorable impeaching evidence.
>
> On September 21, 2006, Defendant filed a motion to suppress a bank statement and papers on the grounds that "defendant was unlawfully stopped and detained as a result of which the evidence was discovered. In other words, Defendant was stopped without any reasonable suspicion of (1) having committed a criminal offense; (2) committing a criminal offense; or (3) being about to commit a criminal offense." A hearing was held on October 20, 2006, and the Motion was denied on October 31, 2006. Defendant complains that he was not given a copy of the BOLO recording until after the hearing but prior to trial. Defendant alleges that there is a reasonable probability, that had the evidence been disclosed to Defendant in a timely manner, the result of the hearing would have been different.
>
> At the outset, this issue is procedurally barred since it should have been raised on direct appeal. In fact, it appears that a very similar issue was raised on direct appeal. *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008); *Robinson v. State*, 707 So. 2d 688, 693 (Fla. 1998); *Rose v. State*, 675 So. 2d 567, 569 n. 1 (Fla. 1996).

As the state court suggested, Godwin, in fact, argued that — based on Officer Trick's testimony and the BOLO — his rights under *Giglio* and *Brady* were violated

by the trial court's denial of his motion to suppress. (Respondent's Exhibit 4 at 38–49) Consequently, the issue was procedurally barred from review in the state post-conviction proceeding. Nevertheless, Godwin fares no better under a *Brady* due process analysis in post-conviction review than he fared under a Fourth Amendment search and seizure analysis on direct review. The post-conviction court rejected the *Brady* claim on the merits as follows (Respondent's Exhibit 46 at 163–64) (record citations omitted) (footnote 4 omitted):

> As to the merits, *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Hunter v. State*, 29 So. 3d 256 (Fla. 2008). To establish a *Brady* violation, a defendant must demonstrate that "(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced." *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003) (citing *Stickler v. Greene*, 521 U.S. 263, 281–82 (1999)). Evidence is prejudicial under *Brady* if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. *Jones v. State*, 998 So. 2d 573 (Fla. 2008). Thus, the proper inquiry is whether the outcome of the motion to suppress would have been different had Defendant been able to use the BOLO to impeach the officers' testimony regarding the color of the vehicle as provided in the BOLO.
>
> In applying the *Brady* test to the facts, the Court finds that there is no reasonable probability that had the BOLO been disclosed prior to the hearing on the motion to suppress, the outcome of the motion to suppress would have been different.[5] The motion to suppress would have been denied even if Defendant was able to use the BOLO to impeach Detective Trick's testimony or any other witness regarding the color of the vehicle as provided in the BOLO.
>
> [5] The Court notes that Defendant received a cassette tape of the BOLO prior to trial. At no time after receiving the cassette tape and before the commencement of trial did Defendant file

> any type of motion alleging a *Brady* violation. Further, the recording of the BOLO was admitted as evidence at trial. Defendant, who represented himself at trial, used the recording of the BOLO to point out inconsistencies between the BOLO and testimony elicited at trial, most notably Officer David Trick's testimony.

As discussed earlier in the introductory facts, the robbery occurred at 2:15 am and Godwin's car was stopped a few minutes later. The post-conviction court's order recites Officer Trick's testimony about his location when he heard the BOLO, his observing a car matching that description, his stopping that car, and the driver consenting to a search of the car. (Respondent's Exhibit 48 at 164–66) Godwin focuses on Officer Trick's testimony that the BOLO described the car as a "large gray color vehicle," however the BOLO actually described the vehicle's color as "dark blue." The post-conviction court's order continued as follows (Respondent's Exhibit 48 at 166) (record citations omitted):

> At the motion to suppress hearing, Officer Felice testified that when he transmitted the BOLO over the radio, he indicated that it was either blue or gray in color, and that the victim believed the car was an Oldsmobile. The BOLO was admitted as evidence by Defendant at trial and was played for the jury.
>
> A police officer may stop a vehicle and request identification from its occupants when the officer has founded or reasonable suspicion that the occupants of the vehicle have committed, are committing, or are about to commit a crime. *Hunter v. State*, 660 So. 2d 244, 249 (Fla. 1995). A "founded suspicion" is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge. *Id.* Several factors are relevant in assessing the legitimacy of a vehicle stop pursuant to a BOLO: "(1) length of time and distance from the offense; (2) route of flight; (3) specificity of the description of the vehicle and its occupants; and (4) the source of the BOLO information." *Id.*; *State v. Wise*, 603 So. 2d 61, 63 (Fla. 2d DCA

> 1992). Other information which is relevant to determine the validity of the stop includes the time of day, the absence of other persons or vehicles in the vicinity of the sighting, any other suspicious conduct, and other activity consistent with guilt. *Rodriquez v. State*, 948 So. 2d 912, 914 (Fla. 4th DCA 2007). The BOLO in this case was admitted as evidence by Defendant at trial and was played for the jury. The BOLO was issued for a "large, dark blue Oldsmobile, eastbound on Broadway." The suspects were described as two black males wearing white t-shirts.

The post-conviction court's well-reasoned order both individually addresses each of the four factors identified above in *Hunter* and concludes with the following analysis (Respondent's Exhibit 48 at 168–69):

> The totality of the circumstances appear sufficient to support the stop of Defendant: he was close to the location, in both time and distance, where the BOLO indicated the suspects had fled, he was traveling the same direction, on the same road as indicated in the BOLO, he was apprehended within 7 minutes of the BOLO which was issued almost immediately after the suspects fled the crime scene, and the BOLO was based on the description provided to law enforcement by the victim at the crime scene. Further, the description of the suspects, two black males, fit the occupants of Defendant's vehicle. While the description of the vehicle differed in both make and model, the vehicle which was apprehended was a similar make and similar color. Further, the Court notes that Defendant was pulled over sometime after 2:00 a.m., and was arrested at 2:30 a.m., a time where there is generally less vehicles on the roadway. As such, the trial court was correct in denying Defendant's motion to suppress. Deputy Trick had the requisite reasonable suspicion to stop Defendant.
>
> The Court finds that even if Defendant was able to impeach Officer Trick regarding the description of the vehicle as provided for in the BOLO, the trial court would have still denied Defendant's motion to suppress. The length of time from the report of the BOLO, the distance and location where Defendant was stopped, the route of flight, the source of the BOLO, the suspect's description as provided for [in] the BOLO, the time of the incident, and the similarities between Defendant's vehicle and the description provided for in the

> BOLO all support the stop. As such, Defendant cannot demonstrate prejudice as required by *Brady*.

The post-conviction court denied the *Brady* claim because Godwin failed to show prejudice, that is, he failed to show that he would have succeeded at the suppression hearing if the state had disclosed the audio of the BOLO before the suppression hearing. The final conclusion warrants repeating: "The length of time from the report of the BOLO, the distance and location where Defendant was stopped, the route of flight, the source of the BOLO, the suspect's description as provided for [in] the BOLO, the time of the incident, and the similarities between Defendant's vehicle and the description provided for in the BOLO all support the stop."[9] Although in his reply (Doc. 13 at 19–23) Godwin disagrees with the post-conviction court's application of facts to the four factors for determining reasonable suspicion for stopping his car, Godwin shows neither that the state court unreasonably determined the facts nor that the state court unreasonably applied *Brady*. Godwin is entitled to no relief under ground three, sub-ground one.

Grounds Four and Two:

Godwin alleges that his Fifth Amendment freedom from double jeopardy was violated when the trial court granted a judgment of acquittal on the charge of kidnapping but allowed the prosecution to proceed with the lesser included charge of false imprisonment (ground four). Also, Godwin alleges that he was denied his right

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[9] Also, as discussed earlier under ground one, sub-ground one, appellate counsel reminded Godwin that "during closing argument, you managed to effectively 'testify' that it *may have looked blue* depending on lighting." (italics original)

to the effective assistance of appellate counsel — specifically regarding the trial court's allowing the state to proceed with the false imprisonment charge — both because the record on appeal was incomplete and because the trial transcripts on the appeal were edited (ground two).

Ground Four:

The post-conviction court denied the double jeopardy claim in ground four as follows (Respondent's Exhibit 50 at 368–69):

> Defendant alleges that his Fifth Amendment right against Double Jeopardy was violated. Prior to jury deliberations, the trial court dismissed the kidnapping charge at the request of Defendant during a motion for judgment of acquittal. However, the trial court allowed the State to argue a lesser included charge of false imprisonment to the jury, pursuant to *Cole v. State*, 942 So. 2d 1010. Defendant argues that subsequently allowing the State to charge Defendant with false imprisonment after Defendant was granted an acquittal as to kidnapping constituted double jeopardy.
>
> Allegations of double jeopardy may be raised in a motion for postconviction relief. *Brown v. State*, 1 So. 3d 1231. Additionally, false imprisonment is considered a necessarily lesser-included offense of kidnapping. *State v. Sanborn*, 533 So. 2d 1169 (Fla. 1988); *Denmark v. State*, 604 So. 2d 845 (Fla. 2d DCA 1992). However, issues of double jeopardy can arise when a primary charge is dismissed on a judgment for acquittal, and a lesser included charge is subsequently instated. *Boone v. State,* 805 So. 2d 1040 (Fla. 4th DCA 2002), outlines the situation where instating a lesser included [charge] is inappropriate. The Fourth District Court of Appeal explains that, pursuant to *Francis v. State*, 736 So. 2d 97 (Fla. 4th DCA 1999), when the record shows that discussions concerning the motion were still ongoing even after the court granted the motion for acquittal, instatement of a lesser included offense of the dismissed charge can be appropriate. *Boone*, 805 So. 2d at 1040 (citing *Francis*, 736 So. 2d at 99). However, where the record shows that the motion for judgment of acquittal has been decided, without indication that the matter was still under consideration, a subsequent instatement of a lesser included

> offense of the dismissed charge is inappropriate. *Boone*, 805 So. 2d at 1041 (citing *Watson v. State*, 410 So. 2d 207, 209 (Fla. 1st DCA 1982)).
>
> The record reflects the following concerning the judge's ruling on the motion of acquittal for kidnapping and the lesser included offense of false imprisonment:
>
> > The Court: I'm going to grant his position to dismiss the kidnapping. Now we've got two robberies.
> >
> > [Prosecutor]: We have a lesser included offense of false imprisonment. This Court is granting the kidnapping, but the lesser included offense of false imprisonment — are you not saying it's not false imprisonment?
> >
> > The Court Let me read the statute.
>
> The record shows that although the trial court granted the dismissal of the kidnapping, debate concerning the motion for judgment of acquittal was not complete. Before moving on to the other offenses, the State began the argument that a lesser included offense should be included. After hearing arguments from both sides on the issue of the lesser included offense, the trial court ruled that false imprisonment could still be argued to the jury. The record shows that there was "ongoing legal argument on the defense motion" when the trial court initially granted part of Defendant's motion, and subsequently allowed the State to argue the lesser included offense. *Boone v. State*, 805 So. 2d 1040, 1041 (Fla. 4th DCA 2002). As such, pursuant to *Boone v. State*, Defendant's right against Double Jeopardy was not violated. The record conclusively shows that Defendant is not entitled to relief.

Godwin lists two cases to meet his burden of showing that the state court's decision is contrary to, or an unreasonable application of, a controlling Supreme Court decision. First, in his reply Godwin "contends that submitting the charge of false imprisonment to the jury, plainly subjected him to further 'fact finding proceedings going to guilt or innocence,' which is prohibited following a midtrial

acquittal by the court. Smalis, supra."[10] Second, after stating in his reply the proposition that "submitting the necessarily lesser-included offense of false imprisonment after acquittal of the greater offense of kidnapping violated double jeopardy," Godwin appends to the end of a string citation "see, e.g., Sanabria v. United States, 437 U.S. 54 (1978) (judgment of acquittal, even though erroneous, barred further prosecution on any aspect of the count)." (Doc. 13 at 24 and 26, respectively)

Godwin's reliance on *Smalis* and *Sanabria* is misplaced because both address whether the government's appeal constitutes a proceeding that leads to the possibility of a second jeopardy after the trial court has granted a judgment of acquittal for insufficiency of the evidence. Instead, Godwin's situation is controlled by *Smith v. Massachusetts*, 543 U.S. 462 (2005), which, as the post-conviction court decided, focuses on whether the judge has issued only an initial, preliminary, partial, conditional, or tentative ruling or issued a final ruling on the motion for a judgment of acquittal. The state court's following both *Boone v. State* and *Cole v. State* is consistent with *Smith*, 543 U.S. at 470, which explains as follows:

> It is important to note, at the outset, that the facts of this case gave petitioner no reason to doubt the finality of the state court's ruling. The prosecutor did not make or reserve a motion for reconsideration, or seek a continuance that would allow him to provide the court with favorable authority. Rather, the sidebar conference concluded, the court asked the prosecutor if he had "any further evidence," and he replied, "No. At this point, the Commonwealth rests their case." Nor did the court's ruling appear on its face to be tentative.

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[10] *Smalis v. Pennsylvania*, 476 U.S. 140 (1986).

To the contrary, in Godwin's trial the judge authorized the state to proceed with the necessarily lesser-included false imprisonment charge as part of the discussion on dismissing the kidnapping charge. The post-conviction court held that *Boone* allows advancement of the lesser-included offense, which is consistent with *Smith*, 543 U.S. at 470–71, which states that "some state courts have held, as a matter of common law or in the exercise of their supervisory power, that a court-directed judgment of acquittal is not effective until . . . the motion hearing is concluded, *Watson v. State*, 410 So. 2d 207, 209 (Fla. App. 1982)." The trial record supports the post-conviction court's determination that the discussions continued beyond the ruling on the motion for a judgment of acquittal on the kidnapping charge, including the trial court's ruling that the state could proceed with the lesser-included false imprisonment charge. (Respondent's Exhibit 19 at 591–93) Godwin fails to show that the state court's decision is contrary to, or an unreasonable application of, a controlling Supreme Court decision, and, as a consequence, Godwin is entitled to no relief under ground four.

Ground Two:

After reviewing the initial brief on direct appeal, Godwin complained to his appointed appellate counsel about an apparent discrepancy between the "Case Progress" report (Respondent's Exhibit 6) and the trial transcripts for events that occurred on December 19, 2006. In response to his complaint counsel advised Godwin, "As to whether or not the transcripts were changed or altered . . . I

seriously doubt it." (Godwin's Exhibit C attached to his petition at Respondent's Exhibit 21) (ellipsis original)

Godwin alleges that appellate counsel was ineffective — specifically regarding the trial court's allowing the state to proceed with the false imprisonment charge — both because the record on appeal was incomplete and because the trial transcripts on the appeal were edited. Twice Godwin presented this claim to the state courts in a petition alleging the ineffective assistance of appellate counsel. (Respondent's Exhibits 21 (2D09-2236) and 34 (2D10-1980)) The state appellate court denied both petitions in a one-sentence order. The respondent incorrectly argues that Godwin failed to "federalize" his claim in state court but correctly argues that the claim lacks merit.

Godwin preserved his motions for a judgment of acquittal at trial, and he identifies no part of the argument on the motions as missing from the transcript. Consequently, Godwin shows no prejudice because appellate review was based on the transcripts, not the erroneous "Case Progress" report. Moreover, as discussed above under ground four, Godwin's double jeopardy argument — whether the trial court's granting of a judgment of acquittal on the kidnapping charge barred the state from proceeding with the lesser-included false imprisonment charge — lacks merit. Godwin cannot show prejudice caused by counsel's not supplementing the appellate record, and, as a consequence, Godwin is entitled to no relief under ground two.

Ground Five:

Godwin alleges that his right to "due process under Kentucky v. Stincer, (1987)[,] was violated by his involuntary absence at the motion for new trial." (Doc. 1 at 19) At Godwin's request, the trial court appointed counsel (who was stand-by counsel during the trial) to represent Godwin at sentencing. At the conclusion of sentencing the trial court granted defense counsel's request to keep Godwin in the county jail for ten days because counsel anticipated that Godwin would "request us to file a motion for new trial, and I would like him to be available to argue it." (Respondent's Exhibit 11 at 244) However, two weeks later (at the hearing on the motion for new trial) Godwin was no longer in the county jail, leaving former stand-by counsel to argue the motion for new trial based on his personal knowledge of the case and Godwin's written comments to counsel in response to counsel's written motion. (Respondent's Exhibit 11 at 248)

Godwin asserted his due process claim in state court in his motion under Rule 3.850. The post-conviction court rejected this claim as procedurally barred as follows (Respondent's Exhibit 48 at 169–70) (brackets original):

> Defendant alleges that his Fourteenth Amendment right to due process under *Kentucky v. Stincer*, 482 U.S. 730 (1987) was violated by his involuntary absence at a hearing on his motion for new trial. Defendant claims that his presence at the hearing would have made the hearing more reliable, and enumerates a variety of arguments that he believes would have been improved had he been present to assist his attorney in making them. Defendant further argues that trial counsel was not familiar with Defendant's grounds for a new trial, and failed to fully argue Defendant's case. Last, Defendant claims that had he been present, there is a reasonable probability that the trial court would have granted his motion.

> However, the Court finds that this claim is procedurally barred because it could have been and should have been raised on direct appeal. *See Morris v. State,* 931 So. 2d 821, 832 & n.12 (Fla. 2006) (concluding that defendant's claim that his involuntary absence from discussions with the trial court during the penalty phase violated his constitutional right to be present at the bench conference was procedurally barred because it was not raised on direct appeal); *Phillips v. State*, 894 So. 2d 28, 35 & n. 6 (Fla. 2004) (concluding that defendant's claim that his absence from an unrecorded bench conference violated his constitutional right to be present at trial was procedurally barred because it was not raised on direct appeal); *Vining v. State*, 827 So. 2d 201, 217 (Fla. 2002) (determining that "substantive claims relating to Vining's absence [during critical stages of trial] are procedurally barred as they should have been raised either at trial or on direct appear"). As such, the Court must deny ground three of Defendant's Motions.

An applicant requesting a federal court to issue a writ of habeas corpus must present each claim to the state courts in the procedurally correct manner. *Upshaw v. Singletary*, 70 F.3d 576, 579 (11th Cir. 1995). The procedurally correct way to raise a claim of trial court error is on direct appeal. The alleged violation of due process presents a claim of trial court error that Godwin should have raised on direct appeal.

Before a claim is procedurally barred from federal review, a state court must reject reviewing the claim based on the procedural deficiency, as *Harris v. Reed*, 489 U.S. 255, 262 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)), explains:

> Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: "The state court must actually have relied on the procedural bar as an independent basis for its disposition of the case."

Also, the state court must declare that it is enforcing the procedural rule. "[I]f it fairly appears that the state court rested its decision primarily on federal law, 'this Court may reach the federal question on review unless the state court's opinion contains a plain statement' that its decision rests upon adequate and independent state grounds" because citing to the state procedural rule and stating that the claim "could have been raised on direct appeal" or in some prior proceeding is insufficient. *Harris v. Reed*, 489 U.S. at 261 and 266 (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)). Consequently, the initial question is whether the state court issued a "plain statement" applying the independent and adequate state procedural bar. As recited above, the state court's order (1) declares "that this claim is procedurally barred because it could have been and should have been raised on direct appeal," (2) cites several state cases that apply the state procedural bar to similar circumstances, and (3) concludes by denying the claim without further analysis.

Based on the post-conviction court's order and the appellate court's affirmance in a *per curiam* decision (Respondent's Exhibit 40), Godwin procedurally defaulted the substantive claim in ground five by not raising the claim on direct appeal. *Harmon v. Barton*, 894 F.2d 1268, 1273 (11th Cir. 1990) (finding that a state appellate "court's *per curiam* affirmance of the trial court's ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts").

As a general proposition, a federal court is precluded from addressing the merits of a procedurally defaulted ground unless the applicant can show "cause and

prejudice" or "manifest injustice." *Coleman v. Thompson*, 501 U.S. 72, 29–30 (1991); *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The basis for "cause" must ordinarily reside in something external to the defense. *Marek v. Singletary*, 62 F.3d 1295, 1302 (11th Cir. 1995). To show "prejudice," the applicant must show "not merely that the errors at his trial created the possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) (underlining original) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

Although he asserts no basis for "manifest injustice" to overcome the procedural default, Godwin alleges that trial counsel rendered ineffective assistance by not objecting to his involuntary absence from the hearing on the motion for a new trial. Proof of ineffective assistance of counsel is a basis for "cause and prejudice" to overcome a procedural default. *Murray v. Carrier*, 477 U.S. at 488–89. But "attorney error constitutes 'cause' only when there is a constitutional right to counsel at the stage when the error is committed." *Williams v. Turpin*, 87 F.3d 1204, 1209 (11th Cir. 1996) (citing *Carrier*, 477 U.S. at 488), *cert. denied*, 530 U.S. 1246 (2000).

