No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES STRICKLAND,
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

CRYSTAL MCBEE FRUSCIANTE
11110 West Oakland Park Boulevard
Suite 388
Sunrise, Florida 33351
(954) 495-7889/ Fax (866) 936-4546
FL Bar No. 80215
Email: crystal@frusciantelaw.com

COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-12557

Non-Argument Calendar

JAMES LAMAR STRICKLAND,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:19-cv-00002-RH-MAF

Before NEWSOM, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

James Lamar Strickland was convicted of armed robbery in Florida state court and sentenced to life in prison. After exhausting his state postconviction remedies, Strickland filed a habeas petition. The district court denied the petition, and we affirm.

I

A

On January 16, 2011, two Florida State University students—Emiloina Pantner and Todd Laycock—were robbed at gunpoint on their way home from a bar in Tallahassee. According to their testimony, they were walking to Pantner's car when an older, mustachioed white male wearing a hooded sweatshirt pulled up next to them in a green Ford Ranger pick-up truck. They testified that when the truck stopped, they were about an arm's length away from the passenger-side window and had a good view of the man inside the truck.

The driver turned on the truck's dome light, told the students that he lived out of his truck, and asked them for gas money. The students told him that they didn't have any money, but the driver persisted, offering to sell them pornographic material. The students again declined. After being turned down twice, the driver stated: "[W]ell what if I show you a gun now." The driver then pulled out a gun, which prompted the students to fork over

whatever cash they had on them—a total of $11. The driver took their money, told the students to walk away, and drove off.

As soon as the robber left, the students found a university police officer, who called the Tallahassee police. Once Tallahassee police arrived, the students recounted what had happened and described the robber. One of the students—Laycock—informed police that he had been able to identify the first three letters of the license plate: "BJM." Laycock also told the officer that it was a Florida plate, but later said he hadn't been sure about that fact. Neither student noticed any other distinguishing features of the truck.

Strickland was a resident of Cairo, Georgia, which is about 30 miles from Tallahassee near the Florida/Georgia line. He drove a green Ford Ranger carrying a Georgia license plate that began "BJM" and that had been in an accident that had not been repaired. Using the information the students provided and a database containing Georgia and Florida license plates, the investigator identified Strickland as a suspect. Moreover, the investigator was able to determine that Strickland had been in Tallahassee when the crime occurred. Despite all of that information, the investigator testified that he did not go to Strickland's address or attempt to search his truck. The jury heard testimony that—due to a decision not to search the truck—the police never found a gun, hooded sweatshirt, or pornographic material connected to Strickland.

About a week after the robbery, police showed the students a photographic lineup of four suspects, which was compiled from the information the students provided and the investigation that

followed. Pantner was able to narrow the selection to two people—in positions three and four of the lineup—but couldn't state with absolute certainty which one was the robber. Laycock was able to positively identify the suspect in position four as the robber. That suspect was Strickland, and Laycock identified him again at trial.

On that information, the jury found Strickland guilty of armed robbery with actual possession of a firearm. As a prison releasee reoffender, *see* Fla. Stat. § 775.082, the state court sentenced Strickland to life in prison.

Here's what the jury *didn't* hear: The day after the Tallahassee robbery, on January 17, 2011, Strickland had been arrested for an unrelated theft. When he was arrested, his truck was impounded and searched. An inventory of the search included a handful of random items—a Christmas tree, a weed eater, and other sundries—but it didn't include a hooded sweatshirt, gun, or pornographic material. For whatever reason, although the officer investigating the January 16th robbery in Tallahassee was aware of the January 17th arrest and that Strickland's truck had been impounded as a result, he was under the impression that the truck had not been searched.

Strickland had the same defense counsel for both criminal cases. But the attorney took at face value the investigator's report for the January 16th robbery, which stated that the truck was not searched in relation to the January 17th theft charge—the attorney didn't cross reference the two cases. Instead, because Strickland

intended to enter a guilty plea on the theft charge, and because he was going to trial on the higher stakes robbery charge, the attorney focused his attention on the robbery case. In so doing, he ignored a material fact—it wasn't police incompetence that failed to uncover the pornographic material, hooded sweatshirt, or gun from Strickland's truck; instead, police had failed to uncover those items because they weren't in the truck when the police searched it.

So, turning back to the trial for the January 16th robbery, the jury received false testimony that the truck had never been searched. They were left with the impression that the incriminating items were never found due to a failure to search; not that the truck actually was searched but that the search was fruitless.

B

Strickland appealed his conviction for the January 16th robbery in state court, and it was affirmed without an opinion. *Strickland v. State*, 128 So.3d 803 (Fla. Dist. Ct. App. 2013). He then sought postconviction relief in Florida, pursuant to Florida Rule of Criminal Procedure 3.850. He asserted that he had received ineffective assistance of counsel and that the prosecution had committed a *Brady* violation by withholding exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963). The state court denied him postconviction relief, which was affirmed on appeal. *Strickland v. State*, 258 So.3d 387 (Fla. Dist. Ct. App. 2018).

Having exhausted his state postconviction remedies, Strickland brought a federal habeas petition under 28 U.S.C. § 2254. A

magistrate judge recommended that his petition be denied and the district court adopted that recommendation. But the district court granted a certificate of appealability on the following question:

> [W]hether the petitioner is entitled to relief based on his attorney's ineffective assistance of counsel as to, or the state's failure to disclose, that the petitioner's truck was searched the day after the robbery at issue and no hoodie, pornography, or gun was found.

Strickland timely appeals the district court's habeas denial on those grounds.[1]

II

Under the Antiterrorism and Effective Death Penalty Act of 1996, "an application for a writ of habeas corpus pursuant to the judgment of a state court shall not be granted by a federal court unless the decision is 'contrary to' or is an 'unreasonable application of' 'clearly established' Supreme Court precedent." *Hall v. Head*, 310 F.3d 683, 690 (11th Cir. 2002) (emphasis omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 391 (2000)); *see also* 28 U.S.C.

[1] Strickland also asserts a *Brady* violation with respect to the investigator's failure to preserve the list of vehicles created based on Laycock's partial license plate identification. But we don't consider that argument because our "review is limited to the issues specified in the COA." *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) (per curiam).

§ 2254(d).[2] That "standard is intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (quotation marks omitted).

Strickland challenges his state conviction on the grounds either that he received ineffective assistance of counsel or that the prosecution committed a *Brady* violation—both of which arise from the same basic premise: The jury was misinformed as to whether police actually searched Strickland's truck. Instead, the jury heard testimony that police never found any of the incriminating items because they didn't look for them, not because they weren't in his truck when police searched it.

We need not delve into the substance of *Brady* violations or ineffective-assistance claims. Any way we slice it—even if Strickland is right that his state trial was constitutionally defective—he wasn't prejudiced by that defect.[3] Put simply, there isn't a

[2] "The district court's determination of whether the state court decision was reasonable . . . is subject to de novo review." *Hall*, 310 F.3d at 690.

[3] For both *Brady* violations and ineffective-assistance claims, a habeas petitioner must establish that he was prejudiced by the state court's error. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (ineffective assistance of counsel); *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (*Brady* violation). And the prejudice inquiry is the same for both: Whether there is a reasonable probability—"a probability sufficient to undermine confidence in the outcome"—that the result of the proceeding would have been different but for the defect. *United States v. Bagley*, 473 U.S. 667, 681–82 (1985) (opinion of Blackmun, J.) (adopting the *Strickland* prejudice standard for *Brady* violations); *see also id.* at 685 (White, J., concurring in the judgment and concurring in part) (same).

reasonable probability that the result of his trial would have been different but for the error that Strickland contends infected his trial. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The state postconviction court determined that because "the defense [was] able to argue . . . lack of evidence as well as police incompetence," and because the January 17th arrest occurred "approximately 34 hours" after the January 16th robbery—giving Strickland time to "remove[]" the incriminating items before the search took place—any error that led to the jury being misinformed "ha[d] no effect at all" on the outcome of the case. That determination is a mixed question of fact and law, *Strickland*, 466 U.S. at 698, subject to AEDPA's reasonableness standard, *Harrington v. Richter*, 562 U.S. 86, 111–13 (2011).

Accordingly, we may reverse only if the state court's prejudice determination was "unreasonable." *Id.* (reversing a grant of habeas relief in part because "[i]t would not have been unreasonable for the California Supreme Court to conclude [petitioner's] evidence of prejudice fell short of [*Strickland*'s] standard"). The district court held that "[u]nder the deferential standard applicable" here, the state court's prejudice "conclusion [was] not 'contrary to' and did not involve 'an unreasonable application of' clearly established federal law." We agree.