Godwin argues that, under *Kentucky v. Stincer*, 482 U.S.730, 745 (1987), "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Although generally true, the statement fails to specifically address whether a motion for new trial is a critical stage. To the contrary, Godwin had no clearly established constitutional right to counsel at the motion for new trial,

at least not a right clearly established by the Supreme Court, as the below discussion in *Marshall v. Rodgers*, 569 U.S. 58, 61, 64 (2013), shows:

> [T]he parties here dispute whether two principles of law are clearly established under [Section 2254(d)(1)]. One is whether . . . a post-trial, pre-appeal motion for a new trial is a critical stage of the prosecution.
>
> . . . .
>
> The Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial.

Accord United States v. McLeod, 53 F.3d 322, 325 n.3 (11th Cir. 1995) ("Neither the Supreme Court nor this circuit has decided whether a hearing on a motion for a new trial, based upon ineffective assistance of counsel, is a 'critical stage' of prosecution to which the right to counsel attaches."). *But see United States v. Berger*, 375 F.3d 1223, 1226 (11th Cir. 2004) ("A post-conviction, pre-appeal Rule 33 motion[, Federal Rules of Criminal Procedure,] is considered part of a defendant's direct appeal, and the Sixth Amendment right to counsel attaches.") (citing case from the Seventh Circuit Court of Appeals as authority).

First, in his reply (Doc. 13 at 28) Godwin cites *United States v. Boyd*, 131 F.3d 951 (11th Cir. 1997), in opposing the respondent's arguments that a motion for new trial is not a "critical stage" and that "counsel was present and adequately argued" the motion for new trial. However, *Boyd* "hold[s] that the district court did not violate Boyd's Confrontation Clause or due process rights in denying his request to be present at the evidentiary hearing," 131 F.3d at 953, on Boyd's motion for new

trial because (1) "his exclusion from the hearing did not 'interfere[ ] with his opportunity for effective cross-examination' of the trial witnesses," *id.* at 954 (quoting *Stincer*) and (2) the defendant's presence was not required because he could not "contribute to the fairness of the procedure" as required under *Stincer*. *Id.* Second, Godwin cites *United States v. Novatom*, 271 F.3d 968, 1000 (11th Cir. 2001), as "rejecting" the respondent's argument. (Doc. 13 at 28) *Novatom* is inapposite because the issue was the defendant's involuntary absence from trial — not a post-trial motion — even though represented by counsel during his absence.

Nevertheless, even if Godwin had a right to the effective assistance of counsel under the Sixth Amendment at the motion for new trial, Godwin must show that his counsel rendered ineffective assistance.

Ground Five, Sub-Ground One:

Godwin alleges that trial counsel rendered ineffective assistance by not objecting to his involuntary absence from the hearing on the motion for new trial. Godwin asserted this claim in state court in his motion under Rule 3.850. As shown below, the post-conviction court rejected this claim after a lengthy analysis, as follows (Respondent's Exhibit 48 at 170–76) (some footnotes omitted):

> Defendant alleges that trial counsel . . . was ineffective for failing to object to Defendant's involuntary absence at the hearing on a motion for new trial. Defendant first alleges that he prepared and represented himself at trial, but elected to have counsel during the sentencing phase. Defendant claims that after his sentencing, his counsel requested the Court keep Defendant at the county jail so that he could argue a motion for new trial. Defendant alleges he was involuntarily absent at the motion for new trial.

Specifically, Defendant alleges that his counsel informed him in a letter that there was a ten day time period in which to file a motion for new trial, and that Defendant then wrote a letter to counsel setting out arguments he thought should be argued at the hearing on the motion for new trial. Defendant alleges that counsel "made vague and indefinite arguments based on the information provided by Defendant in his letter." Defendant claims that counsel failed to present testimonial and tangible evidence in support of the grounds for new trial. Last, Defendant alleges that effective counsel would have objected to the involuntary absence of Defendant from the proceeding. Defendant claims that counsel's failure to object resulted in deficient performance. Defendant further claims that Defendant's presence would have made the hearing more reliable and that [the] result of the proceedings would have been different.

On December 20, 2006, Defendant was convicted of Armed False Imprisonment and Robbery with a Firearm. Immediately after the jury returned a verdict, Defendant was sentenced to 15 years' Florida State Prison for Armed False Imprisonment, and life in prison for Robbery with a Firearm, set to run consecutive. At this point, Defendant was still proceeding *pro se*. The record reflects that on [the next day] Defendant was brought back to Court. The trial judge set aside the previously imposed sentence . . . because he failed to conduct a *Faretta* inquiry and [stand-by counsel] was appointed counsel for sentencing. Defendant was resentenced on January 4, 2007. Defendant was sentenced to 15 years' Florida State Prison for Armed False Imprisonment, and life in prison without parole for Robbery with a Firearm, both running concurrent[ly]. Defendant, by and through his undersigned counsel, filed a Motion for New Trial . . . and a hearing was held . . . . Defendant was not present at the hearing.

A portion of the argument presented by counsel at the hearing on the motion for new trial is as follows:

> The Court: Where is Mr. Godwin!
>
> [Defense Counsel]: I'm assuming he had been transported.
>
> . . . .
>
> I had filed on behalf of Mr. Godwin a standard, if you will, motion for new trial that alleges all the

grounds that are admissible for a new trial. I provided that information to Mr. Godwin. He wrote me back with his additional argument as to why he should be granted a new trial.

Basically three arguments. Ground one is that the testimony of three witnesses, Katrina Winkler, Kenya White and Sabrina Hearns, was clearly false, and compared to their testimony at the detention hearing . . . in looking at their deposition, police reports, *et cetera*, and not only was their testimony false, but the State Attorney knew it was false but presented it anyway; that as a result of that, the false testimony, is obviously in violation of *Gilio* (*sic*), *Mooney v. Hoolihan*, *Kyle v. Kansas*. On those grounds, defendant should be granted a new trial.

The Court: I'll deny that one. Deny that one.

[Defense Counsel]: Secondly, Mr. Godwin alleges there was a bank statement and I believe another document that was from Pleasure Time. One was bearing the name of Katrina Winkler. The other document bearing the name of Pleasure Time. Mr. Godwin, in effect, alleges that there was an invalid chain of custody. There was also some argument about when he was provided notice of those documents because if the Court will recall, I believe the State provided initially a digital copy of that inventory receipt, and then later on, he received an actual copy of that. And Mr. Godwin is alleging that those documents should not have been admitted and that there was a deficiency in the chain of custody. And he cited *United States v. Gray*, that because of the introduction of those documents, the jury would not have convicted him and that he should be granted a new trial because of the erroneous introduction of those documents.

. . . .

The Court: Deny No. 2.

> [Defense Counsel]: I'm believing that based on his notes, he's alleging that as a result of those, a violation of his due process rights.
>
> The Court: Deny No. 3.
>
> . . . .
>
> [Defense Counsel]: This is an additional ground I don't think I enunciated in reference to — I believe he's referring again to those items that were found: The papers with Pleasure Time in Miss Winkler's name. He's alleging that those items were tampered with improperly.
>
> The Court: As opposed to proper tampering, denied. [8]
>
> > [8] In the omitted portion of the transcript the trial court denies the standard 13 grounds included in the Motion for New Trial.

In his Motion, Defendant alleges that counsel "made vague and indefinite arguments based on the information provided by Defendant in his letter," and failed to present testimonial and tangible evidence in support of the grounds for new trial. Defendant further alleges that his presence would have made the hearing more reliable. At the [post-conviction] evidentiary hearing . . . Defendant testified as to [this] sub-ground . . . :

> Ms. Spradley:[9] And [Defense Counsel] testified about a letter that you had written to him. Can you explain to the Court what that was?
>
> > [9] Ms. Jennifer Spradley is the public defender who represented Defendant at the [post-conviction] evidentiary hearing . . . .
>
> Defendant: After I was sentenced, and upon arriving back to the county jail, I received legal mail and it was from [Defense Counsel]. And he apprised me that we had ten days to file a motion for new trial. I actually attached that letter as Exhibit F to my supplemental 3.850 motion. At that time, I responded to his letter, giving him the

grounds, the facts, and what I believed would be a substantial basis for a motion for new trial.

Ms. Spradley: But you weren't able to argue it because you weren't present.

Defendant: That's correct.

Ms. Spradley: Would you have argued it had you been present?

Defendant: Yes, ma'am.

Ms. Spradley: Is that what you wanted to happen?

Defendant: Yes, ma'am.

After reviewing the allegations, the court file, the testimony and the record, the Court finds that Defendant fails to meet the two prong test as set forth in *Strickland v. Washington*. When asserting a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. The Court finds that Defendant fails to establish prejudice. In order to establish prejudice, Defendant must prove that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the hearing on the motion for a new trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

As previously stated, the proper focus of inquiry is, whether if counsel had objected to Defendant's absence at the hearing on the motion for new trial, there is a reasonable probability that the outcome of the hearing on the motion for new trial would have been different. While Defendant's allegation that [Defense Counsel] requested the Court keep Defendant available for the purpose of arguing a motion for new trial at the resentencing hearing is true, the Court finds that Defendant has failed to establish how counsel's failure to object to his absence resulted in prejudice. Defendant failed to present any evidence or testimony at the evidentiary hearing to demonstrate how the outcome of the hearing on a motion for new trial would have been different had he been present. Defendant failed to explain what if any decisions and arguments made at the hearing would have been different if he had been present or how any different

decisions or arguments would have resulted in his motion being granted. *See Kormondy v. State*, 983 So. 2d 418, 436 (Fla. 2007). Defendant did not testify as to any additional arguments he would have presented at the hearing nor did he testify as to any deficiencies in [Defense Counsel]'s arguments. Further, Defendant failed to testify as to any specifics regarding the alleged testimony presented at trial or tangible evidence, which he alleged [Defense Counsel] failed to present in support of the arguments. The Court's confidence in the outcome of the hearing on the motion for new trial has not been undermined.

Additionally, to the extent Defendant is displeased with the thoroughness of [Defense Counsel]'s arguments, Defendant has failed to present any additional testimony or evidence at the evidentiary hearing to demonstrate that any of the arguments provided to [Defense Counsel] in his letter were meritorious. There was no testimony or evidence presented at the evidentiary hearing as to the alleged *Giglio* violation or the alleged invalid chain of custody. The record reflects that [Defense Counsel] argued the additional grounds, which were not included in the standard motion for new trial, based on arguments provided by Defendant.

Further, a review of the January 4, 2007 resentencing transcript reveals that Defendant requested an oral motion "to have a retrial, new trial." While presenting his arguments in support of the oral motion "to have a retrial, new trial," Defendant presented identical arguments relying on the same case law as the arguments presented by [Defense Counsel] at the [motion for new trial] hearing. After hearing Defendant's arguments, the Court stated, "Deny that request. Deny the motion for judgment of acquittal. Deny the new motion for renewal of judgment of acquittal. Deny the motion for perjury under alleged *Giglio*. I'm not going to grant a new trial there. I don't find there was any perjury."

After reviewing the allegations, the testimony and evidence presented at the [post-conviction] evidentiary hearing, the court file, and the record, the Court finds that Defendant has failed to prove the second prong of *Strickland* as the Defendant has failed to prove how counsel's alleged failure to object [to] Defendant's absence at the hearing on the motion for new trial resulted in prejudice. Defendant failed to present any evidence or testimony at the evidentiary hearing to demonstrate how the outcome of the hearing on a motion for new trial would have been different had he been present. As such, no relief is warranted.

The post-conviction court determined that Godwin proved no prejudice. Although he disagrees with the state court's determination, Godwin fails to show that the determination is unreasonable. Godwin identifies no argument that defense counsel failed to assert that would have changed the outcome of the proceeding. As *White v. Singletary*, 972 F.2d at 1220, explains, "The test has nothing to do with what the best lawyers would have done [or] even what most good lawyers would have done[, but] only whether some reasonable lawyer at the trial could have acted . . . as defense counsel acted . . . ." Godwin's contention that he would have "bolstered" counsel's argument if he was present at the hearing fails to show that counsel's performance was either deficient or prejudicial because "trial lawyers, in every case, could have done something more or something different." *Chandler v. United States*, 218 F.3d at 1313. Godwin is entitled to no relief under grounds five and ground five, sub-ground one.

Ground Six:

Godwin alleges that defense counsel rendered ineffective assistance by not objecting to the imposition of a vindictive sentence. The post-conviction court rejected this claim after a lengthy analysis, as follows (Respondent's Exhibit 48 at 176–80)

> Defendant alleges trial counsel . . . was ineffective for failing to object to an allegedly vindictive sentence, "the imposition of a life sentence after a jury trial, when the trial court urged the Defendant to accept an earlier plea offer of ten (10) years." Defendant alleges that the trial court urged him to accept the State's offer, and then imposed a harsher sentence than that offered.

In *Wilson v. State*, 845 So. 2d 142 (Fla. 2003), the Florida Supreme Court's landmark case on judicial vindictiveness, the Court applied a totality of the circumstances standard when determining whether a vindictive sentence had been imposed.

> "Judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other actors, should be considered in determining whether there is a "reasonable likelihood" that the harsher sentence was imposed in retaliation for the defendant not pleading guilty and instead exercising his or her right to proceed to trial. *See Smith*, 490 U.S. at 799, 109 S. Ct. 2201. The other factors that should be considered include but are not limited to: (l) whether the trial judge initiated the plea discussions with the defendant in violation of *Warner*; (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing.

Wilson, 845 So. 2d at 156.

In the present case, the State offered Defendant a plea deal on the morning of trial before *voir dire* had commenced. The colloquy when the plea offer was declined is provided below:

> The Court: Anything further?
>
> [Prosecutor]: I don't think he'll take anything, but I'll make an offer for the record. At least it's on there before we start trial. He's charged now, as I indicated, things are consecutive life sentences possible . . . but I will offer him the 10-year minimum mandatory?

The Court: Period?

[Prosecutor]: Period for all counts to run concurrently, no probation to follow, just 10 years.

The Court: And I would impose that if you were to accept it today, just so you'll know.

Mr. Godwin: No, sir.

The Court: You reject that offer? You understand what that means?

Mr. Godwin: Yes, sir.

The Court: It means you're 28. You would receive credit for all time served. Do you want to talk to [stand-by counsel] for a minute?

Mr. Godwin: The State cannot offer me credit time served right now.

The Court: I'll give it to you.

Mr. Godwin: I'm not taking the offer.

The Court: Do you want to talk to [stand-by counsel]?

Mr. Godwin: I don't need to.

The Court: That's fine. I'm just offering you the opportunity.

Mr. Godwin: Thank you. I thank you for offering it.

The Court: You realize if you're convicted it probably would not be a 10 year minimum mandatory?

Mr. Godwin: It's clear.

The Court: That's a possibility. I don't know if it's probable, but it's a possibility. Anything further?

[Prosecutor]: No, Judge.

> The record in this case indicates that the trial judge did not initiate the plea discussions, but simply responded to a plea offer initiated by the prosecutor . . . . The Court further finds that the trial judge did not exceed the limits of *Warner* by stating, "you realize if you're convicted it probably would not be a 10-year minimum mandatory." Rather, the Court finds that the trial court was simply alerting Defendant that the sentence imposed may be affected by the evidence and testimony introduced at trial. The Court did not voice its opinion on the reasonableness of the plea offer. *See Wilson v. State*, 845 So. 2d at 145, 157 (quoting *Byrd v. State*, 794 So. 2d 671 (Fla. 5th DCA 2001) (concluding that the comment made by the trial judge, "I think 30 years is a steal. He certainly won't get that low," exceeded the limits of *Warner* by stating that if Byrd chose to go to trial he "certainly" would not get that low.) Nor did the trial court urge the Defendant to accept the plea deal. *See Wilson v. State*, 845 So. 2d at 158 (quoting *Wilson*, 792 So. 2d at 602) (concluding that the comment made by the trial judge, "the court's offer was the bottom of the guidelines and in my opinion you should have taken it," violated the bounds of *Warner*.)

While there is a large disparity between the offered ten-year minimum mandatory sentence and the life sentence imposed, "a disparity between the sentence received and the earlier offer will not alone support a finding of vindictiveness . . . [H]aving rejected the offer of a lesser sentence, [the defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile." *Wilson*, 792 So. 2d at 603 (quoting *Mitchell*, 521 So. 2d at 190).[11] Further,

> the fact that a trial judge expresses an inclination to accept a state plea offer does not mean that he or she will be bound to impose the same sentence after hearing the trial, if the evidence raises concerns that were not perceptible from the usually abbreviated representations made to the court during the plea bargaining process. Factors such as the nature of the defendant's prior convictions, the degree of violence employed by the defendant during the commission of the

[11] Ellipsis and brackets original to *Wilson*'s quoting *Mitchell*.

> crime, the sophistication with which the charged offense was committed, and/or the physical or psychological suffering endured by the victim(s), are some factors that might lead the court to increase what it originally considered to be an acceptable sentence.

Wilson, 845 So. 2d at 157 (quoting *Prado v. State*, 816 So. 2d 1155, 1166 Fla. 3d DCA 2002)). During sentencing, the trial court stated, "After having heard the argument, excuse me, having heard the testimony of the witnesses, seeing the absolute fear in the face of one witness when she broke down in tears during cross-examination or direct examination, I understand exactly why they elected not to call the lady." The trial court further stated, "You beat that woman about the head and about the face with a firearm. It could have caused permanent damage to her. It did not." The only time the trial court mentioned the declined plea offer during sentencing was when it stated, "I've heard the testimony of the witnesses from the witness stand. I had no idea what this case would be about until I heard the testimony. I understand why the State offered the 10 years. It was rejected by you."

As such, the Court finds that the trial court did not impose a life sentence because Defendant elected to proceed with trial. Rather, the court finds the harsher sentence was imposed because of additional facts which emerged prior to sentencing, specifically, the violence employed by the defendant during the commission of the crime and the psychological suffering endured by the victims which was elicited through testimony during trial.

Accordingly, applying the totality of circumstances standard, the Court finds that Defendant's sentence is not vindictive. There appeared to be no coercion, no threats, and no implication of a harsher sentence for exercising any right. Defendant got a legal sentence that was within the prerogative of the trial court. That the sentence was greater than offered by the State does not, without more, translate to vindictiveness.

Although Defendant argues that his counsel was deficient in failing to object to a sentence that he thought was harsh, but within the sentencing authority of the trial court, no legal basis for the objection has been suggested. If there was no legal basis for defense counsel to object to the sentence, the failure to do so cannot be ineffective. As Defendant has not met his burden of demonstrating either ineffectiveness in counsel's representation

> of Defendant or prejudice as a result of any alleged deficiency, let alone both as required for relief on a postconviction motion, Defendant warrants no relief on this allegation.

The post-conviction court's determinations —the extent of Godwin's violence toward one of the victims (details learned by the sentencing court during trial) and the absence of a legal basis for objecting to a lawful sentence — refute Godwin's contention that the sentence was vindictive. In his reply Godwin correctly represents that "the trial court was aware of the charges against Petitioner at the motion to suppress hearing [and] that victim Winkler was allegedly hit in the head with a firearm" (Doc. 13 at 34), but not until trial did the court learn that the trauma Godwin inflicted upon a victim was the basis for the prosecutor's dismissing one of the robbery charges so that she would not have to testify — but she had to testify anyway because Godwin called her as a witness, during which examination she "broke down in tears" and exhibited "absolute fear." (Sentencing judges' comments, Respondent's Exhibit 11 at 242) *See Hitchcock v. Wainright*, 770 F.2d 1514, 1518–20 (11th Cir. 1985) (*en banc*) ("Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation."), *rev'd on other grounds*, 481 U.S. 400 (1987). Godwin fails to show that the post-conviction court's denial of ground six is an unreasonable application of *Strickland*.

Ground Six, Sub-Ground One:

Godwin alleges that trial counsel rendered ineffective assistance by not objecting to the sentencing court's (1) reliance on unreliable or materially false information and (2) consideration of both his rejecting the plea offer and his failing to show remorse. Each component of this consolidated claim is addressed separately.