The jury heard ample evidence supporting Strickland's guilt. For example, it heard: (1) eyewitness testimony from one of the victims identifying Strickland as the robber; (2) testimony from the other victim describing Strickland's physical appearance, and

asserting that he had been able to identify Strickland as one of two possible suspects when he viewed a photographic line-up of possible suspects; (3) eyewitness testimony that the robber was driving a green Ford Ranger with a license plate bearing the same first three letters as the license plate on Strickland's green Ford Ranger; and (4) testimony that Strickland, who lived in Georgia, was in Tallahassee on the night of the robbery.

Moreover, the jury heard testimony that the prosecutors had failed to uncover the gun, pornographic material, or hooded sweatshirt that were allegedly involved in the robbery—and it convicted Strickland anyway. It's unlikely that the jury's determination—in light of all of the facts listed above weighing in favor of Strickland's guilt—would have been different had it been informed that, more than simply not finding the incriminating items, the police had searched for and still not found them. And that's especially so given the roughly 34 hours that elapsed between the robbery and the search—ample time for Strickland to have moved the incriminating items out of his truck.

At a minimum, the state court's prejudice determination—that the search evidence wouldn't have made a difference—wasn't "an unreasonable application of clearly established federal law." *Williams*, 529 U.S. at 404–05 (cleaned up).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JAMES LAMAR STRICKLAND,

Petitioner,

v. CASE NO. 4:19:cv2-RH-CAS

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

ORDER DENYING THE PETITION AND GRANTING A CERTIFICATE OF APPEALABILITY

By petition for a writ of habeas corpus under 28 U.S.C. § 2254, James Lamar Strickland seeks relief from his Florida state-court robbery conviction. The petition is before the court on the magistrate judge's report and recommendation, ECF No. 21, and the objections, ECF No. 24. I have reviewed de novo the issues raised by the objections.

The report and recommendation correctly concludes that the petition should be denied. This order accepts the report and recommendation. This order adopts the report and recommendation as the court's opinion on issues not addressed in

this order. And this order also adopts the report and recommendation as the court's further opinion on the issues addressed in this order, except to the extent of any inconsistency with this order.

I

The report and recommendation accurately sets out the governing legal standards. Three are critical here.

First, a federal habeas court may set aside a state court's ruling on the merits of a petitioner's claim only if the ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if the ruling "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). A long and ever-growing line of cases addresses these standards. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86 (2011); *Williams v. Taylor*, 529 U.S. 362 (2000); *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117 (11th Cir. 2012).

Second, to prevail on a claim of ineffective assistance of counsel, a petitioner must show both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice is a reasonable probability of a different result—a showing sufficient to undermine confidence in the outcome. *Id.* at 694.

Third, to prevail on a claim that the state improperly withheld information favorable to the defense, thus denying due process, *see Brady v. Maryland*, 373 U.S. 83 (1963), there must be a reasonable probability that disclosure of the information would have changed the result. This again requires a showing sufficient to undermine confidence in the outcome. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999).

II

Someone—the state says it was Mr. Strickland—robbed two victims on January 16, 2011 as they walked near a street. The victims provided this information to officers: the robber was driving a green truck, was wearing a hoodie, said he lived in his truck, asked for money, offered to sell the victims pornography, and finally, when the victims said no, robbed them at gunpoint. One victim said the green truck had a Florida license plate beginning with "BJM." The same victim later positively identified Mr. Strickland at a photo lineup and then at trial.

Mr. Strickland committed an unrelated theft on the next day, January 17. A search of his green truck on that day turned up no hoodie, no pornography, and no gun. The truck had a Georgia license plate beginning with "BJM."

Law enforcement did not immediately connect the January 16 robbery with the January 17 theft. It apparently was January 21—five days after the robbery—

when law enforcement focused on Mr. Strickland as the suspected robber. The investigating officer did not attempt to search Mr. Strickland's truck, even though the officer had been told that the robber claimed to live in his truck. If that was true, the robber might well have had nowhere else to keep a hoodie, pornography, or gun. But the truck was in Georgia, perhaps 30 miles away, and the officer apparently believed searching it would require a Georgia search warrant.

The robbery and theft were charged in different cases. Mr. Strickland entered a guilty plea in the much-less-serious theft case. He went to trial in the robbery case. The robbery prosecutor apparently did not personally know about, and thus did not disclose, the January 17 search that turned up no hoodie, pornography, or gun. The officer's investigative report said—incorrectly—that there had been no such search.

As it turns out, Mr. Strickland was represented by the same attorney in both cases. The attorney apparently received discovery in the theft case that showed that the truck was searched on January 17 and that no hoodie, pornography, or gun was found. But with his focus on the January 16 robbery, the attorney did not connect the dots. This apparently was an oversight, perhaps attributable in part to the erroneous report that there had been no search. In any event, even good, experienced attorneys sometimes make mistakes. This was one.

III

The state-court record establishes deficient performance by Mr. Strickland's attorney or the state's unconstitutional failure to turn over favorable information. Or both.

If the robbery and theft cases are treated as related, so that the state's disclosure of the information in the theft case satisfied its duty to disclose in the robbery case, then the attorney rendered deficient performance by overlooking the information about the search.

On the other hand, if the robbery and theft cases are treated as separate, then the state has no excuse for its failure to separately disclose the information in the robbery case—not just in the theft case. The state's duty to disclose favorable information is not limited to information known to the prosecutor personally. Officers made the connection between the two cases and were obligated to turn over the favorable information about the search as part of the discovery not only in the theft case but also in the robbery case.

In any event, Mr. Strickland's expert testified in the state collateral proceeding, without contradiction, that in defending the robbery case, the attorney should have found and realized the importance of the information provided through discovery in the theft case, separate or not.

IV

The issue, then, is prejudice.

The subject of what was in Mr. Strickland's truck drew prominent attention during the trial. As it turns out, Mr. Strickland's argument was substantially weaker than it could have been. Mr. Strickland argued with vigor that officers never found a hoodie, pornography, or gun. But with no search to point to, the argument suggested officer negligence more than Mr. Strickland's innocence—there was no way to know whether the materials were or were not in the truck. The jury might have excused the officer for not conducting a search, reasoning the materials could easily have been moved in the five days or so between the robbery and Mr. Strickland's arrest. And more importantly, officer negligence was not the issue. The jury could have concluded that with no evidence of what was or was not in the truck, the defense argument about failure to locate a hoodie, pornography, or gun was nothing more than speculation.

These arguments would have been different had the jury been provided truthful information about the results of the search that occurred one day after the robbery. Whether the difference is sufficient to undermine confidence in the outcome is a close question. Two critical points support the state.

First, Mr. Strickland drove a green truck with a license plate beginning with "BJM." It was a Georgia plate, not a Florida plate, but the crime occurred perhaps 20 miles from the Florida-Georgia line; plates from both states are common in this area. That a witness focusing on the numbers might not accurately identify the

state is hardly surprising. And the three-letter sequence on the plate, provided before there was a suspect, is highly incriminating. Eyewitnesses sometimes incorrectly identify faces. But the odds of hitting three successive letters on a green truck but getting the wrong green truck are surely long. It is not easy to undermine confidence in an outcome based on evidence of this kind.

To be sure, the state did not take a screen shot when it pulled up information on other vehicles with these letters in sequence. Perhaps there were other vehicles, even green trucks, with these letters. But Mr. Strickland has not pointed to any, even today. The burden at trial was on the state. The burden on collateral review is on Mr. Strickland.

Second, the search evidence is persuasive only if Mr. Strickland lived in his truck. If he lived there, and if he committed the robbery, one would expect the hoodie, pornography, and gun still to be in the truck the next day. Where else would he put them? But if he did not live in the truck, one would not be at all surprised if these items were removed and taken into his residence before the next day. Mr. Strickland did not allege or prove in his state collateral proceeding, and has not alleged in this federal habeas petition, that he in fact lived in his truck. That he told the victims he lived in his truck is scant evidence that he actually lived there; this might well have been a panhandler's ruse to obtain a voluntary payment

or a robber's effort to have the victims pull out their wallets, thus making a robbery easier. Here, too, the burden of proof is now on Mr. Strickland.

The state postconviction court ruled that the search evidence would not have made a difference. The conclusion is not ironclad. But the conclusion is not "contrary to" and did not involve "an unreasonable application of" clearly established federal law, and the conclusion was not "based on an unreasonable determination of the facts in light of the evidence presented" in state court. 28 U.S.C. § 2254(d)(1)-(2). Under the deferential standard applicable in this federal habeas proceeding, Mr. Strickland is not entitled to relief.