A. Unreliable or Materially False Information:

Godwin alleges that the testimony of two of the victims was unreliable or materially false, and, consequently, the state court erred in relying on their testimony when determining a sentence. The post-conviction court rejected this claim as follows (Respondent's Exhibit 48 at 181, 183–84)

> Defendant alleges that the trial court considered and relied on evidence which was materially false and/or unreliable in imposing sentence. Defendant alleges that the trial court's statements referring to the fear inflicted by Defendant on Ms. Hearns "was shown to be unreliable in light" of the testimony presented at trial. Defendant further states that Ms. Hearn's testimony was unreliable because she could only identify one of the perpetrators. Additionally, Defendant alleges that the court's consideration of Ms. Winkler's testimony was also improper as it was materially false.
>
> . . . .
>
> To the extent Defendant is alleging trial counsel was ineffective for failing to object to the trial court's reliance on materially false or misleading evidence, the Court finds Defendant has failed to demonstrate deficient performance. The determination of the credibility of witnesses is within the province of the jury. *State v. Scheuschner*, 829 So. 2d 943, 944 (Fla. 4th DCA 2002). The jury found the witness' testimony credible and returned a guilty verdict as to Robbery with a Firearm and Armed False Imprisonment. Subsequent to sentencing, the Court heard arguments regarding perjured testimony resulting in a *Giglio* violation. The Court explicitly rejected Defendant's contention that the testimony of Ms. Hearns and Ms. Winkler was false

> and found that there was no perjured testimony. Thus, the trial court did not rely on false or misleading evidence during sentencing as the trial court had previously ruled that there was no perjured testimony. The trial court accepted the jury's verdict and adjudicated Defendant guilty of Robbery with a Firearm and Armed False Imprisonment. . . . As such, the Court finds no error, and trial counsel cannot be deemed ineffective for failing to raise a meritless issue. *Thompson*, 159 So. 2d at 662.

The basis for Godwin's allegation that the court relied on unreliable or materially false testimony is his disagreement with both the jury's credibility determination and the state court's ruling "that there was no perjured testimony," which ruling necessarily requires a factual determination. The credibility and factual determinations in state court bind a federal court in this circumstance. *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011), *cert. denied*, 568 U.S. 849 (2012), explains:

> Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review. Federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger,* 459 U.S. 422, 103 S. Ct. 843, 851, 74 L. Ed. 2d 646 (1983). We consider questions about the credibility and demeanor of a witness to be questions of fact. *See Freund v. Butterworth,* 165 F.3d 839, 862 (11th Cir. 1999) (*en banc*). And the AEDPA affords a presumption of correctness to a factual determination made by a state court; the habeas petitioner has the burden of overcoming the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

See also Baldwin v. Johnson, 152 F.3d 1304, 1316 (11th Cir. 1998) ("We must accept the state court's credibility determination and thus credit [counsel's] testimony over [petitioner's]."), *cert. denied*, 526 U.S. 1047 (1999) and *Devier v. Zant*, 3 F.3d 1445, 1456 (11th Cir. 1993) ("Findings by the state court concerning historical facts and

assessments of witness credibility are, however, entitled to the same presumption accorded findings of fact under 28 U.S.C. § 2254(d)."), *cert. denied*, 513 U.S. 1161 (1995).

Godwin fails to meet his burden to show that the post-conviction court unreasonably applied *Strickland* when the state court denied his claim that counsel rendered ineffective assistance by not objecting to the trial court's sentence, which he contends is based on unreliable or misleading information.

B. Refusal to Accept Plea:

Godwin alleges that, when determining his sentence, the state court considered his refusal to accept the plea offer. The post-conviction court rejected this claim as follows (Respondent's Exhibit 48 at 181–82)

> After reviewing the allegations, the court file, the testimony presented at the evidentiary hearing, and the record, the Court finds that Defendant has failed to demonstrate deficient performance. To the extent Defendant is alleging trial counsel was ineffective for failing to object to the trial court's consideration of Defendant's refusal to accept a plea, the Court finds Defendant has failed to demonstrate deficient performance. In [ground six discussed above], the Court found that Defendant's sentence was not vindictive as the harsher sentence was not imposed because Defendant refused to accept a plea offer. Rather, the Court found the harsher sentence was imposed because of additional facts which emerged prior to sentencing, specifically, the violence employed by Defendant during the commission of the crime and the psychological suffering endured by the victims which was elicited through testimony during trial. The record clearly demonstrates that the trial court did not consider Defendant's refusal to accept the plea offer when imposing its sentence. Trial counsel cannot be deemed ineffective for failing to raise a meritless issue. *Thompson v. State,* 159 So. 2d 650, 662 (Fla. 2002).

The post-conviction court determined that Godwin failed to prove that counsel was deficient for not objecting to the sentence as allegedly based on the sentencing court's having considered his rejection of the plea offer. The sentencing court's comments about hearing the victim's testimony and "seeing the absolute fear in the face of one witness when she broke down in tears during cross-examination or direct examination" (Respondent's Exhibit 11 at 242) and the post-conviction court's above determinations support an absence of proof of deficient performance. Godwin fails to meet his burden to show that the post-conviction court unreasonably applied *Strickland.*

C. Failure to Show Remorse:

Godwin alleges that, when determining his sentence, the state court considered his lack of remorse. The post-conviction court rejected this claim as follows (Respondent's Exhibit 48 at 182–83)

> Defendant also alleges that counsel was ineffective for failing to object to the trial court's consideration of Defendant's failure to show remorse. The relevant portion of the sentencing transcript is as follows:
>
> > The Court: After having heard the argument, excuse me, having heard the testimony of the witnesses, seeing the absolute fear in the face of one witness when she broke down in tears during cross-examination or direct examination, I understand exactly why [the state] elected not to call that lady.
> >
> > I don't have a doubt in my mind that you committed that robbery, sir. Not one doubt. I find those witnesses to be credible. My fear is, sir, if you're let out amongst the community again, the citizens of the State of Florida and citizens of the United States of America, you would be a —

> put them at risk. I don't think you've shown one ounce of remorse, not one ounce. I don't think you even acknowledge that you committed this crime. To this day, you don't acknowledge that. I don't have a doubt that you committed it.
>
> You beat that woman about the head and about the face with a firearm. It could have caused permanent damage to her. It did not.
>
> It is the judgment, sentence and order of the Court, count of robbery, life Florida State Prison, the rest of your natural life without parole.
>
> It is a 10-year minimum mandatory as to the sentence of false imprisonment with a firearm. 15 years concurrent.

To the extent Defendant is alleging trial counsel was ineffective for failing to object to the trial court's consideration of Defendant's failure to show remorse, the Court finds Defendant has failed to demonstrate deficient performance.

> "Although remorse and an admission of guilt may be grounds for mitigation of a sentence or a disposition, the opposite is not true. A trial court abuses its discretion and infringes on constitutional rights when it imposes a harsher sentence because a defendant exercises the right to remain silent, protests his innocence, or fails to show remorse."

German, 27 So. 3d at 132. The question then is whether the trial court relied on the defendant's lack of remorse in determining the sentence. After a careful review of the sentencing transcript, the Court finds that there is no suggestion that the trial court used defendant's lack of remorse against him. Again, the record demonstrates that the trial court imposed the statutory maximum because of the violence exhibited by Defendant during the commission of the crime and the fear and suffering endured by the victims. The trial court referred to Defendant's absence of remorse in support of his rejection of defense counsel's arguments for mitigation. *See German*, 27 So. 3d at 133 ("[I]n pronouncing sentence, there is no suggestion that the trial court used the defendant's silence, lack of remorse, or failure to admit guilt against him; quite the contrary. The court's comments were directed to the heinous nature of the

> crime."); *See also Shelton v. State*, 59 So. 3d 248 (Fla. 4th DCA 2011) (holding that the court commented on the defendant's lack of remorse in recognition that it lacked any grounds to mitigate his sentence). As such, the Court finds no error, and trial counsel cannot be deemed ineffective for failing to raise a meritless issue. *Thompson*, 159 So. 2d at 662.

The post-conviction court found "that there is no suggestion that the trial court used defendant's lack of remorse against him" in initially determining sentence, but "referred to Defendant's absence of remorse in support of his rejection of defense counsel's arguments for mitigation." According to the post-conviction court, the sentencing court arguably used Godwin's lack of remorse as a reason for not reducing the sentence, as compared to initially determining the sentence. The appellate court concurred with the post-conviction court's interpretation of the record. "[W]e agree with the post-conviction court that in context, the trial court's comments at sentencing were made in connection with its rejection of the argument for mitigation." (Respondent's Exhibit 41 at 3) Consequently, counsel had no basis to object. Godwin fails to meet his burden to show that the state courts unreasonably applied *Strickland*.

IV. CONCLUSION

Godwin fails to meet his burden to show that the state court's decision was either an unreasonable application of controlling Supreme Court precedent or an unreasonable determination of fact. As *Burt v. Titlow*, 571 U.S. 12, 19–20 (2013), states:

> Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose

> claims have been adjudicated in state court. AEDPA requires "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. [86, 103] (2011). "If this standard is difficult to meet" — and it is — "that is because it was meant to be." *Id.*, at [102]. We will not lightly conclude that a State's criminal justice system has experienced the "extreme malfunctio[n]" for which federal habeas relief is the remedy. *Id.*, at [103] (internal quotation marks omitted).

Godwin's application for the writ of habeas corpus (Doc. 1) is **DENIED**. The clerk must enter a judgment against Godwin and **CLOSE** this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

Godwin is not entitled to a certificate of appealability ("COA"). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his application. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a COA. Section 2253(c)(2) permits issuing a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a COA, Godwin must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Because he fails to show that reasonable jurists would debate either the merits of the grounds or the procedural issues, Godwin is entitled to neither a COA nor leave to appeal *in forma pauperis*.

A certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Godwin must obtain permission from the circuit court to appeal *in forma pauperis*.

ORDERED in Tampa, Florida, on October 23, 2020.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

EXHIBIT C

"Appendix C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14409-E

JONATHAN GODWIN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: ROSENBAUM and LUCK, Circuit Judges.

BY THE COURT:

Jonathan Godwin has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's March 30, 2021, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis*. Upon review, Godwin's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

EXHIBIT D

"Appendix D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN GODWIN - Appellant,

VS.

SEC'Y, DEP'T OF CORR., ET AL. - Appellee.

CASE NO.: 20-14409-E

APPLICATION FOR CERTIFICATE OF APPEALABILITY

MR. JONATHAN GODWIN #M07545
WAKULLA C.I.
110 MELALEUCA DRIVE
CRAWFORDVILLE, FLORIDA 32327

Appellant, pro se

JONATHAN GODWIN,
Appellant,

V. CASE NO.: 20-14409-E

SEC'Y, DEP'T OF CORR.,
Appellee.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, the pro se Appellant, JONATHAN GODWIN, states the following individuals or entities have an interest in the outcome of this case:

Altenbernd	State District Court Judge
Behnke, Debra	State Circuit Court Judge
Bock, Diane K.	Assistant Attorney General
Dimmig II, Howard	Public Defender
Dix, Raymond	Special Assistant Public Defender
Flynn, Sean P.	Magistrate Judge
Foster, Jr., Robert	State Circuit Court Judge (Former)
Godwin, Jonathan	Appellant
Holt, Julianne	Public Defender
Kelly	State District Court Judge
Koclanes, Peter	Assistant Attorney General

JONATHAN GODWIN,
Appellant,

V. **CASE NO.:** 20-14409-E

SECRETARY, DEPARTMENT, OF CORRECTIONS ET.AL.,

Lewis, Mark	Assistant State Attorney
Merryday, Steven	United states District Judge
Moody, Ashley	Attorney General
Santiago, Jorge	Private Attorney
Sandy, Ryan	Assistant State Attorney (Former)
Silberman	State District Court Judge
Sinardi, Nick	Private Attorney
Spradley, Jennifer	Assistant Public Defender
Taylor, Wesley	Alleged Codefendant
Wallace	State District Court Judge
Ward, Samantha	State Circuit Court Judge
Warren Andrews	State Attorney
Winkler, Katrina	Victim

Appellant has no knowledge of any publicly held corporation owing 10% or more of any parties stocks.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

The pro se Appellant JONATHAN GODWIN, pursuant to Fed. R. App. P. 22(b), and 28 U.S.C. §2253(c)(2), (3), moves this Court to issue a certificate of appealability.

I. STATEMENT OF CASE AND FACTS[1]

On July 5, 2006, at 2:15 am Godwin and another man entered the "Pleasure Time" Lingerie modeling established and, while threatening with a firearm, demanded money from three women inside the business. One of the women attempted to flee but was captured. Godwin struck one woman in the face with the firearm. When the women were unable to produce a key for the safe, one victim offered her purse, which Godwin took and fled in a car.

The women called the police and provided a description of both the robbers and the car. A few minutes later an officer stopped a car that matched the description of the assailants. During a brief search of the car the officer found papers that displayed the name of one of the victims, which name was provided in a radio transmission. Two of the victims were transported to the site of the traffic stop and positively identified Godwin and the other occupant as the two assailants. About a week later the police searched the car, which was secured in an impound lot, and beneath the rear seat an officer found a firearm that matched the description used in the robbery.

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1. For convenience Godwin will recite those facts relied on by the district court. (Doc. 24, pp. 1-3)

Despite the trial court's repeated attempts to dissuade him, Godwin persisted in proceeding pro se. Nevertheless, the trial court appointed stand-by counsel.[2] Godwin moved under the Fourth Amendment to suppress evidence obtained from the traffic stop. After an evidentiary hearing, the trial court denied the motion to suppress.[3] Although having earlier advised the trial court that the State would not offer a plea bargain (the prosecutor represented that Godwin had prior convictions for attempted first degree murder, robbery with a firearm, and burglary), the State offered before voir dire to resolve all charges for the mandatory minimum sentence of ten years' imprisonment. (Respondent's Exhibit 7 at 85 and 11 at 26-28) Immediately after accepting the verdict and excusing the jury, the trial judge (1) noted that Godwin had "absolutely terrorized" the three women, (2) commented that "I don't have a doubt in my mind that you did it – I don't have the first doubt – not after what I heard here", and (3) sentenced Godwin to life imprisonment because "you should not be out on the streets I don't think ever again, and I mean that." (Respondent's Exhibit 19 at 674-76) However, after realizing that he had not reviewed with Godwin his right to counsel at sentencing, the trial judge appointed counsel to represent Godwin at a resentencing, which occurred a few days later. At the re-sentencing the trial judge recalled (1) that a victim experienced "absolute fear" of Godwin "when she broke down in tears" while testifying under Godwin's

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[2] Both the trial court and the parties identified stand-by counsel as "ghost" or "shadow" counsel.

[3] The denial of the motion to suppress is the subject of ground one in this action.

examination and (2) that Godwin "beat that woman about the head and about the face with a firearm [which] could have caused permanent damage to her." (Respondent's Exhibit 11 at 242-43) The judge again sentenced Godwin to life imprisonment. (Id. at 209 and 243)

Godwin's direct appeal to the Second District Court of Appeals resulted in a per curiam affirmance. (Respondent's Exhibit 4) Godwin unsuccessfully sought collateral relief in state courts (Id. Exhibits 24, 26, 33, 41, 46, 48, 56), then sought habeas corpus relief pursuant to 28 U.S.C. §2254 in the Middle District Court (Tampa Division) on August 8, 2016. (Doc. 1) The district court subsequently denied the habeas petition without an evidentiary hearing, denied both a certificate of appealability and leave to appeal in forma pauperis. (Doc. 24)

II. STANDARD OF REVIEW

In *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the Supreme Court held that a prisoner seeking a certificate of appealability need only demonstrate a substantial showing of the denial of a constitutional right. A person satisfies this standard by demonstrating that jurist of reason could disagree with the district court's resolution of his constitutional claim(s) or that jurist could conclude the issue(s) presented are adequate to deserve encouragement to proceed further. See *Jones v. Sec'y Dep't of Corr.*, 607 F. 3d 1346, 1349 (11th Cir. 2010) ("Where, as here AEDPA ... applies, we look to the [district] court's application of [the act] to

petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id.* (Alteration adopted) (quoting *Lott v. Att'y Gen. Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010); see also, 28 U.S.C. §2253(c). Furthermore, pleadings drafted pro se and without the aid of counsel are to be construed liberally. See *Dupree v. Warden*, 715 F.3d 1295, 1299 (11th Cir. 2013) ("We liberally construe petitions filed pro se").

III. ISSUES PRESENTED

1. Whether the district court violated *Clisby v. Jones*, 960 F. 2d 925 (11th Cir. 1992) when it failed to address Godwin's claim that his Fourth and Fourteenth Amendment Rights against an unreasonable seizure under *Terry v. Ohio*, 392 U.S. 1 (1967), was violated, where the claim was exhausted and not procedurally defaulted?

In Ground One of his §2254 complaint, Godwin alleged, inter alia, that his Fourth and Fourteenth Amendment Rights against unreasonable search and seizure as articulated by *Terry v. Ohio*, 392 U.S. 1 (1967) was violated (Doc. 1, pp. 4-5). The basis for his challenge were that the "information relied upon by the stopping officer was not sufficient to justify the stop, and/or where the stopping officer's testimony regarding what he knew and when he knew it was proven to be false and/or misleading." (*Id.*)

Respondent argued that Godwin's claim were either foreclosed by *Stone v. Powell*, 428 U.S. 465 (1976), or that the stop was valid (Doc. 7, pp. 8-10). Nevertheless, the district court concluded:

> "Although as phrased above Godwin's ground might contest the lawfulness of the initial stop, Godwin conceded during the hearing on the motion to suppress that the officer had probable cause to stop his car ... Godwin stipulates in his application that he conceded the lawfulness of the stop. Petitioner conceded the stop based on the officer's testimony in a strategic move to strengthen his argument that the search exceeded the bounds of *Terry*...Consequently, in ground one Godwin challenges only the scope of the search, not the lawfulness of the stop." (Doc. 24, pp. 12)

The district court then limited Godwin's challenge "to the trial court's pre-trial denial of his motion to suppress the fruits of a search." (*Id.*) Thereafter, concluding that the *Stone* bar applies (*Ibid.*, pp. 12-13, 17-18)

Godwin's allegations merely set forth the supporting historical operative facts of his claim(s). (*Ibid.*) see *Dupree v. Warden*, 715 F. 3d 1295, 1299 (11th Cir. 2013) ("A habeas petitioner must present a claim in clear and simple language such that the district court may not misunderstand it.") Although, it is true that Godwin conceded the stop at the suppression hearing, the trial court's adoption of such concession was not an absolute waiver or abandonment of Godwin's standing to challenge the lawfulness of the stop. See *State v. Gaines*, 770 So.2d 1221, 1227 (Fla. 2000) ("[t]he Rule [3.190(h)] does not affect the inherent power of the trial court to reconsider, while the court has jurisdiction of the case and upon appropriate motion or objection by either counsel [at trial], a ruling previously made on a motion to suppress.") (quoting *Savoie*, 422 So.2d at 311-312); see also *State v. Ellis*, 491 So.2d 1296 (Fla. 3rd DCA 1996) (trial court should have reopen

suppression hearing)[4] As alleged in his complaint, "[Godwin] renewed his motion at trial," and "(through counsel) reasserted that Officer Trick did not have a well-found articulate suspicion to support the stop." (*Ibid.*; Doc. 7, Ex. 15, at pp. 357-59; Ex. 11 at pp. 251-52)

District courts must resolve all claims for relief raised in a habeas proceeding; see *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992). A "claim for relief" is defined as "any allegation of a constitutional violation"; allegations of distinct constitutional violations constitute separate claims for relief "even if other allegations arise from the same alleged set of operative facts." *Id.*

Against this backdrop, the district court's isolation of Godwin's claim challenging the lawfulness of the stop, notwithstanding *Stone*, violated the procedural requirements of *Clisby* when it failed to address Godwin's constitutional challenge that his right against an unreasonable seizure under *Terry*, *supra*, was violated.

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[4] Godwin's concession was the result of prosecutorial misconduct, i.e., suppression of favorable material evidence regarding the description of the Bolo – discussed below. Consequently, that is exactly what the Due Process Clause of the Fourteenth Amendment prohibits. See *California v. Trombetta*, 467 U.S. at 485 (The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and the trial court whenever government witnesses lie under oath.) (citing *Napue v. Illinois*, 360 U.S. 264, 269-272, 3 L. Ed. 2d (217, 79 S. Ct. 340, 98 ALR 406 (1935)).

Sub-Ground One[5]

(A) **Whether reasonable jurist would find the district court's application of AEDPA deference to Godwin's ineffective assistance of appellant counsel claim under *Evitts v. Lucy*, 469 U.S. 387 (1985) debatable or wrong, or conclude that the issue presented is adequate to deserve encouragement to proceed further, where Godwin made a prima facie case for relief?**

In Ground One sub-ground one of his §2254 complaint, Godwin alleged, inter alia, that appellate counsel rendered ineffective assistance by failing to supplement the record on appeal with the trial court's factual findings/rulings to the suppression motion. (Doc. 1, pp. 6-7) Specifically, alleging that "the trial court's findings that there was probable cause to effectuate the stop," was based on [Godwin's] concession, and the trial court's ruling was a product of materially false testimony." (*Id.*)[6]

The district court determined that appellate counsel's failure to supplement the record was tactical. (Doc. 24, pp. 15) That determination was premised solely on appellate counsel's letter to Godwin. (*Id.* at pp. 15-16)[7] That said, the district court's quotation of appellate counsel's letter, deserves the rule of completeness on

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5. The issues herein are presented in the same chronological order as set by the district court. (Doc. 24)

6. See Footnote 4, *supra.*

7. This circuit has concluded that, "questions of whether a decision by counsel was a tactical one is a question of fact." see *Bolender v. Singletary*, 16 F.3d 1547, 1556 n. 12 (11th Cir. 1994). Whether the tactic was reasonable, however, is a question of law and is reviewed de novo. see *Collier v. Turpin*, 177 F.3d 1148, 1199 (11th Cir. 1999) (citing *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)

the stated subject.[8] The next paragraph following the district court's quoted passage states:

> "Having said that, I also assume that the State will request the record supplement with the transcript of the rest of the hearing. I assume the State will argue harmless error in their Answer brief, based on your concession and whatever occurred in the second part of that hearing. This sets up a reply brief argument that the error cannot be deemed harmless, or the State would not have gone to the trouble of getting the rest of the transcript – depending of course on what you said at the hearing, and what the State argues. I also tried to deflect the concession by arguing that it came before you knew of the Bolo tape – which is probably true, but not shown in the ROA." (*Id.*)

The key contextual statement from the quoted paragraph is; "I also tried to deflect the concession by arguing that it came before you knew of the Bolo tape – which is probably true, but not shown in the ROA." The State Court Record up-to-said-point omits any *Giglio/Brady* argument/ruling concerning the *Terry* stop – mentioned above.[9]

Reviewing the record on appeal, as Godwin's appellate counsel had, any competent attorney worthy of his salt would've been remiss not to conclude, as counsel had, that Godwin's concession "came before [he] knew of the Bolo tape." Furthermore, Godwin apprised counsel by letter of the late disclosure. As such, supplementing the record would've been imperative, not only to support said

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[8] See Fed. R. Evid., 106

[9] Subsequent to an evidentiary hearing on Godwin's Fla. R. Crim. P. 3.850 motion, the postconviction court concluded that, "At no time after receiving the cassette tape and before the commencement of trial did [Godwin] file any type of motion alleging a *Brady* violation." (Doc. 7, Ex. 48 at pp. 7 n. 5)

conclusion, but as a legal basis to request relinquishment of jurisdiction, and an order for the trial court to conduct an evidentiary hearing. See *State v. Huggins*, 788 So.2d 238, 241 (Fla. 2001) ([We] relinquished jurisdiction of the direct appeal so that the trial court could conduct an evidentiary hearing on the habeas corpus petition [alleging a *Brady* violation] (citations and footnote omitted) Instead, appellate counsel made a tactical decision to not supplement the record, based on what he believed would be further concession by Godwin.[10] However, being apprised by Godwin of the *Brady/Giglio* violations, along with an apparent ignorance of applicable decisional law, appellate counsel presented an argument to the court that was doomed by his tactical decision (Doc. 7, Ex. 3). See *Jones v. State*, 998 So.2d 573, 581 (Fla. 2008) (Jones admits that his *Brady* claim was not preserved, because it was not addressed by the trial court.); see also *Padovano, Florida Appellate Practice*, §8.1, at pp. 148 (2007 ed.) ("The aggrieved party must obtain an adverse ruling in the lower tribunal to preserve an issue for review....without a ruling or decision, there is nothing to review.")

At first blush, appellate counsel's tactical decision seems plausible, until full review of the ROA and basic research has been conducted. Hence, appellate counsel's strategy was not sound, thus, rendering his performance deficient and

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[10] Counsel's assumptions are rebutted by the record, i.e., (1) Godwin's renewal of the suppression motion at trial, (2) Godwin's attempt to impeach Officer Trick at trial with the Bolo tape, and (3) Godwin's assertion (through trial counsel) that Officer Trick did not have an articulate well founded suspicion to support the stop – motion for new trial. (Doc. 7, Ex. 15 at pp. 357-59, 380-81; Ex. 11 at pp. 251-52)

well below an objective level of reasonableness. See *Huy nh v. King*, 95 F.3d 1052, 1057 (C.A. 11 (Ga.) 1996) ("We conclude that Huynh's counsel's tactical decision to delay the filing of a potentially meritorious suppression motion in order to later obtain more favorable federal habeas review was objectively unreasonable for several reasons.); see also *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) ("an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.")

Against this backdrop, due to appellate counsel's deficiency, Godwin was unable to demonstrate reversible error. See *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla. 1979) (In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error.); see e.g. *State v. G.B.*, 588 So.2d 253 (Fla. 1st DCA 1991) (State failed to provide a record which would justify reversal.)[11] Hence, appellate counsel's deficiency compromised the appellate process to such a degree as to undermine the correctness of the result. Therefore, but for appellate counsel's deficiency, there exists a reasonable probability of a different result of said proceedings.

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[11] Respondent(s) Answer Brief highlighted Godwin's shortcomings: "The record does not support Appellant's claim that the prosecutor fostered false testimony from witnesses; consequently cannot properly establish any Brady or Giglio claims upon the record presented for review." (Doc. 7, Ex. 2 at pp. 8, 17)

Consequently, reasonable jurist would find the district court's application of AEDPA deference to "the per curiam denial of Godwin's claim of ineffective assistance of appellate counsel was not an unreasonable application of *Strickland* (even under de novo review)", debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief (Doc. 24, pp. 17).

2. Whether reasonable jurist would find the district court's application of AEDPA deference to Godwin's claim under *Giglio v. United States*, 405 U.S. 150 (1972) debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin made a prima facie case for relief?

In Ground Three of his §2254 complaint, Godwin alleged, inter alia, that his due process rights under *Giglio v. United States*, 405 U.S. 150 (1972), were violated when the prosecutor intentionally solicited and/or failed to correct false and/or misleading testimony presented to the jury, and used to obtain his conviction. (Doc. 1, pp. 11) Godwin based his claim on the testimony of two key state witnesses, and one defense witness. (Id., pp. 11-13)

To establish a *Giglio* claim, a habeas petitioner must prove: "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony: and (2) such use was material, i.e., that there is any reasonable likelihood that the false testimony could ... have affected the judgment." See *Guzman v. Sec'y Dep't of Corr.*, 663 F.3d 1136, 1348 (11th Cir. 2011)

Mr. Justice Kennedy, speaking for the Supreme Court in *United States v. Dunnigan*, 507 U.S. 87, 94-95, 113. S. Ct. 1111, 122 L.Ed. 2d 445 (1993), a case involving a sentence enhancement under Federal Sentencing Guidelines 3C1.1, explained what constitutes perjury under the Federal criminal perjury Statute, 18 U.S.C. §1621:

"A witness testifying under oath or affirmation violates this statute if she [or he] gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. See 16 21(1); *United States v. Norris*, 300 U.S. 564, 574, 576, 81 L.Ed. 808, 57 S. Ct. 535 (1937). This federal definition of perjury by a witness has remained unchanged in its material respects for over a century. See *United States v. Smull*, 236 U.S. 405, 408, and n. 1, 59 L. Ed. 641, 35 S. Ct. 349 (1915) (tracing history of 16 21's predecessor, *Acts* of Mar. 4, 1909, ch. 321, 125, 35 Stat 1111). It parallels typical state-law definitions of perjury, see American Law Institute, Model Penal Code 241.1 (1985); 4 c. Torcia, *Wharton's Criminal Law* 601 (14th Ed. 1981), and has roots in law dating back to at least the Perjury Statute of 1563, 5 Eliz 1, ch. 9, see Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabeth Courts*, 24 Am J. Legal Hist. 145 (1980). See also *1 Colonial Laws of New York,* 1664-1719, ch. 8, pp. 129-130 (reprinting "An Act to Prevent Willful Perjury", enacted Nov. 1, 1683)" (citations omitted)

Here, Godwin's complaint alleged, inter alia, that the State's key witness Katrina Winkler falsely identified him as being the shorter of the two persons' accused of committing the offense(s). (Doc. 1, pp. 11; Doc. 7, Ex. 13 at pp. 165) On cross-examination, Godwin (acting pro se) attempted to extract the truth of her identification before the jury:[12]

> (*By Godwin*) **Q**. I want to kind of keep the category as you have noted and said: short and taller. Can you describe to the Court the height of these two gentlemen in some form of way: The height of these individuals?
>
> **A**. Well, I would guess your height would be probably about 5-8. 5-9, a hundred and eighty pounds and then the other guy was probably five or six inches taller than you. He was a slight bit thinner. He might have been 200 pounds.
>
> **Q**. You say five or six inches taller than me. Would that make him 6-foot-3?
>
> **A**. 6-foot-1.
>
> **Q**. One?
>
> **A**. Yes.
> (*Ibid.*; Doc. 7, Ex. 13 at pp. 186-87)

Nevertheless, Officers Gary Felice and David Trick testified that Godwin is 5-foot-8, while alleged codefendant Wesley Taylor is 5-foot-5 inches tall. (Doc. 7, Ex. 15 at pp. 342-43, 384)[13] Consequently, the prosecutor knew or should have known that Godwin was not the shorter of the two individuals who were accused

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[12] Godwin's defense was misidentification and police fabrication.

[13] Winkler testified at alleged codefendant Taylor's bond hearing six days after his and Godwin's arrest. (*Ibid*; Doc. 7, Ex. 45 at pp. 124-25)

of committing this crime. (*Ibid.*) see e.g. *Guzman, supra*, at 1349 (noting that knowledge of a prosecution team member is imputed to the prosecutor.) Godwin also alleged, inter alia, that Winkler testified to identifying Godwin from a photo-pack lineup. (*Ibid.;* Doc. 7, Ex. 13 at pp. 194) However, Detective Balkcom testified that Winkler failed to identify anyone (*Id.*; Doc. 7, Ex. 19 at pp. 537). Consequently, the prosecutor knew or should have known that Winkler failed to identify anyone from the photo lineup. (*Id.*) see e.g. *Guzman, supra.*

Suffice to say, Winkler gave false testimony concerning a material matter, i.e. identifying Godwin as the shorter assailant. Her testimony on cross-examination demonstrates her willful intent to provide false testimony by; (1) stating that the other assailant is "6-foot-1", when she already testified against alleged codefendant Taylor, who is in fact, shorter than Godwin and; (2) stating that she identified a photograph from the photo-pack lineup thought to be Godwin, when in fact, Winkler failed to identify anyone. See *Dunnigan, supra,* (Given the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken, there is ample support for the district court's finding.) 507 U.S. at 95-96. Hence, the prosecutor failed to correct the false and/or misleading statements made by Winkler.

Against this backdrop, reasonable jurist would find the district court's application of AEDPA deference, that "Godwin shows only that [Winkler's] testimony was inconsistent" as opposed to being false, debatable or wrong, or

conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief. (Doc. 24, pp. 18-19)[14]

Next, Godwin alleged, inter alia, that Officer Trick's (second key State's witness) suppression hearing and trial testimony, although consistent with each other, was false (Doc. 1, pp. 12). At trial, Officer Trick testified "that the Bolo (be on the lookout) description was for a large gray Oldsmobile heading eastbound on Broadway, with two black male suspects, but couldn't recall the clothing description. He performed a traffic stop of [Godwin's] vehicle based on the Bolo." (*Id.*) Godwin was driving a gray Cadillac (Doc. 7, Ex. 7 at pp. 111, 126-27). However, a belatedly disclosed Bolo tape revealed that the Bolo was for "a dark blue Oldsmobile, a blue Oldsmobile, travelling eastbound on Broadway Boulevard and Orient. The suspects were described as two black males wearing white t-shirts." (Doc. 24, pp. 24; Doc. 7, Ex. 48 at pp. 166) Consequently, the prosecutor knew or should have known that the description of the vehicle was "blue or dark blue", not "gray". He failed to correct the false statement made by Officer Trick. (*Ibid.*) see e.g., *Guzman, supra,* at 1349 (noting that false testimony of a prosecution team member is imputed to the prosecutor)

The district court concluded that, "because the Bolo recording was released to Godwin before trial, the information in the Bolo was available to cross-examine

[14] The district court's materiality analysis is discussed below.

Officer Trick regarding his inconsistent testimony from the suppression hearing and; (2) Officer Trick's inconsistent testimony about the description of the vehicle in the Bolo was not – as discussed immediately above – "material". (Doc. 24, pp. 20) However, Godwin wasn't allowed to impeach Officer Trick on cross-examination at trial with the Bolo tape. (Doc. 7, Ex. 15 at pp. 380-81) compare *United States v. Bueno-Sierra*, 99. F.3d 375, 379-80 (11th Cir. 1996) (holding that government's failure to disclose a key government witness's prior inconsistent statement until the seventh day of the trial was improper, but the defendant was not prejudiced because he was able to fully explore the issue on cross-examination); see also *United States v. McAnalley*, 535 Fed. Appx. 809, 814 (11th Cir. 2013) (where the prosecutorial misconduct involves delayed disclosure of certain evidence, we reverse "only if the defendant can show prejudice.") (citing *Bueno-Sierra*, 99 F.3d 375, 379 (11th Cir. 1996))[15]; and *Taylor v. State*, 845 So. 2d 301, 303 (Fla. 2nd DCA 2003) (The content of a dispatch is often relevant at a pretrial suppression hearing to establish that an officer acted with reasonable suspicion or probable cause.)

Suffice to say, the issue is straightforward, i.e., Officer Trick twice gave false testimony which was the lynch pin to an otherwise insufficient Bolo. See *e.g. King v. State,* 17 So.3d 728, 730-31 (Fla. 1st DCA 2009) (length of time and distance is a neutral factor (8 blocks away), stopped 7 minutes from 911 call ...

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15. "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. Rule 36-2.

vehicle differed, albeit not dramatically from the Bolo description both in color and in make ... as to the specificity factor then, we find little, if any support beyond race.) Furthermore, the prosecutor neither corrected the false statement(s), nor was Godwin allowed to impeach Officer Trick at trial with the best evidence, i.e., the Bolo tape. (Ibid.) see *United States v. Pruitt*, 174 F.3d 1215, 1218 n. 3 (11th Cir. 1999) ("we are severely troubled by the allegations of Moore's perjurious conduct in another case, and his violation of the Fourth Amendment in this case. As police officers well know, evidence which constitutes the "fruit of a poisonous tree" is inadmissible to prove a criminal suspect's guilt.) (citing *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L.Ed. 2d 441 (1963))[16]

Against this backdrop, reasonable jurist would find the district court's application of AEDPA deference, as mention above, debatable or wrong, or conclude that the issue presented is adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief.[17]

Finally, Godwin alleged, inter alia, that Detective Balkcom (defense witness) falsely testified about the procedure for checking in/out evidence that has already been stored. (Doc. 1, pp. 12-13) Godwin received, by demand for more discovery, Detective Balkcom's written report in a supplemental police report

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16. Godwin also asserted a *Brady* claim with the same operative facts – discussed immediately below.

17. The district court's "materiality" analysis is discussed below.

twelve days prior to trial. The first paragraph in Balkcom's report in relevant part states:

> "At 0815 hours I responded to the TPD Impound Lot where I photographed the suspect vehicle along with the contents of the interior that were plainly visible. I collected noted that several paper documents that were bills or bank statements had the name of the business (Pleasure Time) and/or the victim (Katrina Winkler). I returned to headquarters where I down loaded the photographs and printed out copies that I provided to Detective Johnson." (Doc. 7, Ex. 19 at pp. 529)

Ultimately, when pressed by Godwin about his report, Balkcom discounted its accuracy, and denounced it's conveyance that he collected evidence from Godwin's impounded vehicle. (Doc. 7, Ex. 19, at pp. 525-30) In order to rebut such implication, the prosecutor on cross-examination asked the following:

> (*by prosecutor*) **Q**. Whenever you open up evidence that has already been sealed or taped, when you go place that evidence back in the evidence locker for lack of a better term, what procedure do you have to do to ensure that you're the one that's had that evidence?
>
> **A**. We reseal it, initial the tape with our initials and date. (*Id.* at pp. 539-40)

Balkcom's initials and a date are marked on the evidence bag (*Id.*) However, that statement was false because that is not the procedure. (Doc. 1, pp. 13) Any evidence removed/returned to storage must be cataloged by the evidence custodian on shift (*Ibid.*).

Consequently, the prosecutor knew or should have known that the procedure for viewing evidence as stated by Detective Balkcom was false. See *Guzman, supra.* Detective Balkcom's supplement confirms his actions, and the prosecutor

did nothing to correct the false and/or misleading evidence presented to the jury, and impeded the defense from moving to object to the admissibility of said evidence on grounds of probable tampering, and illegal search and seizure (*Id.*).

The district court determined that Godwin alleges "that two police officers gave conflicting testimony about the procedures used for collecting, preserving, and releasing evidence, in other words, a chain of custody." Concluding that the "admissibility of evidence as a matter of state law not subject to federal review." (Doc. 24, pp. 20-21) Consequently, reasonable jurist would find the district court's application of AEDPA deference to said allegations, debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief.

MATERIALITY

As shown above, the district court did not give full consideration to the substantial evidence Godwin put forth in support of a prima facie case. Thus, concluding that Godwin failed to show that the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony. A conclusion – as shown above – reasonable jurist would find debatable or wrong. Moreover, the district court also concluded that, "Godwin fails to show that the testimony was material." (Doc. 24, pp. 19)

Here, there is a mixture of disclosure (even belatedly), nevertheless, the prosecutor, not only failed to correct testimony that he knew or should have known

was false, but also capitalized on it in closing rebuttal argument (Doc. 7, Ex. 19 at pp. 639-47); see *United States v. Stein*, 846 F.3d 1135, 1147-1148 (11th Cir. 2017) ("where the government not only fails to correct materially false testimony but also affirmatively capitalizes on it, a defendant's due process rights are violated despite government's timely disclosure of evidence showing the falsity.") Specifically, the prosecutor argued to the jury that, "the testimony that you have before you is Jonathan Godwin is the man who did it. Whether you believe it's short or tall, we don't know because that other person isn't here." (*Id.* at pp. 646) In other words, don't believe Officer's, Felice and Trick, testimony that Godwin is, in fact, 5-foot-8, while Taylor is 5-foot-5.[18] Furthermore, stating that, "Mr. Godwin drives a Cadillac that if you look at these pictures there's not a better description to give than blue or gray." (*Id.* at pp. 640) Howbeit, the prosecutor knew that the color description in the Bolo of the vehicle was blue or dark blue.[19] Even misleading the tribunal; "Judge, I chose to only introduce that one piece of evidence because that's the only piece that's also in the photograph. As it went down Charlie

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[18] Godwin's sentence of Life imprisonment was a direct result of this prosecutorial misconduct.

[19] This prosecutorial misconduct completely removed and disregarded Godwin's presumption of innocence by explicitly assuming his "identity as an assailant" through falsehoods. See *In Re Winship*, (The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principles whose enforcement 'lies at the foundation of the administration of our criminal law.') 397 U.S. at 364, 90 S. Ct at 1072.