V

Rule 11 of the Rules Governing § 2254 Cases requires a district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were " 'adequate to deserve encouragement to proceed further.' "

529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). Further, to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "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 jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

Mr. Strickland has made the required showing only as set out below.

VI

For these reasons and those set out in the report and recommendation,

IT IS ORDERED:

1. The report and recommendation is accepted.

2. The clerk must enter judgment stating, "The petition is denied with prejudice."

3. A certificate of appealability is granted on this issue: whether the petitioner is entitled to relief based on his attorney's ineffective assistance as to, or

the state's failure to disclose, that the petitioner's truck was searched the day after the robbery at issue and no hoodie, pornography, or gun was found.

4. The clerk must close the file.

SO ORDERED on June 9, 2020.

s/Robert L. Hinkle
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES LAMAR STRICKLAND,

Petitioner,

VS CASE NO. 4:19-cv-00002-RH-MAF

SECRETARY DEPARTMENT OF CORRECTIONS,

Respondent.

JUDGMENT

"The petition is denied with prejudice."

JESSICA J. LYUBLANOVITS
CLERK OF COURT

June 9, 2020
DATE

s/Ronnell Barker
Deputy Clerk: Ronnell Barker

IN THE UNITED STATES NORTHERN DISTRICT OF FLORIDA

JAMES STRICKLAND, Confined: JACKSON CI

v. Prisoner No.: N 17723

SECRETARY DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA.

PETITION UNDER 28 U.S.C.§ 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

1. (a) Name and location of court that entered the judgment of conviction under attack: Second Judicial Circuit, Leon County, Florida.

   (b) Criminal docket or case number: 2011CF 631A1 & A2.

2. (a) Date of the judgment of conviction and sentencing: October 9, 2012.
   (b) Length of sentence: Life (2 concurrent life sentences).

3. In this case, were you convicted on more than one count or crime? Yes.

4. Nature of offenses involved: 2 Counts of Robbery with a firearm.

5. What was your plea? Not guilty.

6 If you went to trial, what kind of trial did you have? Jury.

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing? No.

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

9. If you did appeal, answer the following:
   (a) Name of court: First District Court of Appeal of Florida
   (b) Case number: 1D12-5137.
   (c) Result: Affirmed.
   (d) Date of result: December 23, 2013. Mandate: January 8, 2014.
   (e) Citation: *Strickland v. State*, 128 So. 3d 803 (Fla. 1st DCA 2013).
   (f) Grounds raised: The trial Court erred in refusing to have the "service person number" removed from the verdict form in this case as it unfairly

denigrated the presumption of innocence.
(g) Did you seek further review by a higher state court? No.
(h) Did you file a petition for certiorari in United States Supreme Court? No.

10. Other than the direct appeal listed above, have you filed any petitions, motions, or applications, concerning this judgment of conviction in state court? Yes.

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: First District Court of Appeal.
(2) Docket or case number: 1D15-5813.
(3) Date of filing: December 21, 2015.
(4) Nature of the proceeding: Petition Alleging ineffective assistance of Appellate Counsel.
(5) Grounds raised: Ineffective assistance of appellate counsel for failing to raise trial court error for (1) failing to sustain objections and exceptions during jury selection; (2) in denying judgment of acquittal; and (3) error in evidentiary rulings.
(6) Did you have an evidentiary hearing on the motion? No.
(7) Result: Denied.
(8) Date of result: October 19, 2016.

(b) (1) Name of court: Second Circuit, Leon County, Florida.
(2) Docket or case number: 2011CF 631A1 & A2.
(3) Date of filing: 03/13/2015.
(4) Nature of the proceeding: Motion for Postconviction Relief.
(5) Grounds raised:

1. Counsel Failed to move to suppress the tainted identification.
2. Counsel failed to object to prejudicial testimony and evidence.
3. Counsel failed to move to strike a juror for misconduct.
4. The State failed to provide exculpatory evidence.
5. Counsel failed to investigate, research and prepare for trial.
6. Counsel failed to argue the State's failure to prove the perpetrator carried and actual gun.
7. Counsel failed to object to showing the photo lineup to the jury where the photos appeared as "mug shots."
8. Counsel failed to object to the characterization of the magazines and DVD as pornographic.
9. Counsel failed to object to testimony identifying the victims as college students.

10. Cumulative error.

(6) Did you have an evidentiary hearing? Yes, on grounds 1-2, 4-6, 8 & 10.
(7) Result: Denied.
(8) Date of result: December 14, 2016.
(9) Did you appeal the denial of the 3.850 motion: Yes.
(a) Name of court: First District Court of Appeal, Florida.
(b) Case number: 1D17-0167.
(c) Result: Per Curiam Affirmed.
(d) Date of result: September 28, 2018. Mandate: December 26, 2018.
(e) Citation: *Strickland v. State*, __ So. 3d __ (Fla. 1st DCA 2018).
(f) Did you seek further review by a higher state court? No.
(g) Did you file a petition for certiorari in U.S.S.C.? No.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States.

Ground 1. State failed to provide exculpatory evidence. (Ground 4 of Petitioner Strickland's 3.850 motion).

In his state postconviction motion, Petitioner Strickland alleged that the State failed to provide material exculpatory evidence obtained during the investigation. As a result, Petitioner Strickland was denied his right to a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

During discovery, law enforcement affirmatively told defense counsel that Petitioner Strickland's truck had not been searched. During trial, law enforcement and the state attorney asserted that the truck was not searched. In fact, the truck was searched and its contents were inventoried. None of the items identified by the

alleged victims were found in the truck. Petitioner Strickland did not discover that the truck was searched and inventoried until after his conviction became final.

The victims to the robbery testified that the perpetrator was wearing a hoodie and told them he lived in his truck. They also testified that he attempted to sell them pornographic magazines and DVDs. They said the perpetrator pulled a gun. The day after the robbery, Petitioner Strickland was arrested on an unrelated theft charge. His truck was impounded and searched. The inventory does not show a hoodie, gun or pornographic magazines and DVDs. If Petitioner Strickland had perpetrated the robbery, he would have been living in his truck. The fact that those items were not located in his truck was his best defense. The State's failure to provide this exculpatory evidence (the search) deprived Petitioner Strickland of his best theory of defense.

The State also failed to provide the list of vehicles that matched the description and/or the first three letters of the license plate. The truck was not a match to the description of the victims. The victims provided what they thought were the first three letters of a Florida license plate. Petitioner Strickland had a Georgia license plate. Officer Wester indicated that other vehicles came up when he searched for the license plates beginning with "BJM". The other vehicles that met the criteria for the search were exculpatory and should have been provided to Petitioner Strickland. Had the jury been provided with a list of vehicles that matched the description

provided by the victims, the jury would have been presented with other persons who could have committed the offense. Other possible perpetrators equate to reasonable doubt and an acquittal for Petitioner Strickland.

The failure of the State Attorney to provide this exculpatory evidence constitutes a *Brady* violation and violates Petitioner Strickland's rights under the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83 (1963). To satisfy the materiality prong of *Brady,* a defendant must prove that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *Guzman v. State*, 868 So.2d 498, 506 (Fla. 2003) (*quoting United Sates v. Bagley*, 472 U.S. 667, 682 (1985) (plurality opinion)).

During the state court postconviction evidentiary hearing the State contended that the Assistant State Attorney trying the case was unaware that the truck had been searched. The Supreme Court in 2006 succinctly addressed this issue in *Youngblood v. West Virginia*, 547 U.S. 867 (2006).

> "A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. This Court has held that the *Brady* duty to disclose extends to impeachment evidence as well as exculpatory evidence, and *Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigator and not to the prosecutor.' 'Such evidence is material if "there is a reasonable possibility that had the evidence been disclosed to the defense, the result of the proceeding would have been

> different",' although a 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.' The reversal of a conviction is required upon a 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.,* at 435.

In denying Grounds four and five of the state court postconviction motion, the postconviction court noted that defense counsel was still able to argue that the police were incompetent by failing to search the truck and that as a result there was a lack of evidence. The court reasoned that the theory of defense was presented and that even if Petitioner Strickland had known about the search of the truck it would not have made a significant difference and would have been risky because it could have let the jury know that Petitioner Strickland was initially arrested for a theft. This reasoning by the postconviction court ignores the fact that the same protections employed during the trial to prevent the jury being prejudiced by information of the theft arrest, could have been used regardless of whether or not the truck was actually searched. As it was, the jury was provided inaccurate information.