Thompson collected this evidence at the scene, put it in their impound lot, which is where the evidence locker is located." (Doc. 7, Ex. 17 at pp. 484) However, the prosecutor introduced the two pieces of physical evidence linking Godwin to the crime scene. (Doc. 7, Ex. 15 at pp. 358-59)[20] Consequently, jurist of reason would find the district court's application of AEDPA deference to Godwin's *Giglio* claim, debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief (Doc. 24, pp. 18-21).

Sub-Ground One

(A) In Ground Three Sub-Ground One of his §2254 complaint, Godwin alleged, inter alia, that the prosecutor violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Agurs v. United States*, 427 U.S. 97 (1976), by not disclosing, before the suppression hearing, "favorable impeaching evidence regarding the Bolo." (Doc. 1, pp. 15) As mention above, Godwin's concession of the *Terry* stop antedated disclosure of the Bolo tape. Had Officers Felice and Trick "testified truthfully at the suppression hearing, [Godwin] would have never conceded" the *Terry* stop. (Doc. 13, pp. 23)

The district court correctly stated, "Godwin focuses on Officer Trick's testimony that the Bolo described the car as a 'large gray color vehicle', however,

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[20] Godwin's allegations concerning Det. Balkcom become moot upon a finding that the stop under *Terry* were deemed illegal.

the Bolo actually described the vehicle's color as dark blue." (Doc. 24, pp. 24) Nevertheless, the district court agreed that, "Godwin failed to show prejudice, that is, he failed to show that he would have succeeded at the suppression hearing if the State had disclosed the audio of the Bolo before the suppression hearing." (*Id.* At pp. 26)

Carnes, (now Chief) Circuit Judge, writing for the Court in *Smith v. Sec'y Dep't of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009) stated:

"There are two categories of Brady violations ... The first category of violations, often (and what we call) Giglio claims, occurs where the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false. *Agurs*, 427 U.S. at 103-04, 97 S. Ct. at 2397-98; *Giglio v. United States*, 405 U.S. 150,153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) (noting that the same rule applies when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears.") (internal quotation marks omitted)... Under this category of Brady violations the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103, 97 S. Ct. at 2397....

The other category of Brady violations occurs when the government suppresses evidence that is favorable to the defense, although the evidence does not involve false testimony or false statements by the prosecution. The defendant is

entitled to a new trial if he establishes that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 685, 105 S. Ct. 3375, 3383, 3385, 87 L. Ed. 2d 705 (1985) (internal quotation marks omitted) see also *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1565, 131 L. Ed. 490 (1995). A "reasonable probability" of a different result exists when the government's evidentiary suppression, viewed cumulatively, undermine confidence in the guilty verdict; see *Kyles*, 514 U.S. at 434, 436-37 n. 10, 115 S. Ct. at 1566, 1567 n. 10. *Id. (Ellipsis added)*

Ultimately, the district court applied neither "materiality" standard as set forth in *Smith*, *supra*. Even though, the former "material" standard would be applicable to the instant case. Consequently, reasonable jurist would find the district court's application of AEDPA deference to Godwin's Brady claim, debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief (*Ibid.*).

3. **Whether reasonable jurist would find the district court's application of AEDPA deference to Godwin's ineffective assistance of counsel appellate counsel claim under *Evitts v. Lucy*, 469 U.S. 387 (1985), debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin made a prima facie case for relief?**

In Ground Two of his §2254 complaint, Godwin alleged, inter alia, that newly appointed appellate counsel rendered ineffective assistance by failing to ensure a complete and accurate record be provided for direct appeal (Doc. 1, pp. 8-9). Specifically, Godwin alleged, inter alia, that judgment of acquittals argued on "the 19th of December, 2006", were omitted from the trial transcripts. Furthermore, had appellate counsel followed-up on Godwin's assertions, by conducting a thorough review of the record on appeal, counsel would have discovered an abundance of documentary evidence supporting Godwin's assertions – including the court docket. (*Id.*)

Notwithstanding, the numerous documents supporting Godwin's assertions, (Doc. 1, Ex. D), the court docket alone sufficed. See *Paez v. Sec'y Dep't of Corr.*, 28 Fed. Fla. L. Weekly C743 (11th Cir. Jan. 7, 2020) (Fed. R. Evid., 201 permits a court to "judicially notice a fact, (state court docket) that is not subject to reasonable dispute because it ...can be accurately and readily determined from sources whose accuracy cannot reasonably be question.") Consequently, newly appointed appellate counsel's failure to "fully investigate" the ROA, and have the record corrected and completed, rendered his performance deficient and well below an objective level of reasonableness. See *Hardy v. United States*, 375 U.S. at

280 ("The right to notice 'plain errors or defects' is illusory if no transcript is available at to one whose lawyer on appeal enters the case after the trial is ended."); see also *Evitts, supra,* at 836 ("A party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.")[21]

Suffice to say, had appellate counsel performed efficiently, the ROA would've demonstrated, among other meritorious challenges, a double jeopardy violation. The trial court (orally) granted a judgment of acquittal on the kidnapping count at the close of the State's case without reservation. Then reinstated the kidnapping count at the close of the defense, although granting a J.O.A. for the second time, yet, submitting the necessarily lesser included offense of false imprisonment to the jury, violating double jeopardy (*Ibid.*). Accord *Smith v. Massachusetts*, 543 U.S. 462 (2005); see also *Turner v. State*, 171 So.3d 722 (Fla. 2nd DCA 2015) (petition alleging ineffective assistance of appellate counsel granted... for this issue of whether the trial court violated the Double Jeopardy clause when it granted Petitioner's motion for judgment of acquittal and then later reversed its decision and instructed the jury on a lesser offense), appeal granted at *Turner v. State*, 41 Fla. L. Weekly D 1997 (Fla. 2nd DCA Aug. 31, 2016) ("trial court was prohibited by double jeopardy principles from setting aside judgment of

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[21] Respondent(s) conceded the omission responding to Godwin's petition alleging ineffective assistance of appellate counsel in State court (Doc. 7, Ex. 23 at pp. 12 n. 2).

acquittal on this charge, which was entered following the close of the State's case, and then reinstating it after the defense rested.") (citing *Smith v. Massachusetts,* 543 U.S. 462, *464*-65 (2005)); compare *United States v. Hill,* 643 F. 3d 807, 867 (11th Cir. 2011) ("Unlike in *Smith*, the matter was resolved satisfactorily before Hill went forward with his case.") Therefore, appellate counsel's deficiency compromised the appellate process to such a degree as to undermine the correctness of the proceedings. Hence, there is a reasonable probability of a different result of said proceedings.

Against this backdrop, reasonable jurist would find the district court's conclusion that, "Godwin cannot show prejudice caused by counsel's not supplementing the appellate record", debatable or wrong, or conclude the issue presented adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief. (Doc. 24, pp. 30-31)[22]

4. Whether reasonable jurist would find the district court's application of AEDPA deference to Godwin's ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin made a prima facie case for relief?

In Ground Six Sub-Ground One of his §2254 complaint, Godwin alleged, inter alia, that trial counsel rendered ineffective assistance by failing to object to improper considerations by the trial court in imposing statutory maximum

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[22] Godwin argued that the State Appellate Court's denial of his petition alleging ineffective assistance of appellate counsel, was not on the merits, and thus, subject to de novo review (Doc. 13, pp. 8-9).

sentences. (Doc. 1, pp. 27-29) Specifically, that the trial court relied on Godwin's "rejection of a plea, failure to show remorse and reliance on materially false and/or unreliable information in imposing sentence." (Id.)[23] Godwin contended that the State courts "factual findings should not be entitled to a presumption of correctness." (citing 28 U.S.C. §2254 (e)(1)) (Doc. 13, pp. 39)[24]

In sum, Godwin contended that the trial court violated due process by relying on materially false and/or unreliable information in imposing sentence. See *United States v. Valentine*, 21 F. 3d 395, 398 (11th Cir. 1994) (due process requires that sentence not be based on mistaken factual conclusions of which defendant received no notice). Particularly, the testimony of Winkler and Hearns (*Id.* At pp. 27-28). The district court noted that "credibility and factual determinations in state court bind a federal court in this circumstance." (Doc. 24, pp. 50) Although generally true, a state court's credibility finding on a particular issue may be overturned by a habeas court only when "evidence on this issue raised... is too powerful to conclude anything but" that the trial court's finding was unreasonable. See *Miller-El v. Dretke*, 545 U.S. 231, 265, 125 S. Ct. 2317, 162 L. Ed. 2d 196

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[23] *See Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11TH Cir. 1984) ("when 'the validity of the claim that [counsel] failed to assert is clearly a question of state law ... we must defer to the State's construction of its own law.")

[24] The First District Court of Appeals, State of Florida, has held that reliance on a criminal defendant's "failure to show remorse" is proper. See *Davis v. State*, 268 So. 3d 958 (Fla. 1st DCA 2019) rev. granted 2019 Fla. Lexis 1032 (Fla. June 11, 2019) Hence, Godwin will forego argument on his "failure to show remorse" at this time.

(2005); *Wiggins v. Smith*, 539 U.S. at 528 (state court "based its conclusion, in part, on clear factual error," and "this partial reliance on an erroneous factual finding ... highlights the unreasonableness of the state court's decision."); see also 28 U.S.C. §2254 (e)(1)

At sentencing, the trial court stated, "[that Godwin] beat [Winkler] about the head and about the face with a firearm. It could have caused permanent damage to her. It did not." (Doc. 1, pp. 28; Doc. 7, Ex. 11 at pp. 243) Winkler testified that she was beaten by the shorter individual with a firearm, and that Godwin was the shorter of the accuse. (*Id.*) However, Godwin is not the shorter of the two who were accused of committing this offense. See *Issue 2, supra*. Furthermore, as alleged, inter alia, "the trial court" wasn't sure if Godwin was the taller or shorter assailant (*Ibid.*; Doc. 7, Ex. 13 at pp. 266; Ex. 19 at pp. 619). In addition, the trial court relied on the unreliable testimony of Hearns (*Ibid.* at 27). Hearns' testimony reflects that she was able to identify Godwin as a suspect at the live show-up, but couldn't identify the other suspect because he held a different victim (*Ibid.*; Doc. 7, Ex. 18 at pp. 452-53). However, six days after the incident, Hearns and Winkler testified against alleged co-defendant Taylor, but not against Godwin (Doc. 1, Ex. F, G respectively). Hence, trial counsel's failure to object to the trial court's reliance on materially false and/or unreliable testimony, rendered his performance deficient, and well below an objective level of reasonableness. See *Craun v. State*, 38 Fla. L. Weekly D2289, D2290 (Fla. 2nd DCA 2013) ("Defense counsel should

have objected when the court stated that Craun was not entitled to leniency based not on Craun's own conduct, but on the conduct of his co-defendant, Peterson.")

Before trial, the trial court indicated that it would impose the State's plea offer of ten years upon a guilty plea from Godwin. (Doc. 24, pp. 44-45) In light of the statutory maximum imposition of life imprisonment based on improper considerations, but for counsel's deficient performance, there is a reasonable probability that Godwin would've received a much lesser sentence. This probability is sufficient to undermine confidence in the outcome of the sentencing proceedings. Accord. *Craun, supra,* (..."reliance on those considerations was improper, and it undermines our confidence in the outcome of the sentencing process."); see also *Brown v. Wainwright,* 785 F.2d 1457, 1465 (11th Cir. 1985) (The defendant must prove that the false evidence was "material" in obtaining his conviction or sentence or both.)

Consequently, reasonable jurist would find the district court's application of AEDPA deference, that "Godwin fails to meet his burden that the post-conviction court unreasonably applied *Strickland*... which he contends is based on unreliable or misleading information", debatable or wrong, or conclude that the issue presented adequate to deserve encouragement to proceed further, where Godwin has made a prima facie case for relief (Doc. 24, pp. 51).

WHEREFORE, Godwin respectfully request that the Court grant his application for a certificate of appealability, and any further relief deemed just and proper in accordance with the law.

/s/
MR. JONATHAN GODWIN #M07545, pro se

DECLARATION/CERTIFICATE OF SERVICE

HAVING READ the foregoing application, I affirm under penalties of perjury pursuant to 28 U.S.C. §1746; 18 U.S.C. §1621, all stated is true and correct; and certify that a true copy has been handed to officials at Wakulla C.I. for forwarding by prepaid U.S. postage to: Office of the Clerk, 56 Forsyth Street, N.W., Atlanta, Ga. 30303; and Peter Koclanes, AAG, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, Fl 33608-7013 on this ____ day of December, 2020.

/s/
MR. JONATHAN GODWIN #M07545, pro se
Wakulla Correctional Institution
110 Melaleuca Drive
Crawfordville, FL 32327-4963

EXHIBIT E

"Appendix E"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.: 20-14409-E

JONATHAN GODWIN - Appellant,

VS.

SEC'Y, DEP'T OF CORR., ET AL. - Appellee.

MOTION FOR REHEARING, RECONSIDERATION, VACATE OR MODIFY ORDER DENYING CERTIFICATE OF APPEALABILITY

MR. JONATHAN GODWIN #M07545
WAKULLA C.I.
110 MELALEUCA DRIVE
CRAWFORDVILLE, FLORIDA 32327

Appellant, pro se

JONATHAN GODWIN,
Appellant,

V. CASE NO.: 20-14409-E

SECRETARY, DEPARTMENT, OF CORRECTIONS ET. AL.,
Appellee.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, the pro se Appellant, **JONATHAN GODWIN**, states the following individuals or entities have an interest in the outcome of this case:

Altenbernd	State District Court Judge
Behnke, Debra	State Circuit Court Judge
Bock, Diane K.	Assistant Attorney General
Dimmig II, Howard	Public Defender
Dix, Raymond	Special Assistant Public Defender
Flynn, Sean P.	Magistrate Judge
Foster, Jr., Robert	State Circuit Court Judge (Former)
Godwin, Jonathan	Appellant
Holt, Julianne	Public Defender
Kelly	State District Court Judge
Koclanes, Peter	Assistant Attorney General

JONATHAN GODWIN,
Appellant,

V. **CASE NO.:** 20-14409-E

SECRETARY, DEPARTMENT, OF CORRECTIONS ET.AL.,

Lewis, Mark	Assistant State Attorney
Merryday, Steven	United states District Judge
Moody, Ashley	Attorney General
Santiago, Jorge	Private Attorney
Sandy, Ryan	Assistant State Attorney (Former)
Silberman	State District Court Judge
Sinardi, Nick	Private Attorney
Spradley, Jennifer	Assistant Public Defender
Taylor, Wesley	Alleged Codefendant
Wallace	State District Court Judge
Ward, Samantha	State Circuit Court Judge
Warren Andrews	State Attorney
Winkler, Katrina	Victim

Appellant has no knowledge of any publicly held corporation owing 10% or more of any parties stocks.

MOTION FOR RECONSIDERATION, VACATE OR MODIFY

The pro se Appellant, **Jonathan Godwin**, pursuant to Fed. R. Civ. P. 59(e) and 11th Cir. R. 27-2, moves this Honorable Court to reconsider, vacate, or modify its March 30, 2021 order denying the Application for Certificate of Appealability. The following hereto is in support thereof:

1. On October 23, 2020, the Middle District Court (Tampa Division) in a fifty-six (56) page slip opinion, denied Godwin's 28 U.S.C. § 2254 complaint after reaching the merits, along with a Certificate of Appealability and leave to proceed in forma pauperis. (Doc. 24)

2. Godwin timely filed a Notice of Appeal, separately applied for a Certificate of Appealability and leave to proceed in forma pauperis with this Court.

3. On March 30, 2021, this Court denied the Application for a Certificate of Appealability, stating that Godwin failed to make the requisite showing "that reasonable jurists would find both: (1) the merits of an underlying claim; and (2) the procedural issues that he seeks to raise." (citing *Slack v. McDaniel*, 529 U.S. 473, 478 (2000)).

4. The district court in *Slack, intra*, "invoked the abuse of the writ doctrine to dismiss with prejudice" his petition without reaching the merits. *Slack*, then sought "to challenge the dismissal of claims as abusive." 529 U.S., at 479-480. However, the Ninth Circuit Court of Appeals denied *Slack* a Certificate of Probable Cause

(C.P.C.), a necessary requirement to effectuate an Appeal of the dismissal of a 28 U.S.C. §2254 complaint[1]. Ultimately, the U.S. Supreme Court granted certiorari, and concluded:

> Where a district court has *rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds.* We hold as follows: *Where the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable whether the district court was correct in its procedural ruling.* 529 U.S., at 484, 120 S. Ct. 1595 (emphasis added).

5. In *Miller-El v. Cockrell*, the United States Supreme Court reaffirmed that in *Slack*, "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 537 U.S., at 338, 123 S. Ct. 1029 (2003).

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[1] Pre - AEDPA the issuance of a C.P.C. was required to effectuate an appeal, and thus, the equivalent to a Certificate of Appealability. See *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1099 (1983) (must make a substantial showing of the denial of a federal right); see e.g. 28 U.S.C. § 2253(c)(2).

6. The district court rejected Godwin's constitutional claims on the merits, and therefore, to satisfy 28 U.S.C. § 2253(c), Godwin was only required to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S., at 484, 120 S. Ct. 1595.

WHEREFORE, based on the foregoing, Godwin respectfully request that the Court reconsider, vacate, or modify its order requiring Godwin to show both that reasonable jurists would find debatable the district court's assessment of; (1) the merits of the underlying claim(s), and (2) the procedural issue(s), where the district court rejected Godwin's claims on the merits as opposed to dismissing them on procedural grounds.

/s/

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Crawfordville, FL 32327-4963

EXHIBIT F

"Appendix F"

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

v.

JONATHAN GODWIN,
Defendant.
_____/

CASE NO.: 06-CF-013197

DIVISION:

ORDER GRANTING AN EVIDENTIARY HEARING IN PART; ORDER DENYING IN PART

THIS MATTER is before the Court on Defendant's Motion for Postconviction Relief, filed on August 25, 2010 and Defendant's Supplemental Motion for Postconviction Relief, filed on December 6, 2011. The Court, having considered the Motions, the court file, and the record, finds as follows:

PROCEDURAL HISTORY

On July 24, 2006, Defendant and Co-Defendant were charged with seven counts, with the following applying to Defendant: (1), Armed Burglary of a Structure in violation of Florida Statutes 810.02(1) and (2)(b) and 775.087(2); (3), Kidnapping (possession of firearm) in violation of Florida Statutes 787.01(1)(a) and 775.087(2); (5), Robbery (with a firearm, less than $300) in violation of Florida Statutes 812.13(1) and (2)(a) and 775.087(2); (6), Robbery (with a firearm, more than $300, less than $20,000) in violation of Florida Statutes 812.13(1) and (2)(a) and 775.087(2); and (7), Attempted Robbery (with a firearm, less than $300) in violation of Florida Statutes 812.13(1) and (2)(a), 775.087(2) and 777.04. (*See* Indictment, previously attached in the Court's January 3, 2012 Order). On December 20, 2006, Defendant was found guilty of Armed False Imprisonment and Robbery with a Firearm. (*See* Judgment, previously attached in the Court's January 3, 2012 Order). Defendant was sentenced to 15 years

imprisonment for the Armed False Imprisonment, and life imprisonment without parole on the Robbery with a Firearm, both running concurrent. (*See* Sentence, previously attached in the Court's January 3, 2012 Order). Defendant filed a notice of appeal on January 19, 2007. The Second District Court of Appeal affirmed Defendant's sentence and judgment on December 19, 2008. Defendant timely filed his initial Motion for Postconviction Relief on August 25, 2010. Defendant filed a Memorandum of Law and Facts in Support of the Motion for Postconviction Relief on December 17, 2010. Defendant filed a Motion for Leave to Supplement Postconviction Motion and a Motion for Access to Original Court Documents on February 9, 2011. On August 3, 2011, Defendant filed a Motion for Pretrial Transcripts to be Transcribed. On November 11, 2011, this Court granted Defendant's request to supplement his Motion for Postconviction Relief and dismissed Defendant's request for pretrial transcripts to be transcribed. Defendant filed his Supplement Motion for Postconviction Relief on December 6, 2011. The State filed its Response on May 15, 2012.

DISCUSSION[1]

OVERVIEW

Defendant filed his initial Motion for Postconviction Relief on August 25, 2010. Defendant filed a Memorandum of Law and Facts in Support of the Motion for Postconviction Relief on December 17, 2010. Defendant filed his Supplement Motion for Postconviction Relief on December 6, 2011. After reviewing all three documents, this Court finds that the initial Motion and the Supplemental Motion raise the same claims, with the Supplemental Motion including some additional exhibits. As such, this Court will predominantly refer to the

[1] References to Defendant's Supplemental Motion for Postconviction Relief are cited as *SMPR*, x. References to the State's Response are cited as *SR*, x. References to the trial transcript are cited as *T*, x.

Supplemental Motion throughout this Order. In his timely, sworn Supplemental Motion for Postconviction Relief, Defendant raises the following six grounds:

1. Defendant's Fourteenth Amendment right to Due Process under *Giglio v. U.S.*, 405 U.S. 150 (1972) was violated when the state intentionally solicited and/or failed to correct false or misleading evidence presented to the jury and used to obtain his conviction.
    a. Secondary Argument: Defendant's Fourteenth Amendment right to Due Process under *Brady v. Maryland*, 373 U.S. 83 (1963) was violated by the State's failure to disclose favorable impeaching evidence.

2. Defendant's Fifth Amendment Right against Double Jeopardy was violated when, after the jury was sworn, the State orally amended the information charging armed kidnapping to armed false imprisonment.

3. Defendant's Fourteenth Amendment Right to Due Process under *Kentucky v. Stincer*, 482 U.S. 730 (1987) was violated by his involuntary absence at a hearing on a motion for new trial.
    a. Secondary Argument: Counsel was ineffective for failing to object to the absence of Defendant.

4. Defendant's Fourteenth, Fifth and Article I § 9 Right to Due Process was violated by imposition of a vindictive sentence, thus constituting fundamental error.
    a. Secondary Argument: Counsel was ineffective for failing to object to the imposition of a life sentence.

5. Trial court committed fundamental error when it improperly considered Defendant's right to maintain his innocence and failure to show remorse when imposing Defendant's sentence, thus violating Defendant's Fifth and Fourteenth Amendment Rights to Due Process.
    a. Secondary Argument: Defendant's Fifth and Fourteenth Amendment rights to Due Process under *Townsend v. Burke*, 334 U.S. 736 (1948) were violated when the trial court relied on materially false or unreliable information when sentencing Defendant, thus constituting fundamental error.
    b. Tertiary Argument: Counsel was ineffective for failing to object to the trial court's consideration of Defendant's plea rejection, Defendant's failure to show remorse, and trial court's reliance on materially false and/or unreliable information when imposing Defendant's sentence.

6. Defendant's Fourteenth Amendment Right to Due Process and access to the courts was violated by the denial of the trial court to provide transcripts needed for Defendant to petition the U.S. Supreme Court.

In the Court's January 3, 2012 Order Denying Defendant's Motion for Access to Original Court Documents, Denying Defendant's Supplemental Motion for Postconviction Relief in Part; Ordering State to Respond in Part, the Court denied Defendant's Ground Two, Ground Four, Ground Five, Ground Five Sub-ground One and Ground Six. The Court ordered the State to respond to Defendant's remaining grounds. After considering Defendant's remaining grounds and the State's response, the present order now follows:

STRICKLAND STANDARD

In his Motion, Defendant alleges ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), the Supreme Court of the United States established the standards of an ineffectiveness inquiry:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> ....
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction...has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.
>
> ....
>
> ...the proper standard for attorney performance is of reasonably effective assistance.

Thus, effective assistance of counsel does not mean that a defendant must be afforded errorless counsel, or that future developments in law must be anticipated. *Meeks v. State*, 382 So. 2d 673, 675-76 (Fla. 1980). Additionally, when ineffective assistance is alleged, the burden is on the person seeking collateral relief to allege the grounds for relief, specifically, and to

affirmatively establish whether prejudice resulted. *See Downs v. State*, 453 So. 2d 1102, 1108 (Fla. 1984) (citing *Strickland*, 466 U.S. at 693). The test for prejudice is:

> [T]hat there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

Accordingly, a defendant claiming ineffective assistance of counsel in a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 has the burden to prove: (1) counsel's deficient performance deprived defendant of his or her constitutionally protected right to counsel; and (2) counsel's deficient performance changed the outcome of the proceeding and deprived defendant of a fair trial. *See id.* at 686-87.

However, even if a defendant's allegations are sufficient to state a claim for relief, a motion may be summarily denied, without an evidentiary hearing, if the record conclusively refutes the allegations and demonstrates that the defendant is not entitled to relief. *See Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993). An evidentiary hearing will be required unless the motion is facially insufficient, or the record demonstrates that the defendant is not entitled to relief. *See id.* Additionally, at an eidentiary hearing on a claim of ineffective assistance of counsel, the "court must be highly deferential to counsel, and in assessing the performance, every effort must 'be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Ferrell v. State*, 918 So. 2d 163, 170 (Fla. 2005) (quoting *Strickland*, 466 U.S. at 689).

I. GROUND ONE, AND GROUND ONE SUB-GROUND ONE, OF DEFENDANT'S SUPPLEMENTAL MOTION FOR POSTCONVICTION RELIEF

In Ground One of his Supplemental Motion for Postconviction Relief, Defendant alleges that his Fourteenth Amendment Right to Due Process under *Giglio v. United States*, 405 U.S. 150 (1972) was violated. *SMPR*, 5. He bases this claim on three specific occurrences. First, Defendant claims that the State knowingly allowed State witness Katrina Winkler to provide false testimony that Defendant was the shorter of two men who robbed her. *SMPR*, 5–6. Defendant argues that the State knew this testimony was false or misleading because the criminal report affidavits show that Defendant is five feet, eight inches tall, while his co-defendant is five feet, five inches tall. *SMPR*, 6. Second, Defendant argues that the criminal report affidavits show that the co-defendant attacked State witness Katrina Winkler, and not Defendant, contrary to her testimony. *SMPR*, 7. Finally, Defendant argues that because Katrina Winkler was unable to identify him in a photo line-up, her later in-court testimony is misleading or false. *SMPR*, 7–8.

To establish a *Giglio* claim that the state intentionally deceived or misled the defendant and the trier of fact by allowing false testimony, it must be shown that: (1), the testimony given was false; (2), the prosecutor knew the testimony was false; and (3), the false testimony was material. *Johnston v. State*, 70 So.3d 472 (Fla. 2011). In its response, the State argues that the mere fact that a witness may have made conflicting statements does not necessarily mean that her trial testimony was false. *SR*, 1–2 (citing to *Rockerman v. State*, 773 So.2d 602 (Fla. 1st DCA 2000)). The State goes on to note that the trial court addressed Defendant's complaint as to the inconsistency with the evidence of Defendant's height: "It's not perjured testimony... [T]hey may think that you are the tall guy. That the short guy did it and the short guy had the gun and you didn't have a gun so you could be a principal to be guilty of robbery with no firearm." *SR*, 2 (citing *T*, 618, 618–619). The State also notes that the prior statements were

available for use during cross-examination, and that Defendant did raise these matters at that time. The State argues that Defendant has not shown that (1), the testimony given was false beyond being inconsistent with some prior statements; or, (2), that the prosecutor knew that the testimony was false. The State moves to have this claim denied. The Court agrees with the State's argument. Therefore, Defendant's Ground One is **DENIED**.

In Ground One of his Supplemental Motion for Postconviction Relief, Defendant also alleges that his Fourteenth Amendment right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963) was violated by the State's failure to disclose favorable impeaching evidence regarding a BOLO (be on the lookout) alert. *SMPR*, 12. Defendant states that witness Officer David Trick testified at a pretrial hearing that he received a BOLO from Officer Gary Felice for a large gray Oldsmobile, driven by two black males and including a clothing description. *SMPR*, 12. However, during trial the State turned over a copy of the BOLO, which included the following description: "A large, dark blue Oldsmobile, a blue Oldsmobile, traveling eastbound on Broadway Boulevard and Orient." *SMPR*, 12; T, 320. Defendant complains that the State failed to provide the BOLO before the pretrial hearing, where Defendant could have used it as favorable impeaching evidence. *SMPR*, 13. Under *Brady*, Defendant bears the burden to show prejudice and must demonstrate that favorable material evidence was willfully or inadvertently suppressed by the State. *Hannon v. State*, 941 So.2d 1109 (Fla. 2006); *Archer v. State*, 934 So.2d 1187 (Fla. 2006); *Deren v. State*, 985 So.2d 1087 (Fla. 2008).

In its Response, the State agrees that Defendant is entitled to an evidentiary hearing on this sub-ground. It is therefore **ORDERED AND ADJUDGED** that Defendant's Supplemental Motion for Post-Conviction Relief is hereby **GRANTED** to the extent that Defendant is entitled to an evidentiary hearing on Ground One, Sub-Ground One.

II. Ground Three, and Ground Three Sub-ground One of Defendant's Supplemental Motion for Postconviction Relief

In Ground Three of his Motion for Postconviction Relief, Defendant argues that his Fourteenth Amendment right to Due Process under *Kentucky v. Stincer*, 482 U.S. 730 (1987) was violated by his involuntary absence at a hearing on his motion for new trial. *SMPR*, 16. Defendant claims that his presence at the hearing would have made the hearing more reliable, and enumerates a variety of arguments that he believes would have been improved had he been present to assist his attorney in making them. *SMPR*, 17–18.

A claim pursuant to *Kentucky v. Stincer*, 482 U.S. 730 (1987) may be raised in a motion for postconviction relief. *Donaldson v. State*, 985 So.2d 63, 64 (2008). A criminal defendant's presence is required "at any stage of the criminal proceeding that is critical to the outcome if [the defendant's] presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). Defendant additionally alleges that trial counsel was ineffective for failing to object to the hearing on a motion for new trial proceeding without Defendant. *SMPR*, 18. Defendant argues that trial counsel was not adequately familiar with Defendant's grounds for a new trial, and failed to fully argue Defendant's case. *SMPR*, 19. Defendant claims that, had he been present, there is a reasonable probability that the trial court would have granted his motion. *SMPR*, 20.

In its Response, the State agrees that Defendant is entitled to an evidentiary hearing on these grounds. *SR*, 3. It is therefore **ORDERED AND ADJUDGED** that Defendant's Supplemental Motion for Post-Conviction Relief is hereby **GRANTED** to the extent that Defendant is entitled to an evidentiary hearing on Ground Three and Ground Three, Sub-ground One.

III. Ground Four Sub-ground One of Defendant's Supplemental Motion for Postconviction Relief.

In Ground Four Sub-ground One Defendant alleges that his trial counsel was ineffective for failing to object to Defendant's sentence as vindictive. *SMPR*, 22. Defendant states that if trial counsel had objected to the trial court's allegedly vindictive sentence, the results of the sentencing proceeding would have been different. *SMPR*, 23. An allegation of counsel's failure to object to a vindictive sentence is a cognizable claim under a motion for postconviction relief. *St. Pierre v. State*, 966 So.2d 972, 975 (Fla. 2d DCA 2007).

In its Response, the State argues that whether Defendant's sentence was vindictive is controlled by factors described in *Wilson v. State*, 845 So.2d 142 (2003), including judicial participation in plea negotiations followed by a harsher sentence, if the trial judge initiated negotiations, if the trial judge urged the defendant to take the plea, the disparity between the offer and the ultimate sentence, and the lack of facts to explain the increased sentence. *SR*, 5–6. However, the factors under which a court can consider whether a sentence is vindictive are not limited to those listed above. In *Wilson*, the Supreme Court adopted a "totality of the circumstances" test where circumstances giving rise to a presumption of vindictiveness shifts the burden to the State to produce affirmative evidence on the record that dispels the presumption. *Wilson*, 845 So.2d 156–157. While the State asks the Court to treat this issue as purely one of law, the Court finds that, under the totality of the circumstances, Defendant has made a facially sufficient case showing a presumption of vindictiveness. Therefore, the State should be afforded the opportunity to rebut this presumption by producing affirmative evidence from the record at an evidentiary hearing. If the sentence ultimately proves vindictive, the Court must then take evidence at an evidentiary hearing as to whether trial counsel was ineffective for failing to object to the sentence.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Supplemental Motion for Post-Conviction Relief is hereby **GRANTED** to the extent that Defendant is entitled to an evidentiary hearing on Ground Four Sub-ground One.

IV. Ground Five Sub-ground Two of Defendant's Supplemental Motion for Postconviction Relief

In Ground Five Sub-ground Two, Defendant alleges that trial counsel was ineffective for failing to object to the trial court's consideration of Defendant's refusal to accept a plea, failure to show remorse, and reliance on materially false or misleading evidence. *SMPR*, 27–28. Defendant argues that he would have received a lesser sentence had trial counsel objected to the sentence. *SMPR*, 28. In its Response, the State agrees that Defendant is entitled to an evidentiary hearing on this sub-ground. It is therefore **ORDERED AND ADJUDGED** that Defendant's Supplemental Motion for Post-Conviction Relief is hereby **GRANTED** to the extent that Defendant is entitled to an evidentiary hearing on Ground Five Sub-ground Two.

CUMULATIVE ORDER

The Court warns Defendant that, pursuant to Rule 3.850(m),

> A prisoner, who is found by a court to have brought a frivolous or malicious collateral criminal proceeding, or who knowlingly or with reckless disregard for the truth brought false information or evidence before the court, is subject to disciplinary procedures pursuant to the rules of the Department of Corrections. The prisoner may also be prohibited from filing future pro se pleadings attacking his or her conviction and sentence.
>
> *See Fla. R. Crim. P.* 3.850(m).

It is therefore **ORDERED AND ADJUDGED** that Defendant's Supplemental Motion for Post-Conviction Relief is hereby **GRANTED** to the extent that Defendant is entitled to an evidentiary hearing on Ground One Sub-ground One, Ground Three, Ground Three Sub-ground One, Ground Four Sub-ground One, and Ground Five Sub-ground Two.

It is further **ORDERED** that Ground One is **DENIED.**

This matter will be set for a status hearing at the Court's earliest convenience to determine Defendant's entitlement to counsel, and, once the Court schedules Defendant's evidentiary hearing, Defendant will be transported for that hearing. As such, it is unnecessary for Defendant to file either a motion for appointment of counsel or motion for transport.

Defendant may not appeal until such time as this Court has entered a final Order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 22nd day of June, 2012.

DEBRA K. BEHNKE, Circuit Judge

Attachments:

Trial Transcript, pgs.: 618–619, 320

Send copies to:

Jonathan Godwin
#M07545
Mayo Correctional Institution
8784 W. U.S. Highway 27
Mayo, FL 32066

Mark Lewis, Esq.
Assistant State Attorney for Div. C
419 N. Pierce Street
Tampa, Florida 33602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished to Jonathan Godwin (DC # M07545), Mayo Correctional Institution, 8784 W. U.S. Highway 27, Mayo, Florida 32066 by regular U.S. Mail; and to Mark Lewis, Assistant State Attorney for Division C, 419 Pierce Street, Tampa, Florida 33602, by inter-office mail on this 12 day of June, 2012.

Linda Lopez, Judicial Assistant

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice Division

STATE OF FLORIDA **CASE NO.: 06-CF-013197**

v.

JONATHAN GODWIN, **DIVISION: C**
Defendant.
_____/

ORDER DENYING GROUND ONE SUB-GROUND ONE, GROUND THREE, GROUND THREE SUB-GROUND ONE, GROUND FOUR SUB-GROUND ONE, AND GROUND FIVE SUB-GROUND TWO OF MOTIONS FOR POSTCONVICTION RELIEF

THIS MATTER is before the Court on Defendant's Motion for Postconviction Relief filed on August 25, 2010, and Defendant's Supplemental Motion for Postconviction Relief, filed December 5, 2011, pursuant to Florida Rule of Criminal Procedure 3.850.[1] On June 13, 2012, the Court granted an evidentiary hearing on ground one sub-ground one, ground three, ground three sub-ground one, ground four sub-ground one, and ground five sub-ground two. On September 27, 2012, the Court held the evidentiary hearing. Written arguments were due on November 9, 2012. After reviewing the allegations, the testimony, evidence and arguments presented at the September 27, 2012, evidentiary hearing, the court file, and the record, the Court finds as follows:

PROCEDURAL HISTORY

On July 24, 2006, Defendant and Co-Defendant were charged with seven counts, with the following applying to Defendant: (1), Armed Burglary of a Structure in violation of Florida Statutes 810.02(1) and (2)(b) and 775.087(2); (3), Kidnapping (possession of firearm) in violation of Florida Statutes 787.01(1)(a) and 775.087(2); (5), Robbery (with a firearm, less than

[1] The Court notes that Defendant's Motion for Postconviction Relief and Defendant's Supplemental Motion for Postconviction Relief will hereinafter be referred to as Defendant's Motions.

$300) in violation of Florida Statutes 812.13(1) and (2)(a) and 775.087(2); (6), Robbery (with a firearm, more than $300, less than $20,000) in violation of Florida Statutes 812.13(1) and (2)(a) and 775.087(2); and (7), Attempted Robbery (with a firearm, less than $300) in violation of Florida Statutes 812.13(1) and (2)(a), 775.087(2) and 777.04. *See* Indictment, attached. On December 20, 2006, a jury found Defendant guilty of Armed False Imprisonment and Robbery with a Firearm. *See* Verdict Form, attached. Defendant was sentenced to 15 years' Florida State Prison for Armed False Imprisonment, and life in prison without parole for Robbery with a Firearm, both running concurrent. *See* Judgment and Sentence, attached. The Second District Court of Appeal affirmed the conviction and sentence, and the mandate issued December 17, 2008. *See* Mandate, attached.

In his timely, properly sworn Motions for Postconviction Relief, Defendant alleges six grounds.[2] *See* Motion for Postconviction Relief, Supplemental Motion for Postconviction Relief, attached. On January 3, 2012, the Court denied ground two, including ground two sub-ground one and ground two sub-ground two, ground four, ground five, ground five sub-ground one and ground six, and ordered the State to respond to ground one, ground one sub-ground one, ground three, ground three sub-ground one, ground four sub-ground one and ground five sub-ground two. *See* Order Denying Defendant's Motion for Access to Original Court Documents; Denying Defendant's Supplemental Motion for Postconviction Relief in Part; Ordering State to Respond in Part, attached. After considering Defendant's remaining grounds and the State's response, on June 13, 2012, the Court denied ground one and granted an evidentiary hearing on ground one sub-ground one, ground three, ground three sub-ground one, ground four sub-ground one and

[2] In his Motions, Defendant alleges a total of six grounds. However, some of the grounds include secondary arguments. For clarity, the Court will provide Defendant's numbering sequence as it appears in his Postconviction Motions: Ground 1, Ground 1(d), Ground 2, Ground 2(a), Ground 2(b), Ground 3, Ground 3(a), Ground 4, Ground 4(a), Ground 5, Ground 5(a), Ground 5(b), Ground 6.

ground five sub-ground two. *See* Order Granting an Evidentiary Hearing in Part; Order Denying in Part, attached. On September 27, 2012, this Court held an evidentiary hearing on the remaining claims. At the evidentiary hearing, defense counsel requested additional time to file written arguments. The Court granted the request and gave the parties until November, 9, 2012, to file written arguments. *See* September 27, 2012 Case Progress Sheet, Evidentiary Hearing Transcript, attached. Defense counsel filed written arguments on November 9, 2012. *See* Defendant's Argument in support of 3.850, attached.

DISCUSSION

OVERVIEW

At the evidentiary hearing, the Court heard testimony from Defendant, Defendant's trial counsel, Nick Sinardi[3], and the assistant state attorney who prosecuted Defendant, Ryan Sawdy, on the following five grounds:

1(d). Defendant's Fourteenth Amendment right to Due Process under *Brady v. Maryland*, 373 U.S. 83 (1963), was violated by the State's failure to disclose favorable impeachable evidence;

3. Defendant's Fourteenth Amendment Right to Due Process under *Kentucky v. Stincer*, 482 U.S. 730 (1987), was violated by his involuntary absence at a hearing on a motion for new trial;

3(a). Ineffective assistance of counsel: Trial counsel, Nick Sinardi, was ineffective for failing to object to the absence of Defendant at the motion for new trial;

4(a). Ineffective assistance of counsel: Trial counsel, Nick Sinardi, was ineffective for failing to object to the imposition of a life sentence after a jury trial, when the trial court urged the Defendant to accept an earlier plea offer of ten (10) years;

5(b). Ineffective assistance of counsel: Trial counsel, Nick Sinardi, was ineffective for failing to object to the trial court's consideration of Defendant's plea rejection, Defendant's failure to show remorse, and trial court's reliance on materially false and/or unreliable information when imposing Defendant's sentence.