The postconviction court's reasoning also ignores the testimony of Michael Kessler. Mr. Kessler is a board certified criminal trial lawyer with 30 years of experience and hundreds of trials. He testified that:

> If I have been trying this case, knowing that the truck had in fact been searched, the fact it was searched and they didn't find these important items in the truck the day after the crime would have been

> a main feature of the defense. It would have been the strongest point that the defense could have presented in the case, apart from maybe putting the defendant on the stand. And if he had a felony prior record, which he did, I wouldn't have wanted to put him on the stand.
>
> What you're talking about here is a difference between a speculative doubt, which the jury instruction says is not reasonable doubt. Maybe the police could have searched it if they should have. If they had, they wouldn't have found any of these things; that's speculation what the police might have found. But if you actually had affirmative proof that they did search, they did search the very next day and they didn't find these things, that would have been very very important and it would have been the main – it should have been the main feature of the defense presentation because it does tend to contradict or undermine the accuracy of the identification witnesses.
>
> And these people actually were robbed. They are basically telling the truth as they believe it to be, but that doesn't mean they are right. And here's important evidence that at worse, casts doubt on whether or not they are right. So yes, I have presented it a whole lot differently if I, as the trial lawyer, knew the truck had been searched.

The state postconviction court erred by concluding that the withheld evidence was not material because the Defense could (and did) still argue that the police were incompetent for their failure to search the truck and that as a result there was a lack of evidence. The postconviction court's ruling did not take into account that informing the jury that the truck was searched shortly after the alleged robbery, and none of the items described by the victims were in the truck constitutes actual evidence of innocence. Whereas arguing the incompetence of law enforcement is not evidence of anything related to Petitioner Strickland's guilt or innocence.

The truck was searched and nothing was found that connected Petitioner Strickland to the crime. If Petitioner Strickland was the perpetrator, the hoodie, the pornographic magazines and DVDs, and, most importantly, the gun, would have been in the truck. None of those items were in the truck. Yet the jury was never told that no evidence was found in the truck because no one involved in the trial knew the truck had been searched.

The postconviction court also reasoned that the fact that more than a day passed between the two crimes made the search information irrelevant. However, Petitioner Strickland is not required to prove that the information would have resulted in an acquittal. Rather "reversal of a conviction is required upon a 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.,* at 435.

Thus, the state postconviction court's ruling on this claim was contrary to and an unreasonable application of *Brady* and *Youngblood*. Moreover, the state court's decision was based on an unreasonable determination of the facts in light of the evidence contained in the state record.

Ground 2. Defense counsel rendered ineffective assistance by failing to investigate, research and prepare for trial. (Ground 5 of Petitioner Strickland's 3.850 motion).

In his state postconviction motion, Petitioner Strickland alleged that defense counsel rendered ineffective assistance by failing to investigate, research and

prepare for trial. As a result, Petitioner Strickland was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

The failure of counsel to thoroughly investigate the law and facts is apparent on the face of the record. During the trial, there was extensive discussion about the failure of law enforcement to search the truck. There was argument and posturing between the State and defense counsel. Defense counsel wanted to cross-examine Officer Wester about his lack of diligence in the investigation because he didn't search the truck, but was concerned about opening the door to the other pending case. The jury was told law enforcement failed to search the truck. In fact, the truck was searched and inventoried. The victims testified that the perpetrator told them he was living in his truck. They also testified he attempted to sell them pornographic magazines and DVDs and then pulled a gun.

Petitioner Strickland was arrested the next day on an unrelated theft charge. (Petitioner Strickland was apprehended by law enforcement while picking up scrap metal, some of which was determined to belong to another individual. As a result, he was charged with theft.) Petitioner Strickland's truck was impounded and searched. The inventory does not show a hoodie, a gun, pornographic magazines or DVDs. If Petitioner Strickland had been the perpetrator of the robbery, living in his truck, one would expect to find the items in his truck the next day. The fact that

those items were not found was Petitioner Strickland's best defense.

Petitioner Strickland was deprived of his best theory of defense. In *Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008), the Eleventh Circuit Court of Appeals explained that a defense attorney is required to prepare himself for trial prior to making strategic trial decisions:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Crawford v. Head*, 311 F.3d 1288, 1298 (11th Cir. 2002) (quoting *Strickland*, 466 U.S. at 690–91). "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior" to a legal proceeding. *Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987). Such preparation includes an understanding of the legal procedures and the legal significance of tactical decisions within those proceedings. *Young v. Zant*, 677 F.2d 792, 794, 799–800 (11th Cir. 1982).

Defense counsel was ineffective for failing to thoroughly investigate the law and facts relevant to plausible options in preparing for trial. Counsel's failure fell below the applicable standard of performance.

To obtain postconviction relief on the basis of ineffective assistance of counsel, a defendant most show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984). As to the first prong, Petitioner Strickland has established that

counsel made errors so serious that counsel was not functioning as the counsel guaranteed Petitioner Strickland by the Sixth Amendment, in that he should have investigated and discovered the truck was search and none of the items connecting him to the crime were located in the truck. Further he should have presented the information to the jury. Here, it cannot be said that defense counsel met the standard of counsel guaranteed Petitioner Strickland in the Sixth Amendment.

Petitioner Strickland has also demonstrated that counsel's ineffectiveness prejudiced the Defense because he was deprived of the strongest evidence supporting his theory of defense. Petitioner Strickland did not commit the crime and the fact that his truck contained none of the items described by the victims was the best evidence to support his innocence. Absent defense counsel's failure to obtain and present to the jury the unfruitful search of the truck, there is a reasonably probability that Petitioner Strickland would not have been convicted and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

It does not matter whether the fault is laid at the feet of the Office of the State Attorney for their failure to provide the information in discovery, or with the Defense Attorney who should have found the information by investigating and preparing his case. Both attorneys, credibly denied knowledge that the truck was searched. The

fact remains: The truck was searched and the incriminating items that would have been in the robber's truck were not in Petitioner Strickland's truck.

Petitioner Strickland should not have to suffer because of the mistake of a law enforcement officer or state attorney who honestly believed the truck had not been searched. An honest mistake requires nothing other than that Petitioner Strickland be provided the opportunity to present his best defense.

The Sixth Amendment right to counsel implicitly includes the right to effective assistance of counsel. *See McMann v. Richardson*, 397 U.S.759, 771 n.14 (1970); *Chatom v. White*, 858 F.2d 1479, 1484 (11th Cir. 1988). The familiar test utilized by courts in analyzing ineffective assistance of counsel claims is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires a 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 defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 446 U.S. 668, 687 (1984). The Supreme Court emphasized that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684. *See also Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *United States v. Cronic*, 446 U.S. 648, 653 (1984) ("Without counsel, the right to a trial would be

of little avail") (internal quotation marks and footnote omitted); *United States v. Morrison*, 449 U.S. 361, 364 (1981).

Applying the *Strickland* standard to the state court trial record, it is clear that defense counsel was ineffective for failing to investigate, research and prepare for trial. Counsel's actions fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different. Therefore, Petitioner Strickland satisfies both of the *Strickland* prongs.

The state court's rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Strickland's Sixth Amendment right to the effective assistance of counsel. Additionally, the state court's rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Ground 3. Defense counsel rendered ineffective assistance of counsel by failing to file a motion to suppress based upon tainted photo lineup and in court identifications. (Ground 1 of Petitioner Strickland's 3.850 motion)

In his state postconviction motion, Petitioner Strickland alleged that defense counsel rendered ineffective assistance of counsel by failing to file a motion to suppress based upon tainted photo lineup and in-court identifications. As a result, Petitioner Strickland was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation

of article I, section 16, of the Florida Constitution.

The alleged robbery occurred on January 16, 2011. The victim stated that they were leaving a bar around 1:30 a.m. and a green truck pulled up to them in a parking lot. A male driver, wearing a hoodie and asking for money indicated that he lived in his truck. The two victims refused, indicating that they had no money. This assailant then pointed what the victims believed to be a gun and demanded money. The victims gave the assailant a few dollars and ran from the scene to a police car nearby. The victims were interviewed but were not provided with the photo lineup until five days later. Only one of the victims picked Petitioner Strickland from the photo lineup.

Although the victims viewed the photo lineup individually, they arrived together; left together, and were allowed to have contact during the procedure. The failure to isolate the victims from one another, the length of time between the crime and the photo lineup, and the failure on the part of the victims to give consistent and accurate descriptions of the perpetrator tainted the identification.