[3] The Court notes that Defendant represented himself at trial. Nick Sinardi was appointed standby counsel, and was appointed counsel for sentencing purposes.

STRICKLAND STANDARD

In his Motion, Defendant alleges ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), the Supreme Court of the United States established the standards of an ineffectiveness inquiry:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> ....
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction...has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.
>
> ....
>
> ...the proper standard for attorney performance is of reasonably effective assistance.

Thus, effective assistance of counsel does not mean that a defendant must be afforded errorless counsel, or that future developments in law must be anticipated. *Meeks v. State*, 382 So. 2d 673, 675-76 (Fla. 1980). Additionally, when ineffective assistance is alleged, the burden is on the person seeking collateral relief to allege the grounds for relief, specifically, and to affirmatively establish whether prejudice resulted. *See Downs v. State*, 453 So. 2d 1102, 1108 (Fla. 1984) (citing *Strickland*, 466 U.S. at 693). The test for prejudice is:

> [T]hat there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

Accordingly, a defendant claiming ineffective assistance of counsel in a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 has the burden to prove: (1) counsel's deficient performance deprived defendant of his or her constitutionally protected right to counsel; and (2) counsel's deficient performance changed the outcome of the proceeding and deprived defendant of a fair trial. *See id.* at 686-87.

GROUND ONE SUB-GROUND ONE

In ground one sub-ground one, Defendant alleges that his Fourteenth Amendment right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963) was violated by the State's failure to disclose favorable impeaching evidence regarding a BOLO (be on the lookout alert). Defendant alleges that Officer David Trick testified at a pretrial hearing that he received a BOLO from Officer Gary Felice for a large gray Oldsmobile, driven by two black males and including a clothing description. However, after the pretrial hearing, the State turned over a copy of the BOLO, which included the following description: "A large, dark blue Oldsmobile, a blue Oldsmobile, traveling eastbound on Broadway Boulevard and Orient." Defendant complains that the State failed to provide the BOLO before the pretrial hearing, where Defendant could have used it as favorable impeaching evidence.

On September 21, 2006, Defendant filed a motion to suppress a bank statement and papers on the grounds that "defendant was unlawfully stopped and detained as a result of which the evidence was discovered. In other words, Defendant was stopped without any reasonable suspicion of (1) having committed a criminal offense; (2) committing a criminal offense; or (3) being about to commit a criminal offense." *See* Motion to Suppress, attached. A hearing was held on October 20, 2006, and the Motion was denied on October 31, 2006. Defendant complains that he was not given a copy of the BOLO recording until after the hearing but prior to

trial. Defendant alleges that there is a reasonable probability, that had the evidence been disclosed to Defendant in a timely manner, the result of the hearing would have been different.

At the outset, this issue is procedurally barred since it should have been raised on direct appeal. In fact, it appears that a very similar issue was raised on direct appeal. *Green v. State,* 975 So. 2d 1090, 1105 (Fla. 2008); *Robinson v. State,* 707 So. 2d 688, 693 (Fla. 1998); *Rose v. State,* 675 So. 2d 567, 569 n. 1 (Fla. 1996). As to the merits, *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Hunter v. State,* 29 So. 3d 256 (Fla. 2008). To establish a *Brady* violation, a defendant must demonstrate that "(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence[4]; and (3) the defendant was prejudiced." *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003) (citing *Stickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Evidence is prejudicial under *Brady* if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. *Jones v. State*, 998 So. 2d 573 (Fla. 2008). Thus, the proper inquiry is whether the outcome of the motion to suppress would have been different had Defendant been able to use the BOLO to impeach the officers' testimony regarding the color of the vehicle as provided in the BOLO.

In applying the *Brady* test to the facts, the Court finds that there is no reasonable probability that had the BOLO been disclosed prior to the hearing on the motion to suppress, the

[4] The Court notes that the record is inconclusive as to whether Defendant was provided a copy of the cassette tape containing the BOLO prior to the hearing on the motion to suppress. Ryan Sawdy, who was the lead prosecutor in Defendant's case, testified at the evidentiary hearing that he provided a copy of the tape to Defendant prior to the hearing. *See* Evid. Hrg. Transcr. 32. However, the Court is unable to find with confidence that Defendant was provided a copy of the BOLO prior to the hearing. While an Additional Notice of Discovery, dated September 14, 2006, does state "Enclosed please find a the [sic] audio cassette enclosed", there is no description of the contents of the cassette tape. *See* Additional Notice of Discovery, attached. As such, the Court will assume that Defendant did not receive a copy of the cassette tape prior to the hearing on the motion to suppress.

outcome of the motion to suppress would have been different.[5] The motion to suppress would have been denied even if Defendant was able to use the BOLO to impeach Detective Trick's testimony or any other witness regarding the color of the vehicle as provided in the BOLO.

At the hearing held to address Defendant's motion to suppress, Officer Trick testified as follows:

> Mr. Sawdy: And in what capacity were you working that evening?
>
> Ofc Trick: As a patrol officer.
>
> Mr. Sawdy: At some point in the evening, did you hear any radio transmissions by Officer Felice?
>
> Ofc Trick: Yes, I did.
>
> Mr. Sawdy: Could you tell the Court what it was that you heard over the radio from Officer Felice?
>
> Ofc Trick: He gave a robbery BOLO which contained vehicle description and two suspects' descriptions and direction of travel of the vehicle?
>
> Mr. Sawdy: Can you tell the Court what the vehicle description was that you heard over the BOLO?
>
> Ofc Trick: A large gray Oldsmobile, I think.
>
> Mr. Sawdy: And do you remember the description of the occupants that was given over the radio?
>
> Ofc Trick: There was [sic] two black males and gave their shirt colors, but I can't remember what the shirt color was.
>
> Mr. Sawdy: And the direction of travel, you said was also given. What direction was given over the radio?
>
> Ofc Trick: Eastbound on Broadway.

---

[5] The Court notes that Defendant received a cassette tape of the BOLO prior to trial. At no time after receiving the cassette tape and before the commencement of trial did Defendant file any type of motion alleging a *Brady* violation. Further, the recording of the BOLO was admitted as evidence at trial. Defendant, who represented himself at trial, used the recording of the BOLO to point out inconsistencies between the BOLO and testimony elicited at trial, most notably Officer David Trick's testimony.

Mr. Sawdy: And did you have an opportunity when you heard that BOLO, were you in patrol or on patrol, I should say?

Ofc Trick: Yes, I was.

Mr. Sawdy: Where were you located when you heard this radio transmission?

Ofc Trick: Around Adamo and 50th Street.

Mr. Sawdy: At the time you heard this radio transmission was your attention drawn to any particular vehicle on the road at that time?

Ofc Trick: No.

Mr. Sawdy: How long after hearing this radio transmission – let me ask you this. Did you eventually come into contact with a vehicle and make a stop on the vehicle?

Ofc Trick: Yes, I did.

Mr. Sawdy: At what point or how long after hearing this radio transmission did you make a stop on that vehicle?

Ofc Trick: Three minutes, five minutes.

Mr. Sawdy: And when was it that you actually saw – actually not when, but where did you see this vehicle?

Ofc Trick: I saw it at the lights on Broadway, heading eastbound at Adamo.

Mr. Sawdy: What did you observe as that vehicle – what was the description that you actually saw?

Ofc Trick: A large gray color vehicle with two black male occupants.

Mr. Sawdy: And based on the BOLO and what you saw, did you then pull this vehicle over?

Ofc Trick: Yes, I did.

....

Mr. Sawdy: Now when you went back to the driver's side, what happened next?

Ofc Trick: I asked the driver for permission to search his vehicle.

Mr. Sawdy: Did the driver give that permission?

Ofc Trick: Yes, he did.

October 20, 2006 Hearing Transcr. 30:4-25, 31:1-25, 32:1-7, 33:21-25, 34:1

At the motion to suppress hearing, Officer Felice testified that when he transmitted the BOLO over the radio, he indicated that it was either blue or gray in color, and that the victim believed the car was an Oldsmobile. October 20, 2006 Hearing Transcr. 20:24-15, 21:1-9. The BOLO was admitted as evidence by Defendant at trial and was played for the jury.

A police officer may stop a vehicle and request identification from its occupants when the officer has founded or reasonable suspicion that the occupants of the vehicle have committed, are committing, or are about to commit a crime. *Hunter v. State,* 660 So. 2d 244, 249 (Fla. 1995). A "founded suspicion" is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge. *Id.* Several factors are relevant in assessing the legitimacy of a vehicle stop pursuant to a BOLO: "(1) length of time and distance from the offense; (2) route of flight; (3) specificity of the description of the vehicle and its occupants; and (4) the source of the BOLO information." *Id.; State v. Wise,* 603 So. 2d 61, 63 (Fla. 2d DCA 1992). Other information which is relevant to determine the validity of the stop includes the time of day, the absence of other persons or vehicles in the vicinity of the sighting, any other suspicious conduct, and other activity consistent with guilt. *Rodriquez v. State,* 948 So. 2d 912, 914 (Fla. 4th DCA 2007). The BOLO in this case was admitted as evidence by Defendant at trial and was played for the jury. The BOLO was issued for a "large, dark blue Oldsmobile, eastbound on Broadway." The suspects were described as two black males wearing white t-shirts. Trial Transcr. 318-324.

Looking to the first factor, time and distance from the offense, Officer Felice transmitted the initial BOLO over the radio. At around 2:00 a.m., he was dispatched to an intrusion alarm, but as he approached the location of the alarm call, he encountered a topless woman running and yelling "please stop, we're being robbed". The woman indicated that she worked at Pleasure Time, located across the street, and that they we were being robbed. As Officer Felice positioned his vehicle at the scene, a second woman ran towards him and stated that they had just been robbed and that the suspects had just fled in a vehicle. At this point, Officer Felice obtained a description of the suspects, a description of the vehicle, and the direction the vehicle fled from the second woman. Officer Felice then immediately transmitted a BOLO based on this information. October 20, 2006 Hearing Transcr. 15-24. The BOLO was issued almost immediately after the suspects fled. Officer Trick testified that he pulled over Defendant's vehicle approximately 3-5 minutes after hearing the BOLO. The radio transmissions played at trial indicate that Officer Trick pulled over Defendant's vehicle within 7 minutes of the BOLO. As such, Defendant's vehicle was apprehended within 7 minutes of the transmission of the BOLO almost immediately after the suspects had fled Pleasure Time. Therefore, Defendant's vehicle was close to the crime scene in both time and distance.

Regarding the second factor, route of flight, the BOLO specified that the suspect's vehicle was heading eastbound on Broadway. Officer Trick testified that he pulled over the Defendant while he was traveling east on Broadway. October 20, 2006 Hearing Transcr. 31. As such, Defendant's location, when stopped, coincided with the route of flight provided for in the BOLO.

Regarding the third factor, specificity of the description of the vehicle and its occupants, the BOLO indicated that two black males were traveling in a large, dark, blue Oldsmobile.

While the occupants of the vehicle were consistent with the description provided for in the BOLO, two black males, the vehicle was not dark blue, it was gray. Further, the vehicle was a Cadillac, not an Oldsmobile. However, the makes were similar as they were both large, boxy vehicles, and Defendant's vehicle while not dark blue, was dark gray. The Court notes that Officer Felice first encountered the victims around 2:00 a.m., and that Defendant was arrested at 2:30 a.m. Generally, vehicular traffic is sparse at that early hour of the morning. The Court must take this into consideration when determining if Officer Trick had the requisite "reasonable or founded" suspicion to stop the vehicle. *Grant v. State,* 718 So. 2d 238 (Fla. 2d DCA 1998); *Cobb v. State,* 642 So. 2d 656 (Fla. 1st DCA 1994)

Lastly, the fourth factor, the source of the BOLO information, Officer Felice testified that he sent the BOLO immediately after receiving a description from the victim at the crime scene.

The totality of the circumstances appear sufficient to support the stop of Defendant: he was close to the location, in both time and distance, where the BOLO indicated the suspects had fled, he was traveling the same direction, on the same road as indicated in the BOLO, he was apprehended within 7 minutes of the BOLO which was issued almost immediately after the suspects fled the crime scene, and the BOLO was based on the description provided to law enforcement by the victim at the crime scene. Further, the description of the suspects, two black males, fit the occupants of Defendant's vehicle. While the description of the vehicle differed in both make and model, the vehicle which was apprehended was a similar make and similar color. Further, the Court notes that Defendant was pulled over sometime after 2:00 a.m., and was arrested at 2:30 a.m., a time where there is generally less vehicles on the roadway. As such, the trial court was correct in denying Defendant's motion to suppress. Deputy Trick had the requisite reasonable suspicion to stop Defendant.

The Court finds that even if Defendant was able to impeach Officer Trick regarding the description of the vehicle as provided for in the BOLO, the trial court would have still denied Defendant's motion to suppress. The length of time from the report of the BOLO, the distance and location where Defendant was stopped, the route of flight, the source of the BOLO, the suspect's description as provided for the BOLO, the time of the incident, and the similarities between Defendant's vehicle and the description provided for in the BOLO all support the stop. As such, Defendant cannot demonstrate prejudice as required by *Brady*. **Therefore, the Court must deny ground one sub-ground one of Defendant's Motions.**

GROUND THREE

In claim three, Defendant alleges that his Fourteenth Amendment right to due process under *Kentucky v. Stincer*, 482 U.S. 730 (1987) was violated by his involuntary absence at a hearing on his motion for new trial. Defendant claims that his presence at the hearing would have made the hearing more reliable, and enumerates a variety of arguments that he believes would have been improved had he been present to assist his attorney in making them. Defendant further argues that trial counsel was not familiar with Defendant's grounds for a new trial, and failed to fully argue Defendant's case. Last, Defendant claims that had he been present, there is a reasonable probability that the trial court would have granted his motion.

However, the Court finds that this claim is procedurally barred because it could have been and should have been raised on direct appeal. *See Morris v. State,* 931 So. 2d 821, 832 & n. 12 (Fla. 2006) (concluding that defendant's claim that his involuntary absence from discussions with the trial court during the penalty phase violated his constitutional right to be present at the bench conference was procedurally barred because it was not raised on direct appeal); *Phillips v. Sate*, 894 So. 2d 28, 35 & n. 6 (Fla. 2004) (concluding that defendant's claim that his absence

from an unrecorded bench conference violated his constitutional right to be present at trial was procedurally barred because it was not raised on direct appeal); *Vining v. State*, 827 So. 2d 201, 217 (Fla. 2002) (determining that "substantive claims relating to Vining's absence [during critical stages of trial] are procedurally barred as they should have been raised either at trial or on direct appeal"). **As such, the Court must deny ground three of Defendant's Motions.**

GROUND THREE SUB-GROUND ONE

In ground three sub-ground one, Defendant alleges that trial counsel, Nick Sinardi, was ineffective for failing to object to Defendant's involuntary absence at the hearing on a motion for new trial. Defendant first alleges that he prepared and represented himself at trial, but elected to have counsel during the sentencing phase. Defendant claims that after his sentencing, his counsel requested the Court keep Defendant at the county jail so that he could argue a motion for new trial. Defendant alleges he was involuntarily absent at the motion for new trial.

Specifically, Defendant alleges that his counsel informed him in a letter that there was a ten day time period in which to file a motion for new trial, and that Defendant then wrote a letter to counsel setting out arguments he thought should be argued at the hearing on the motion for new trial. Defendant alleges that counsel "made vague and indefinite arguments based on the information provided by Defendant in his letter." Defendant claims that counsel failed to present testimonial and tangible evidence in support of the grounds for new trial. Last, Defendant alleges that effective counsel would have objected to the involuntary absence of Defendant from the proceeding. Defendant claims that counsel's failure to object resulted in deficient performance. Defendant further claims that Defendant's presence would have made the hearing more reliable and that result of the proceedings would have been different.

On December 20, 2006, Defendant was convicted of Armed False Imprisonment and Robbery with a Firearm. *See* Verdict Form, attached. Immediately after the jury returned a verdict, Defendant was sentenced to 15 years' Florida State Prison for Armed False Imprisonment, and life in prison for Robbery with a Firearm, set to run consecutive. At this point, Defendant was still proceeding *pro se*. The record reflects that on December 21, 2006, Defendant was brought back to Court. The trial judge set aside the previously imposed sentence of December 20, 2006, because he failed to conduct a *Faretta* inquiry and Nick Sinardi was appointed counsel for sentencing.[6] *See* December 21, 2006, Case Progress Sheet, attached. Defendant was resentenced on January 4, 2007. Defendant was sentenced to 15 years' Florida State Prison for Armed False Imprisonment, and life in prison without parole for Robbery with a Firearm, both running concurrent. *See* Judgment and Sentence, attached. Defendant, by and through his undersigned counsel, filed a Motion for New Trial on January 12 2007, and a hearing was held on January 19, 2007. *See* Motion for New Trial, attached. Defendant was not present at the hearing.

A portion of the argument presented by counsel at the hearing on the motion for new trial is as follows:

> The Court: Where is Mr. Godwin?
>
> Mr. Sinardi: Nick Sinardi for the record. I'm assuming he had been transported.
>
> Ms. Neal[7]: Standing in for Ryan Sawdy for the record.
>
> Mr. Sinardi: Correct. I had filed on behalf of Mr. Godwin a standard, if you will, motion for new trial that alleges all the grounds that are

[6] At the evidentiary hearing, Defendant testified as to the same sequence of events. *See* Evid. Hrg. Transcr, attached. Further, the transcript of the January 4, 2007, resentencing hearing also confirms the same sequence of events. *See* January 4, 2007, Resentencing Hrg. Transcr., attached.

[7] Ms. Neal is an assistant state attorney who appeared on behalf of the State at the hearing on the motion for new trial.

admissible for a new trial. I provided that information to Mr. Godwin. He wrote me back with his additional argument as to why he should be granted a new trial.

Basically three arguments. Ground one is that the testimony of three witnesses, Katrina Winkler, Kenya White and Sabrina Hearns, was clearly false, and compared to their testimony at the detention hearing in front of, I believe it was Judge Heinrich, in looking at their deposition, police reports, et cetera, and not only was their testimony false, but the State Attorney knew it was false but presented it anyway; that as a result of that, the false testimony, is obviously in violation of *Gilio* (sic), *Mooney v. Hoolihan, Kyle v. Kansas*. On those grounds, defendant should be granted a new trial.

The Court: I'll deny that one. Deny that one.

Mr. Sinardi: Thank you. Secondly, Mr. Godwin alleges there was a bank statement and I believe another document that was from Pleasure Time. One was bearing the name of Katrina Winkler. The other document bearing the name of Pleasure Time. Mr. Godwin, in effect, alleges that there was an invalid chain of custody. There was also some argument about when he was provided notice of those documents because if the Court will recall, I believe the State provided initially a digital copy of that inventory receipt, and then later on, he received an actual copy of that. And Mr. Godwin is alleging that those documents should not have been admitted and that there was a deficiency in the chain of custody. And he cited *United States v. Gray*, that because of the introduction of those documents, the jury would not have convicted him and that he should be granted a new trial because of the erroneous introduction of those documents. And finally, he's alleging, I'm assuming –

The Court: Is that No. 2? Now you're going to No. 3?

Mr. Sinardi: That is No. 2.

The Court: Deny No. 2.

Mr. Sinardi: I'm believing that based on his notes, he's alleging that as a result of those, a violation of his due process rights.

The Court: Deny No. 3.

January 19, 2007 Transcr. 3:2-25, 4:1-25, 5:1-10.

Mr. Sinardi: There is an additional – I apologize.

The Court: That's quite all right.

Mr. Sinardi: This is an additional ground I don't think I enunciated in reference to – I believe he's referring again to those items that were found: The papers with Pleasure Time in Miss Winkler's name. He's alleging that those items were tampered with improperly.

The Court: As opposed to proper tampering, denied.[8]

January 19, 2007, Transcr. 7:19-25, 8:1.

In his Motion, Defendant alleges that counsel "made vague and indefinite arguments based on the information provided by Defendant in his letter," and failed to present testimonial and tangible evidence in support of the grounds for new trial. Defendant further alleges that his presence would have made the hearing more reliable. At the evidentiary hearing held on September 27, 2012, Defendant testified as to ground three sub-ground one:

Ms. Spradley[9]: And Mr. Sinardi testified about a letter that you had written to him. Can you explain to the Court what that was?