The determination of whether to exclude an out-of-court identification is determined by a two-pronged test: (1) whether the police used an unnecessarily suggestive procedure and number (2) if so, considering all the circumstances, whether the suggestive procedure gives rise to a substantial likelihood of irreparable

misidentification. *See Manson v. Brathwaite*, 430 U. S. 98, 110 – 14, 97 S. Ct. 2243, 53 L.Ed. 140 140 (1977) and *Rimmer v. State*, 825 So. 2d 304, 316 (Fla. 2002) The factors to be considered in evaluating the likelihood of misidentification if the identification should be suppressed are; (a) the witness' opportunity to view the suspect at the time of the crime; (b) the witness' degree of attention; (c) the accuracy of the witness' prior description of the suspect; (d) the level of certainty demonstrated by the witness at the confrontation; and (e) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In this case, the victims had a very limited opportunity to view the suspect at the time of the crime. It was dark, they did not give attention to detail and were inconsistent and inaccurate in their descriptions of the suspect and only one positively identified Petitioner Strickland. (The one who had been drinking just prior to the incident). Additionally, despite a description that the perpetrator was wearing glasses, none of the persons in the photo line-up were wearing glasses.

For these reasons, the in-court identification should not have been allowed based upon the tainted identification. Especially for the witness who was unable to make any positive identification but was allowed to basically identify Petitioner Strickland in-court. An "in-court identification may not be admitted unless it is found to be reliable and based solely upon the witness' independent recollection of

the offender at the time of the crime, uninfluenced by the intervening illegal confrontation." *State v. Gomez*, 937 So. 2d 828 (Fla. 4th DCA 2006). (A two-part test is applicable in determining whether to suppress an out-of-court identification: "(1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.")

The factors above make it likely that a motion to suppress the identifications, (at least, the in-court identification by the witness incapable of picking out Petitioner Strickland in the photo lineup) would have been granted. If not, allowing the in-court identification would have required a reversal on appeal unless the record demonstrated beyond a reasonable doubt that there was no reasonable possibility that the error affected the verdict.

Petitioner Strickland submits that he satisfies both prongs of the *Strickland* test: he has demonstrated that counsel's performance was deficient in that he should have filed a motion to suppress the identification. He has also demonstrated that counsel's ineffectiveness prejudiced the defense. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding,

thereby undermining any confidence in the outcome.

Defense counsel was ineffective because he failed to file a motion to suppress the tainted identifications of Petitioner Strickland and allowed the in-court identification which was based upon the tainted show-up identifications. Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceedings would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. Therefore, Petitioner Strickland satisfies both of the *Strickland* prongs.

Thus, the state postconviction court's ruling on this claim was contrary to and an unreasonable application of *Strickland.* Moreover, the state court's decision was based on an unreasonable determination of the facts in light of the evidence contained in the state record.

Ground 4. Defense counsel rendered ineffective assistance of counsel by his failure to object to prejudicial testimony and evidence; his failure to properly argue that the State failed to prove he carried an actual gun; and his failure to object to characterization of the magazines and DVDs as pornographic.

In his state postconviction motion, Petitioner Strickland alleged that defense counsel rendered ineffective assistance of counsel by his failure to object to prejudicial testimony and evidence; his failure to properly argue that the State failed

to prove he carried an actual gun; and his failure to object to characterization of the magazines and DVDs as pornographic. As a result, Petitioner Strickland was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

Petitioner Strickland submits that these three inadequacies of counsel constitute ineffective assistance of counsel as follows:

i. Petitioner Strickland was arrested on an unrelated charge the day after the subject robbery. He was picked up while "scrapping"[1] after it was reported that he was taking items that belonged to others and had not been discarded. He was incarcerated on these relatively minor charges for several weeks before he was arrested on the robbery charges. Officer Wester testified that Petitioner Strickland was in the area during the robbery, which was a reference to the theft charges. Defense counsel should have objected and requested a mistrial based upon the State's intentional disclosure of prejudicial information that allowed the jury to surmise Petitioner Strickland was incarcerated for another charge. Officer Wester also referred to a criminal database that he used to search for vehicles that matched the truck and first three letters of the license plate for the truck used in the robbery. This evidence was improper and prejudicial and should not have been allowed

[1] "Scrapping" refers to picking up scrap metal out of garbage placed outside for pickup.

without objection.

ii. Petitioner Strickland's motion for Judgment of Acquittal based upon the failure of the State to prove an actual gun was used in the crime was denied but the trial court indicated that it was fair for the defense to argue the issue in closing.

Mr. Pantner testified he could not tell if the gun was a revolver or another type of weapon, or even if the gun was a toy. Mr. Laycock also indicated he could not distinguish a revolver from another firearm and that it could have been a toy.

Despite this testimony and encouragement from the trial court, defense counsel did not argue to the jury that the State failed to prove the crime was committed with a firearm.

iii. Finally, the postconviction court indicated that it was not the witnesses who characterized the magazines and videos as pornographic. The court indicated "The victims never characterized the items as pornographic they gave defendant's statement. He said it was pornographic and that is found in the record on Page 192 and 119." The reference by the court is to statements made by the perpetrator of the robbery. Only if one assumes that Petitioner Strickland is guilty – could one say that the witness statement quoting the robber is attributable to Petitioner Strickland. So, prior to his conviction, the witnesses could have been instructed to refer to the material as magazines and DVDs. It was irrelevant and prejudicial to refer to the material as pornographic.

Defense counsel rendered ineffective assistance of counsel by his failure to object to prejudicial testimony and evidence; his failure to properly argue that the State failed to prove Petitioner Strickland carried an actual gun; and his failure to object to characterization of the magazines and DVDs as pornographic. Counsel's failures fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceedings would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. Therefore, Petitioner Strickland satisfies both of the *Strickland* prongs.

The state postconviction court's ruling on this claim was contrary to and an unreasonable application of *Strickland.* Moreover, the state court's decision was based on an unreasonable determination of the facts in light of the evidence contained in the state record

Ground 5. Defense counsel rendered ineffective assistance of counsel by failing to move to strike a juror for misconduct. (Ground 3 of Petitioner Strickland's 3.850 motion).

In his state postconviction motion, Petitioner Strickland alleged that defense counsel rendered ineffective assistance by failing to move to strike a juror for misconduct. As a result, Petitioner Strickland was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

During the trial, Juror Number 5 disclosed to the bailiff that he had been dishonest in answering the court's standard questions during voir dire. He withheld information that he had a relative convicted of a crime. This disclosure occurred after the close of evidence but prior to the jury instruction. Defense counsel did not object or move to strike the juror. The juror deliberately failed to disclose his bias. At the very least, counsel should have inquired about the juror's bias to determine if grounds existed for removal. Without such inquiry, ignoring the juror's dishonesty was a reckless disregard of Petitioner Strickland's right to a fair trial. To make matters worse, the dishonest juror was the foreman. Thus, intensifying the effect of a biased juror.

Defense counsel should have moved the court to inquire specifically of the juror or for a mistrial. Juror misconduct gives rise to a rebuttable presumption of prejudice. Generally, as in this case, juror misconduct issues arise where a juror conceals a material fact during voir dire. *See Roland v. State*, 584 So. 2d 68, 70 (Fla. 1st DCA 1991).

Every irregularity which would subject a juror to censure does not require a new trial. However, once the defendant has established juror misconduct, he is entitled to a rebuttable presumption of prejudice and, thus, a new trial, unless the state can demonstrate to the court that any prejudice was harmless. *Gould v. State*, 745 So. 2d 354, 358 (Fla. 4th DCA 1999). Counsel failed to take any action at all

and as such was ineffective. Florida Rule of Criminal Procedure 3.600(b) lists grounds for the granting of a new trial if prejudice is shown. Juror misconduct is one such ground. *See* Fla. R. Crim. P. 3.600(b)(4)

The postconviction court determined "it is clear" ground 3 "was a tactical decision and that there was absolutely no prejudice from a juror that didn't disclose during jury selection. But later disclosed that he had a relative that had been convicted of a crime."

The record does not conclusively show that the Petitioner Strickland is entitled to no relief and there are no attachments supporting the postconviction court's conclusion that the decision not to challenge the juror was a tactical decision.

Counsel's failure to request removal of the juror or a mistrial based upon juror misconduct constitutes ineffective assistance of counsel. "Whether trial counsel had a tactical or strategic reason for not pursuing the dismissal of the juror is a determination that usually requires an evidentiary hearing." *Reynolds v. State*, 99 So. 3d 459 (Fla. 2012) *citing Erlsten v. State*, 842 So. 2d 967 (Fla. 4th DCA 2003).

In addition, trial counsel failed to preserve the issue for appeal by failing to make the appropriate objections and motions.

Petitioner Strickland was entitled to an evidentiary hearing on the claim that counsel was ineffective for failure to move the court for voir dire of the specific juror, followed by a motion to remove the juror or a motion for mistrial.

The Sixth Amendment right to counsel implicitly includes the right to the effective assistance of counsel. *See McMann v. Richardson,* 397 U.S. 759, 771 (1970); *Chatom v. White,* 858 F.2d 1479, 1484 (11th Cir. 1988). "The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency." *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Defense counsel was ineffective for failing to move to strike a juror for misconduct. Counsel's actions fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. Therefore, Petitioner Strickland satisfies both of the *Strickland* prongs.

The state court denied the Petitioner Strickland the opportunity to present evidence related to his claim and therefore Petitioner Strickland was prevented from developing a factual basis for his claim in state court. Hence, Petitioner Strickland is not precluded from an evidentiary hearing in this proceeding and the Court should grant him one.

Ground 6. Defense counsel rendered ineffective assistance of counsel by failing to object to showing the photo lineup to the jury where the photos appeared as "mug shots" (Ground 7 of Petitioner Strickland's 3.850 motion).

In his state postconviction motion, Petitioner Strickland alleged that defense counsel rendered ineffective assistance of counsel by failing to object to showing the photo lineup to the jury where the photos appeared as "mug shots." As a result, Petitioner Strickland was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

Defense counsel failed to object to showing the photo identification to the jury. The photos appeared as "mug shots and indicate a prior record and as a result were prejudicial." *Higgins v. State*, 885 So. 2d 994 (Fla. 4th DCA 2004). The State responded to this issue by claiming that the photos were taken from the driver license database. This is incorrect. The photos came from a criminal database. Both attorneys and the judge discussed the fact that the photos case from CJIS, which is the Criminal Justice Information Service for the Florida Department of Law. (T II 206). It was accepted that all persons in the database had been arrested. Further, the victims' identification was not unequivocal. The more-sober of the two, did not identify Petitioner Strickland from the photo line-up. There were no fingerprints and no physical evidence was taken from Petitioner Strickland's truck. *See Lock v. State*, 799 So. 2d 384 (Fla. 4th DCA 2001).

In denying this ground the postconviction court stated: "There was no proof that the photos looked like 'mug shots.' In this lineup that the State has introduced

today in State's 3 looks like any other lineup that I've seen." (PC 165). Because this ground was summarily denied, Petitioner Strickland was not required to provide "proof that the photos looked like "mug shots." Furthermore, when no evidentiary hearing is conducted on such claims, this Court must accept Petitioner Strickland's factual allegations to the extent they are not refuted in the record. There are no records attached to the postconviction court's order to support the summary denial of the motion.

Defense counsel was ineffective for failing to object to showing the photo lineup to the jury where the photos appeared as "mug shots". Counsel's actions fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. Therefore, Petitioner Strickland satisfies both of the *Strickland* prongs.

The state postconviction court's ruling on this claim was contrary to and an unreasonable application of *Strickland.* Moreover, the state court's decision was based on an unreasonable determination of the facts in light of the evidence contained in the state record.

Ground 7. Defense counsel rendered ineffective assistance of counsel by failing to object to testimony identifying the victims as college students. (Ground 9 of Petitioner Strickland's 3.850 motion).

In his state postconviction motion, Petitioner Strickland alleged that defense counsel rendered ineffective assistance by failing to object to the irrelevant testimony identifying the victims as college students. As a result, Petitioner Strickland was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

During the trial, the victims testified that they were (or had been) students of Florida State University and fraternity brothers. Such testimony had no probative value and served only to bolster the testimony of the witnesses, garner sympathy for the victims, and create animosity towards Petitioner Strickland. As such, its probative value was outweighed by the prejudice to Petitioner Strickland. Counsel should have objected or filed a motion in limine to prevent the testimony. Because Tallahassee is a college town, FSU students are likely more sympathetic and credible based only on the fact that they are Florida State students. Where the information is irrelevant to the proof of the charges, the information was offered solely to garner favor and bolster the witnesses in front of the jury.

Defense counsel was ineffective for failing to object to the irrelevant testimony identifying the victims as college students. Counsel's failure fell below

the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceedings would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding thereby undermining any confidence in the outcome. Therefore, Petitioner Strickland satisfies both of the *Strickland* prongs.

The state postconviction court's ruling on this claim was contrary to and an unreasonable application of *Strickland.* Moreover, the state court's decision was based on an unreasonable determination of the facts in light of the evidence contained in the state record.

Ground 8. The cumulative effect of defense counsel's error deprived the Petitioner of a fair trial. (Ground 10 of Petitioner Strickland's 3.850 motion).

In his state postconviction motion, Petitioner Strickland alleged that all of the errors committed by defense counsel in the Petitioner Strickland's case, considered either individually or together, resulted in the Petitioner being denied a fair trial. "Where no single error or omission of counsel, standing alone, significantly impairs the defense, the district court may nonetheless find unfairness and thus, prejudice emanating from the totality of counsel's errors and omissions." *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979). *See also Cargle v. Mullin*, 317 F.3d 1196, 1206-1207 (10th Cir. 2003).

Ground 9. Appellate counsel rendered ineffective assistance of counsel for failing to argue on direct appeal that the trial court erred by failing to sustain the defense counsel's objections and exceptions during jury selection.

In his ineffective assistance of appellate counsel petition, Petitioner Strickland alleged that appellate counsel was ineffective for failing to raise on appeal a claim that the trial court erred by failing to sustain the defense counsel's objections and exceptions during jury selection.

Petitioner Strickland was charged by information with two counts of armed robbery with a firearm. During voir dire, the State challenged a juror for cause based upon the fact that the Defense attorney had represented the juror's son several years prior. Although the juror was appropriately rehabbed, and stated that she could be fair, the State challenged the juror for cause.

Petitioner Strickland objected to the State's challenge for cause, but the court granted the challenge for cause and excused the juror. Petitioner Strickland again noted his exception to the panel once the jury panel was accepted but not yet sworn. Thus, the issue was properly preserved. "the issue was properly preserved for review on appeal and [defendant] did not waive his objection to the cause challenge. *See Arnold v. State*, 755 So.2d 696, 698 (Fla. 4th DCA 1999) (explaining that in order to prevent waiver of juror challenge issue, opponent must call court's attention to its earlier objection before jury is sworn); *Ault v. State*, 866 So. 2d 674 (Fla. 2003) The test for determining juror competency is whether a juror can lay aside any bias or

prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *Id*. at 684.

In *Blake v. State*, 110 So. 3d 534 (1st DCA 2013), a very similar case, this court found that removal for cause was erroneous and that such removal was not subject to the harmless error test, "Rather, the relevant inquiry is "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error." *Grey v. Mississippi*, 481 U.S. 648, 686 (1987) (emphasis in original).

This issue was properly preserved by trial counsel and should have been raised on appeal by appellate counsel. Had the issue been raised, Petitioner Strickland submits that this Court would have reversed the trial court and remanded the matter for a new trial. Therefore, Petitioner Strickland submits that his appellate counsel was ineffective for failing to raise this issue on appeal. Petitioner Strickland has proven a specific error or omission committed by appellate counsel (failure to raise a preserved objection to the jury panel) and Petitioner Strickland has established that the error had a prejudicial impact on the appeal. The error/omission fell outside the range of professionally acceptable performance and the error compromised the appellate process – thereby undermining the confidence in the fairness and correctness of the outcome. *See Cupon v. State*, 833 So. 2d 302, 304-05 (Fla. 1st DCA 2002) ("In the case on review, we conclude that appellate counsel's failure to

raise a preserved and meritorious issue caused the representation to fall outside the range of professionally accepted performance."); *Lowman v. Moore*, 744 So. 2d 1210, 1210 (Fla. 2d DCA 1999) (holding failure to raise on direct appeal the issue that an essential element of the offense was not proved constituted ineffective assistance of appellate counsel).

Petitioner Strickland was prejudiced by his appellate counsel's failure to raise this meritorious issue on direct appeal. Petitioner Strickland has satisfied both the cause and prejudice prongs of *Strickland*. In this case, appellate counsel fell below the objective standard of reasonableness in failing to raise a claim on direct appeal that the trial court erred by failing to sustain the defense counsel's objections and exceptions during jury selection.