Defendant: After I was sentenced, and upon arriving back to the county jail, I received legal mail and it was from Mr. Sinardi. And he apprised me that we had ten days to file a motion for new trial. I actually attached that letter as Exhibit F to my supplemental 3.850 motion. At that time, I responded to his letter, giving him the grounds, the facts, and what I believed would be a substantial basis for a motion for new trial.

Ms. Spradley: But you weren't able to argue it because you weren't present.

Defendant: That's correct.

Ms. Spradley: Would you have argued it had you been present?

Defendant: Yes, ma'am.

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[8] In the omitted portion of the transcript, the trial court denies the standard 13 grounds included in the Motion for New Trial. *See* January 19, 2007 Transcr., attached.

[9] Ms. Jennifer Spradley is the public defender who represented Defendant at the evidentiary hearing held on September 27, 2012.

Ms. Spradley: Is that what you wanted to happen?

Defendant: Yes, ma'am.

Evid. Hrg. Transcr. 62:15-25, 63:1-5.

After reviewing the allegations, the court file, the testimony and the record, the Court finds that Defendant fails to meet the two prong test as set forth in *Strickland v. Washington.* When asserting a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. The Court finds that Defendant fails to establish prejudice. In order to establish prejudice, Defendant must prove that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the hearing on the motion for a new trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

As previously stated, the proper focus of inquiry is, whether if counsel had objected to Defendant's absence at the hearing on the motion for new trial, there is a reasonable probability that the outcome of the hearing on the motion for new trial would have been different. While Defendant's allegation that Nick Sinardi requested the Court keep Defendant available for the purpose of arguing a motion for new trial at the resentencing hearing is true, the Court finds that Defendant has failed to establish how counsel's failure to object to his absence resulted in prejudice. Defendant failed to present any evidence or testimony at the evidentiary hearing to demonstrate how the outcome of the hearing on a motion for new trial would have been different had he been present. Defendant failed to explain what if any decisions and arguments made at the hearing would have been different if he had been present or how any different decisions or arguments would have resulted in his motion being granted. *See Kormondy v. State,* 983 So. 2d

418, 436 (Fla. 2007). Defendant did not testify as to any additional arguments he would have presented at the hearing nor did he testify as to any deficiencies in Mr. Sinardi's arguments. Further, Defendant failed to testify as to any specifics regarding the alleged testimony presented at trial or tangible evidence, which he alleged Mr. Sinardi failed to present in support of the arguments. The Court's confidence in the outcome of the hearing on the motion for new trial has not been undermined.

Additionally, to the extent Defendant is displeased with the thoroughness of Mr. Sinardi's arguments, Defendant has failed to present any additional testimony or evidence at the evidentiary hearing to demonstrate that any of the arguments provided to Mr. Sinardi in his letter were meritorious. There was no testimony or evidence presented at the evidentiary hearing as to the alleged *Giglio* violation or the alleged invalid chain of custody. The record reflects that Mr. Sinardi argued the additional grounds, which were not included in the standard motion for new trial, based on arguments provided by Defendant.

Further, a review of the January 4, 2007 resentencing transcript reveals that Defendant requested an oral motion "to have a retrial, new trial". While presenting his arguments in support of the oral motion "to have a retrial, new trial", Defendant presented identical arguments relying on the same case law as the arguments presented by Mr. Sinardi at the January 19, 2007 hearing. *See* January 4, 2007 Transcr., attached. After hearing Defendant's arguments, the Court stated, "Deny that request. Deny the motion for judgment of acquittal. Deny the new motion for renewal of judgment of acquittal. Deny the motion for perjury under alleged *Giglio*. I'm not going to grant a new trial there. I don't find there was any perjury." January 4, 2007 Hrg. Transcr: 12:8-13.

After reviewing the allegations, the testimony and evidence presented at the September 27, 2012 evidentiary hearing, the court file, and the record, the Court finds that Defendant has failed to prove the second prong of *Strickland* as the Defendant has failed to prove how counsel's alleged failure to object at Defendant's absence at the hearing on the motion for new trial resulted in prejudice. Defendant failed to present any evidence or testimony at the evidentiary hearing to demonstrate how the outcome of the hearing on a motion for new trial would have been different had he been present. **As such, no relief is warranted. The Court must deny Ground Three Sub-ground One of Defendant's Motion.**

GROUND FOUR SUB-GROUND ONE

In ground four sub-ground one, Defendant alleges trial counsel, Nick Sinardi, was ineffective for failing to object to an allegedly vindictive sentence, "the imposition of a life sentence after a jury trial, when the trial court urged the Defendant to accept an earlier plea offer of ten (10) years". Defendant alleges that the trial court urged him to accept the State's offer, and then imposed a harsher sentence than that offered.

In *Wilson v. State,* 845 So. 2d 142 (Fla. 2003), the Florida Supreme Court's landmark case on judicial vindictiveness, the Court applied a totality of the circumstances standard when determining whether a vindictive sentence had been imposed.

> "Judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other actors, should be considered in determining whether there is a "reasonable likelihood" that the harsher sentence was imposed in retaliation for the defendant not pleading guilty and instead exercising his or her right to proceed to trial. *See Smith*, 490 U.S. at 799, 109 S.Ct. 2201. The other factors that should be considered include but are not limited to: (1) whether the trial judge initiated the plea discussions with the defendant in violation of *Warner*[10]; (2) whether the trial judge, through his

[10] "In *Warner*, we considered whether it was permissible for the trial judge to participate in plea negotiations and, if so, what restrictions apply...The first restriction we placed on judicial participation is that the trial judge could not initiate the plea dialogue." *See Warner,* 762 So. 2d at 513. However, the judge "may...participate in such discussions upon the request of a party" and "[o]nce involved, the court may actively discuss potential sentences and

> or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing."

Wilson 845 So. 2d at 156.

In the present case, the State offered Defendant a plea deal on the morning of trial before voir dire had commenced. The colloquy when the plea offer was declined is provided below:

The Court:	Anything further?
Mr. Sawdy:	I don't think he'll take anything, but I'll make an offer for the record. At least it's on there before we start trial. He's charged now, as I indicated, things are consecutive life sentences possible. Forgive me. I just came down with a cold yesterday, but I will offer him the 10-year minimum mandatory?
The Court:	Period?
Mr. Sawdy:	Period for all counts to run concurrently, no probation to follow, just 10 years.
The Court:	And I would impose that if you were to accept it today, just so you'll know.
Mr. Godwin:	No, sir.
The Court:	You reject that offer? You understand what that means?
Mr. Godwin:	Yes, sir.
The Court:	It means you're 28. You would receive credit for all time served. Do you want to talk to Mr. Sinardi for a minute?
Mr. Godwin:	The State cannot offer me credit time served right now.
The Court:	I'll give it to you.

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comment on proposed plea agreements". *Id.* at 513-514....Second, we made clear that the judge must "*neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial.*" *Wilson* 845 So. 2d at 151-152.

Mr. Godwin:	I'm not taking the offer.
The Court:	Do you want to talk to Mr. Sinardi?
Mr. Godwin:	I don't need to.
The Court:	That's fine. I'm just offering you the opportunity.
Mr. Godwin:	Thank you. I thank you for offering it.
The Court:	You realize if you're convicted it probably would not be a 10-year minimum mandatory?
Mr. Godwin:	It's clear.
The Court:	That's a possibility. I don't know if it's probable, but it's a possibility. Anything further?
Mr. Sawdy:	No, Judge.

Trial Transcr. 26:22-25, 27:1-25, 28:1-11.

The record in this case indicates that the trial judge did not initiate the plea discussions, but simply responded to a plea offer initiated by the prosecutor, Mr. Sawdy. The Court further finds that the trial judge did not exceed the limits of *Warner* by stating, "you realize if you're convicted it probably would not be a 10-year minimum mandatory." Rather, the Court finds that the trial court was simply alerting Defendant that the sentence imposed may be affected by the evidence and testimony introduced at trial. The Court did not voice its opinion on the reasonableness of the plea offer. *See Wilson v. State*, 845 So. 2d at 145, 157 (*quoting Byrd v. State*, 794 So. 2d 671 (Fla. 5th DCA 2001) (concluding that the comment made by the trial judge, "I think 30 years is a steal. He certainly won't get that low", exceeded the limits of *Warner* by stating that if Byrd chose to go to trial he "certainly" would not get that low.) Nor did the trial court urge the Defendant to accept the plea deal. *See Wilson v. State*, 845 So. 2d at 158 (*quoting Wilson*, 792 So. 2d at 602) (concluding that the comment made by the trial judge,

"the court's offer was the bottom of the guidelines and in my opinion you should have taken it", violated the bounds of *Warner*.)

While there is a large disparity between the offered ten-year minimum mandatory sentence and the life sentence imposed, "a disparity between the sentence received and the earlier offer will not alone support a finding of vindictiveness...having rejected the offer of a lesser sentence, [the defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile." *Wilson,* 792 So. 2d at 603 (quoting *Mitchell*, 521 So. 2d at 190). Further,

> "the fact that that a trial judge expresses an inclination to accept a state plea offer, does not mean that he or she will be bound to impose the same sentence after hearing the trial, if the evidence raises concerns that were not perceptible from the usually abbreviated representations made to the court during the plea bargaining process. Factors such as the nature of the defendant's prior convictions, the degree of violence employed by the defendant during the commission of the crime, the sophistication with which the charged offense was committed, and/or the physical or psychological suffering endured by the victim(s), are some factors that might lead the court to increase what it originally considered to be an acceptable sentence."

Wilson, 845 So. 2d at 157 (quoting *Prado v. State*, 816 So. 2d 1155, 1166 Fla. 3d DCA 2002)). During sentencing, the trial court stated, "After having heard the argument, excuse me, having heard the testimony of the witnesses, seeing the absolute fear in the face of one witness when she broke down in tears during cross-examination or direct examination, I understand exactly why they elected not to call the lady." January 4, 2007 Transcr. 18:9-15. The trial court further stated, "You beat that woman about the head and about the face with a firearm. It could have caused permanent damage to her. It did not." January 4, 2007 Transcr. 19:3-5. The only time the trial court mentioned the declined plea offer during sentencing was when it stated, "I've heard the testimony of the witnesses from the witness stand. I had no idea what this case would be about

until I heard the testimony. I understand why the State offered the 10 years. It was rejected by you." January 4, 2007 Transcr. 18:5-9.

As such, the Court finds that the trial court did not impose a life sentence because Defendant elected to proceed with trial. Rather, the court finds the harsher sentence was imposed because of additional facts which emerged prior to sentencing, specifically, the violence employed by the defendant during the commission of the crime and the psychological suffering endured by the victims which was elicited through testimony during trial.

Accordingly, applying the totality of circumstances standard, the Court finds that Defendant's sentence is not vindictive. There appeared to be no coercion, no threats, and no implication of a harsher sentence for exercising any right. Defendant got a legal sentence that was within the prerogative of the trial court. That the sentence was greater than offered by the State does not, without more, translate to vindictiveness.

Although Defendant argues that his counsel was deficient in failing to object to a sentence that he though was harsh, but within the sentencing authority of the trial court, no legal basis for the objection has been suggested. If there was no legal basis for defense counsel to object to the sentence, the failure to do so cannot be ineffective. As Defendant has not met his burden of demonstrating either ineffectiveness in counsel's representation of Defendant or prejudice as a result of any alleged deficiency, let alone both as required for relief on a post-conviction motion, Defendant warrants no relief on this allegation. **Therefore, the Court must deny ground four sub-ground one of Defendant's Motions.**

GROUND FIVE SUB-GROUND TWO

In ground five sub-ground two, Defendant alleges that trial counsel, Nick Sinardi, was ineffective for failing to object to the trial court's consideration of Defendant's refusal to accept

a plea, failure to show remorse, and reliance on materially false or misleading evidence. Defendant argues that he would have received a lesser sentence had trial counsel objected to the sentence. Specifically, Defendant alleges that the trial court considered and relied on evidence which was materially false and/or unreliable in imposing sentence. Defendant alleges that the trial court's statements referring to the fear inflicted by Defendant on Ms. Hearns "was shown to be unreliable in light" of the testimony presented at trial. Defendant further states that Ms. Hearn's testimony was unreliable because she could only identify one of the perpetrators. Additionally, Defendant alleges that that the court's consideration of Ms. Winkler's testimony was also improper as it was materially false.

During sentencing phase proceedings, the defendant, his or her counsel, and the State have an opportunity to be heard, affording, if appropriate the State and defendant an opportunity to present additional evidence. *Spencer v. State,* 615 So. 2d 688, 690-691 (Fla. 1993). The weight to be given to the evidence is a trial court decision. *Hertz v. State,* 941 So. 2d 1031, 1038 (Fla. 2006). Further, trial courts have considerable discretion in sentencing within the minimum and maximum allowed by law, with the exception of imposing a sentence in violation of a defendant's constitutional rights. *German v. State,* 27 So. 3d 130, 132 (Fla. 4th DCA 2010).

After reviewing the allegations, the court file, the testimony presented at the evidentiary hearing, and the record, the Court finds that Defendant has failed to demonstrate deficient performance. To the extent Defendant is alleging trial counsel was ineffective for failing to object to the trial court's consideration of Defendant's refusal to accept a plea, the Court finds Defendant has failed to demonstrate deficient performance. In claim four sub-claim one, the Court found that Defendant's sentence was not vindictive as the harsher sentence was not imposed because Defendant refused to accept a plea offer. Rather, the Court found the harsher

sentence was imposed because of additional facts which emerged prior to sentencing, specifically, the violence employed by Defendant during the commission of the crime and the psychological suffering endured by the victims which was elicited through testimony during trial. The record clearly demonstrates that the trial court did not consider Defendant's refusal to accept the plea offer when imposing its sentence. Trial counsel cannot be deemed ineffective for failing to raise a meritless issue. *Thompson v. State,* 759 So. 2d 650, 662 (Fla. 2002).

In ground five sub-ground two, Defendant also alleges that counsel was ineffective for failing to object to the trial court's consideration of Defendant's failure to show remorse. The relevant portion of the sentencing transcript is as follows:

> The Court: After having heard the argument, excuse me, having heard the testimony of the witnesses, seeing the absolute fear in the face of one witness when she broke down in tears during cross-examination or direct examination, I understand exactly why they elected not to call that lady.
>
> I don't have a doubt in my mind that you committed that robbery, sir. Not one doubt. I find those witnesses to be credible. My fear is, sir, if you're let out amongst the community again, the citizens of the State of Florida and citizens of the United States of America, you would be a – put them at risk. I don't think you've shown one ounce of remorse not one ounce. I don't think you even acknowledge that you committed this crime. To this day, you don't acknowledge that. I don't have a doubt that you committed it.
>
> You beat that woman about the head and about the face with a firearm. It could have caused permanent damage to her. It did not.
>
> It is the judgment, sentence and order of the Court, count of robbery, life Florida State Prison, the rest of your natural life without parole.
>
> It is a 10-year minimum mandatory as to the sentence of false imprisonment with a firearm. 15 years concurrent.

January 4, 2007 Transcr. 18:9-25, 19:1-12.

To the extent Defendant is alleging trial counsel was ineffective for failing to object to the trial court's consideration of Defendant's failure to show remorse, the Court finds Defendant has failed to demonstrate deficient performance.

> "Although remorse and an admission of guilt may be grounds for mitigation of a sentence or a disposition, the opposite is not true. A trial court abuses its discretion and infringes on constitutional rights when it imposes a harsher sentence because a defendant exercises the right to remain silent, protests his innocence, or fails to show remorse."

German, 27 So. 3d at 132. The question then is whether the trial court relied on the defendant's lack of remorse in determining the sentence. After a careful review of the sentencing transcript, the Court finds that there is no suggestion that the trial court used defendant's lack of remorse against him. Again, the record demonstrates that the trial court imposed the statutory maximum because of the violence exhibited by Defendant during the commission of the crime and the fear and suffering endured by the victims. The trial court referred to Defendant's absence of remorse in support of his rejection of defense counsel's arguments for mitigation. *See German*, 27 So. 3d at 133 ("[I]n pronouncing sentence, there is no suggestion that the trial court used the defendant's silence, lack of remorse, or failure to admit guilty against him; quite the contrary. The court's comments were directed to the heinous nature of the crime."); *See also Shelton v. State,* 59 So. 3d 248 (Fla. 4th DCA 2011) (holding that the court commented on the defendant's lack of remorse in recognition that it lacked any grounds to mitigate his sentence). As such, the Court finds no error, and trial counsel cannot be deemed ineffective for failing to raise a meritless issue. *Thompson,* 759 So. 2d at 662.

To the extent Defendant is alleging trial counsel was ineffective for failing to object to the trial court's reliance on materially false or misleading evidence, the Court finds Defendant has failed to demonstrate deficient performance. The determination of the credibility of

witnesses is within the province of the jury. *State v. Scheuschner,* 829 So. 2d 943, 944 (Fla. 4th DCA 2002). The jury found the witness' testimony credible and returned a guilty verdict as to Robbery with a Firearm and Armed False Imprisonment. Subsequent to sentencing, the Court heard arguments regarding perjured testimony resulting in a *Giglio* violation. The Court explicitly rejected Defendant's contention that the testimony of Ms. Hearns and Ms. Winkler was false and found that there was no perjured testimony. *See* January 4, 2007 transcr., attached. Thus, the trial court did not rely on false or misleading evidence during sentencing as the trial court had previously ruled that there was no perjured testimony. The trial court accepted the jury's verdict and adjudicated Defendant guilty of Robbery with a Firearm and Armed False Imprisonment. Further, Defendant's claim that his Fourteenth Amendment Right to Due Process under *Giglio v. United States,* 405 U.S. 150 (1972) was violated when the State intentionally solicited and/or failed to correct false or misleading evidence was summarily denied in this Court's June 13, 2012 Order Granting an Evidentiary Hearing in part; Order Denying in part. *See* Order Granting an Evidentiary Hearing in part; Order Denying in part, attached. As such, the Court finds no error, and trial counsel cannot be deemed ineffective for failing to raise a meritless issue. *Thompson,* 759 So. 2d at 662. **Therefore, the Court must deny ground five sub-ground two of Defendant's Motions.**

It is therefore **ORDERED AND ADJUDGED** that Grounds One Sub-Ground One, Three, Three Sub-Ground One, Four Sub-Ground One, and Five Sub-Ground Two of Defendant's Motions are hereby **DENIED.**

Defendant has thirty (30) days from the date of this Final Order within which to appeal. However, a timely-filed motion for rehearing shall toll the finality of this Order.

DONE AND ORDERED in chambers in Hillsborough County, Florida, this

April, 2013.

ORIGINAL SIGNED
CONFORMED COPY
APR 26 2013
SAMANTHA L. WARD
CIRCUIT JUDGE

SAMANTHA L. WARD, Circuit Judge

Attachments:

Indictment
Verdict Form
Judgment and Sentence
Mandate
Motion for Postconviction Relief (without attachments)
Supplemental Motion for Postconviction Relief (without attachments)
Order Denying Defendant's Motion for Access to Original Court Documents; Denying Defendant's Supplemental Motion for Postconviction Relief in part; Ordering State to Respond in Part (without attachments)
Order Granting an Evidentiary Hearing in part; Order Denying in part (without attachments)
September 27, 2012 Case Progress Sheet
September 27, 2012 Evidentiary Hearing Transcript
Defendant's Argument in support of 3.850
Motion to Suppress
Additional Notice of Discovery
October 20, 2006 Motion to Suppress Hearing Transcript
December 21, 2006 Case Progress Sheet
January 4, 2007 Resentencing Hearing Transcript
Motion for New Trial
January 19, 2007 Motion for New Trial Hearing Transcript
Trial Transcript, Pages 26-28, 314-326

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished to Jonathan Godwin, DC # M07545, Mayo Correctional Institution, 8784 US Highway 27 West, Mayo, Florida 32066, by regular U.S. Mail; Jennifer Spradley, Assistant Public Defender, 700 East Twiggs Street, Tampa, Florida 33602, by inter-office mail; and to Christine Brown, Assistant State Attorney, 419 Pierce Street, Tampa, Florida 33602, by inter-office mail, on this _____ day of April, 2013.

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APR 26 2013

SUZANNE FLOWERS
JUDICIAL ASSISTANT

Suzanne Flowers, Judicial Assistant