The state court's ruling in this case was contrary to and an unreasonable application of *Strickland* and Petitioner Strickland's Sixth Amendment right to the effective assistance of counsel. Additionally, the state court's ruling was based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Ground 10. Appellate counsel rendered ineffective assistance of counsel for failing to argue on direct appeal that the trial court erred by denying the motion for judgment of acquittal.

In his ineffective assistance of appellate counsel petition, Petitioner Strickland alleged that appellate counsel was ineffective for failing to raise on appeal a claim

that the trial court erred by denying the motion for judgment of acquittal.

Both witnesses testified that they thought the perpetrator pulled a gun but could not be sure that it was a real gun. Since there was no gun recovered from the truck, and no gun entered into evidence, the victims' subjective belief is not sufficient evidence that Petitioner Strickland actually carried a gun. Petitioner Strickland moved for a judgment of acquittal and later after the close of the evidence renewed his motion. Thus, the issue was preserved for appellate review.

The court should have granted the motion for judgment of acquittal. The court previously found:

> The prosecutor suggested the jury could find Augustine carried a firearm during commission of the offense based on the victim's belief that Augustine carried a firearm. See *Dicks v. State*, 75 So.3d 857, 859–60 (Fla. 1st DCA 2011) (recognizing that prosecutor erred in giving an incorrect interpretation of the law during closing argument); *Butler v. State*, 602 So.2d 1303, 1305 (Fla. 1st DCA 1992) (noting the state may not prove that defendant carried a firearm during a robbery "by presenting evidence of nothing more than the victim's subjective belief that the defendant possessed a 'firearm' ").

Augustine v. State, 143 So. 3d 940 (Fla. 4th DCA 2014).

In the case before the court, no gun was offered into evidence. Because Petitioner Strickland was arrested and his truck was impounded, a gun should have been recovered if Petitioner Strickland was the perpetrator. Since none was located, the State was forced to rely solely on the victims' description. The victims' observation was made in a very dark area (pitch black) and was speculative at best.

Taken in the light most favorable to the State, the victims' testimony is insufficient to prove Petitioner Strickland was the perpetrator, or that he carried a gun.

This issue was properly preserved by trial counsel and should have been raised on appeal by appellate counsel. Had the issue been raised, Petitioner Strickland submits that the court would have reversed the trial court and remanded the matter for a new trial. Therefore, Petitioner Strickland submits that his appellate counsel was ineffective for failing to raise this issue on appeal. Petitioner Strickland has proven a specific error or omission committed by appellate counsel (failure to raise a preserved denial of a motion for judgment of acquittal) and Petitioner Strickland has established that the error had a prejudicial impact on the appeal. The error/omission fell outside the range of professionally acceptable performance and the error compromised the appellate process – thereby undermining the confidence in the fairness and correctness of the outcome. *See Cupon v. State*, 833 So. 2d 302, 304-05 (Fla. 1st DCA 2002) ("In the case on review, we conclude that appellate counsel's failure to raise a preserved and meritorious issue caused the representation to fall outside the range of professionally accepted performance."); *Lowman v. Moore*, 744 So. 2d 1210, 1210 (Fla. 2d DCA 1999) (holding failure to raise on direct appeal the issue that an essential element of the offense was not proved constituted ineffective assistance of appellate counsel).

The motion for judgment of acquittal should have been granted and the most Petitioner Strickland could be convicted of was petit theft, a misdemeanor.

Petitioner Strickland was prejudiced by his appellate counsel's failure to raise this meritorious issue on direct appeal. Petitioner Strickland has satisfied both the cause and prejudice prongs of *Strickland*. In this case, appellate counsel fell below the objective standard of reasonableness in failing to raise a claim on direct appeal that the trial court erred by denying the motion for judgment of acquittal.

The state court's ruling in this case was contrary to and an unreasonable application of *Strickland* and Petitioner Strickland's Sixth Amendment right to the effective assistance of counsel. Additionally, the state court's ruling was based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Ground 11. Appellate counsel rendered ineffective assistance of counsel for failing to argue on direct appeal that the trial court erred in evidentiary rulings made during the trial.

In his ineffective assistance of appellate counsel petition, Petitioner Strickland alleged that appellate counsel was ineffective for failing to raise on appeal a claim that the trial court erred in evidentiary rulings made during the trial. The court limited Appellant Strickland's ability to cross-examine witnesses thereby infringing on his right to a fair trial. The trial court inhibited Appellant Strickland pursuing his theory of defense by not allowing Petitioner Strickland to inquire regarding the fact that a

number of persons fit the description and the Officer did not save the list of suspects; and by not allowing Petitioner Strickland to inquire that there were other automobiles that had the same three numbers on the license plate but he did not keep that list of possible suspects.

Both of these inquiries should have been allowed because there were other possible individuals who fit the description of the perpetrator (so much so that one of the victims did not pick Petitioner Strickland out of a line up). There were also other possible perpetrators whose automobile contained the same three numbers on the license plate. Any of those persons, could have been an alternative suspect. Thus, the argument could have been made that the guilty party was one of the suspects that fit the description physically or that drove the similar automobile, rather than Petitioner Strickland. This is especially compelling evidence when there was no other evidence linking Petitioner Strickland to the crime. The witness identification and the partial license plate were the only evidence linking Petitioner Strickland to the crime. A trial court reversibly errs by prohibiting cross-examination "when the facts sought to be elicited are germane to that witness' testimony and plausibly relevant to the theory of defense." *Bertram v. State*, 637 So. 2d 258, 260 (Fla. 2d DCA 1994); *Docekal v. State*, 929 So. 2d 1139 (Fla. 5th DCA 2006).

Thus the other suspects who were located by the search for the line-up participants, as well as the vehicles that shared the first three characters of the license

plate provided Petitioner Strickland with the opportunity to develop other potential suspects to provide reasonable doubt for the jury as part of his overall strategy. The court's ruling did not allow him to place that defense in front of the jury. "A trial court may not prohibit cross-examination when the facts sought to be elicited are germane to that witness' testimony and plausibly relevant to the theory of defense." *Martino v. State*, 964 So. 2d 906, 908 (Fla. 4th DCA 2007) citing *Smith v. State*, 38 So. 3d 871 (Fla. 4th DCA 2010). The evidence was therefore relevant and admissible. "There are different considerations presented when the question relates to the relevancy of evidence to show a reasonable doubt, rather than the commission of a crime. *Vannier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998). "If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility." *Id.* (citations omitted). *Roman v. State* (Fla. 4th DCA 2015).

Petitioner Strickland was prejudiced by his appellate counsel's failure to raise this meritorious issue on direct appeal. Petitioner Strickland has satisfied both the cause and prejudice prongs of *Strickland*. In this case, appellate counsel fell below the objective standard of reasonableness in failing to file a claim that the trial court erred in evidentiary rulings made during the trial by limiting Petitioner Strickland's ability to cross-examine witnesses thereby infringing on his right to a fair trial.

The state court's ruling in this case was contrary to and an unreasonable application of *Strickland* and Petitioner Strickland's Sixth Amendment right to the effective assistance of counsel. Additionally, the state court's ruling was based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

13. If any of the grounds listed in 12 were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:
    All grounds were properly raised in state court.

14. Do you have any petition or appeal not pending in any court, either state or federal, as to the judgment under attack? Yes (___) No (_X_)

15. Give the name and address, if known of each attorney who represented you in the following stages of the judgment attacked herein:

    (a) At preliminary hearing: N/A
    (b) At arraignment and plea: N/A
    (c) At trial: Frederick M. Conrad, 908 Thomasville Road, Tallahassee, Florida
    (d) At Sentencing: Frederick M. Conrad
    (e) On Appeal: David A. Davis, 4009 Danesborough Place, Tallahassee, Florida
    (f) In postconviction proceeding:
    Crystal M. Frusciante/undersigned counsel
    (g) On appeal from any adverse ruling in a postconviction proceeding:
    Crystal M. Frusciante

16. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack. Yes (___) No (_X_)

17. Petition timeliness: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition:

The Petitioner's convictions and sentence became final on March 24, 2014 – when the ninety-day period for filing a petition for writ of certiorari in the United States Supreme Court expired (note the ninetieth day was a Sunday, so the deadline expired on the following Monday). However, the one-year limitations period was tolled on March 13, 2015, when the Petitioner filed his Florida Rule of Criminal Procedure 3.850 state postconviction motion. The rule 3.850 appeal mandate was issued on December 26, 2018.

Oath

I declare (or certify, verify, or state) under penalty or perjury that the foregoing is true and correct. Executed on January 2, 2019:

/s/ Crystal McBee Frusciante on behalf of James Strickland.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida
Email: crimapptlh@myfloridalegal.com

by email on January 2, 2019;

Julie L. Jones, Secretary
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

by U.S. mail delivery on January 2, 2019.

Respectfully submitted,

/s/ Crystal McBee Frusciante
CRYSTAL MCBEE FRUSCIANTE
FL Bar No. 80215
11110 West Oakland Park Boulevard, Suite 388
Sunrise, Florida 33351
(954) 495-7889 Fax (866) 936-4546
Email: crystal@frusciantelaw.com

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **STRICKLAND**

period, it's your testimony you had one, maybe two drinks that were liquor, not beer?

A Correct.

Q Okay. When you guys left -- and can you show us on the map what direction you traveled?

A We came out the back door, right around here. Went through -- this is the back parking lot. And walked under this pavilion here, walked down the street right here, and ended up in this parking lot right there.

Q And can you please tell the members of the jury what, if anything, happened when you arrived in that parking lot?

A We were approached by a truck coming from the west, this way, that pulled up right next to us in the parking lot right here.

Q Okay. And can you please describe this truck to the members of the jury?

A It looked like a small green Ford Ranger, was what I described it as.

Q Okay. Now, what happened as the truck approached you?

A It pulled up and opened its window. The man inside flipped the light on and asked us for money.

Q Okay.

A He said he was -- oh, I'm sorry.

Q -- TVs?
A Yes. Okay, yes, sir.
Q You might have, you know, different types of property; right?
A Or things, yes, sir.
Q Okay. Now, the subcategory here was automobiles?
A Correct.
Q So you clicked on the box that said automobiles. I'm trying to write upside down. Kind of like that. Right?
A Sort of, yes, sir.
Q Okay. General concept?
A General concept, yes, sir.
Q I'm correct on that; right, sir?
A Yes, sir.
Q And what you do when you click on that box for automobiles is you're trying to get a partial tag; right?
A Yes, sir.
Q And in this case, you had three letters of a tag?
A Yes, sir.
Q And it was your understanding you were looking for a Florida tag?
A Yes, sir.
Q And that's based on the reports that you got?
A Yes, sir.
Q And you got a bunch of different pieces of cars?

A Right, that's correct, yes, sir.
Q Now, do you have a list of those cars that came up?
A No, sir, I do not.
Q And if you ran that same search today, would you get a different list?
MR. HUTCHINS: Objection, your Honor. Relevance.
MR. CONRAD: It's going to the fact that -- it's a lack of evidence issue.
MR. HUTCHINS: Well, Judge, no. It's not relevant, whether he ran it today, what would come up today versus what would come up then.
THE COURT: Sustained.
BY MR. CONRAD:
Q The list of cars that you got, all right, do you have that list?
A I do not.
MR. HUTCHINS: Objection. Cumulative. He's already answered that.
THE COURT: Sustained.
BY MR. CONRAD:
Q Did you destroy that list?
A No, sir.
Q Did you write any of that down?
A No, sir.
Q Is there any way to recover that list?

A No, sir, I don't --
Q Okay. And if we tried to run it again today, we would get a different list?
MR. HUTCHINS: Objection, your Honor.
THE COURT: That's been sustained.
MR. CONRAD: I'm trying to demonstrate, your Honor, that the list is gone. We don't have it. We'll never be able to get it.
MR. HUTCHINS: Objection. Counsel is testifying now.
THE COURT: Move on, Mr. Conrad.
MR. CONRAD: Okay.
BY MR. CONRAD:
Q Do you know how many automobiles came up with that letter B-J-N?
A No, sir. I don't recall with any certainty.
Q And you don't have a description of any of those?
A No, sir. It -- no, I don't.
Q You don't know how many of them were pickups?
A No, sir.
Q You don't know how many of them were green pickups?
MR. HUTCHINS: Objection. Cumulative, your Honor.
THE COURT: Overruled.
THE WITNESS: No, sir.
BY MR. CONRAD:

Q You don't know how many of them were green pickups?
A No, sir.
Q You don't know how many of them were Florida pickups and how many of them were Georgia pickups?
A No, sir.
Q Okay. And after that, after you got that list, then you focused on a physical description --
A Yes, sir.
Q -- right? Okay.
And you pulled up several people in a different database?
A No, sir.
Q Same database?
A Yes, sir.
Q Okay. That matched -- I'm talking about the description of a person.
A Not exactly.
Q Okay. You pulled up different descriptions of people?
A No, sir.
Q Okay. Well, you got that one hit on Mr. Strickland's car?
A Yes, sir.
Q And that was a Georgia car?
A Yes, sir.

Q What is the make and model of the vehicle that it came back registered to?
A A Ford.
Q Green Ranger?
A Yes, sir.
Q Is that the same vehicle described by the victims?
A Yes.
Q Now, he resides in Cairo, Georgia; is that correct?
A Yes, sir.
Q You are an officer with the Tallahassee Police Department; is that correct?
A Yes, sir.
Q Do you have jurisdiction in Cairo, Georgia?
A No, sir.
Q And if a piece of property were to be searched in Cairo, Georgia, would you have to go to Georgia and get a search warrant in the state of Georgia?
A Yes, sir, I would.
Q Okay. So you could get a judge to sign a search warrant here, but it would have no effect in a different jurisdiction; is that correct?
A Correct, sir.
Q Now, let me ask you some questions. You've testified that you put together other photo lineups prior to this case; correct?

MR. CONRAD: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. CONRAD:

Q Can you introduce yourself to the jury? Say your name?

A Pardon?

Q What's your name?

A State my name?

Q Yes, sir.

A Glen L. Strickland.

Q Okay. Are you hard of hearing?

A Yes, I am very definitely hard of hearing.

Q Okay. So I've got to yell at you in order to get you to answer?

A Yes.

Q Okay. Do you know James Strickland?

A Yes.

Q How do you know James Strickland?

A He's my son.

Q All right. Are you familiar with his truck?

A Yes, I am.

Q Were you familiar with his truck on January the 16th of 2011?

A I'm sorry. I didn't hear the question.

Q Did you know what his truck looked like on January

the 16th of 2011?

A Where it was?

Q Do you know what it looked like on that date?

A Yes, I do, uh-huh.

Q Okay. I'm going to show you some pictures.

A All right.

Q Okay? They've been marked as Defendant's Exhibit 1 through 7. All right?

A Right.

Q Okay. Can you take a look at these pictures, please?

A Yes (examining photographs.)

Q What are those pictures of?

A They are pictures of James Strickland's truck.

Q All right. Were you present when these pictures were taken?

A Yes, I was.

Q When were these pictures taken?

A They were taken in May of this -- of 2011, I believe.

Q 2011. Do these pictures accurately represent the way the truck looked on January the 15th and January the 16th of 2011?

A Yes.

Q And did you see the truck prior to those dates?

A Yes, I did.
Q And did it look the same as it did in these pictures?
A Yes, it did.
MR. CONRAD: I'm going to move these pictures into evidence, your Honor.
MR. HUTCHINS: For the reasons stated previously, Judge --
THE COURT: I can't see.
MR. HUTCHINS: Judge, we object for the reasons that we stated previously, but we understand the Court's ruling.
THE COURT: Okay. Defendant's Exhibits 1 through 7 are admitted.
(Defendant's Exhibit Nos. 1-7 received in evidence.)
THE WITNESS: I'm sorry. I couldn't hear.
MR. CONRAD: You don't need to worry about that.
THE COURT: You don't need to worry about it, sir.
MR. CONRAD: I don't have any further questions.
THE COURT: Mr. Hutchins?
THE WITNESS: Am I finished?
THE COURT: No, just wait. The other attorney may have some questions.
THE WITNESS: Oh, okay.

CROSS EXAMINATION

mean he can testify to his opinion, but he can't testify to Mr. Conrad's thoughts.

BY MS. FRUSCIANTE:

Q Okay. In your opinion, did it modify the way the trial may have proceeded?

A It certainly would have --

THE COURT: Okay. That's the same, that's the same question. So he can give his opinion about what's a good defense, or how the trial went, or what would have been a good idea how to handle things. But, he can't testify to what Mr. Conrad was thinking.

But even if you change the question a little bit you still can't ask that question. So ask him something different, please.

MS. FRUSCIANTE: Okay.

(Pause)

BY MS. FRUSCIANTE:

Q In preparing for and trying the case, with the fact that you did not have the evidence, change the way you approached the trial from more perspect -- pros -- (inaudible) than just the fact that you would be able to argue that that information was not found due to the search of the truck?

A If I had been trying this case, knowing that the truck had in fact been searched, the fact it was searched and they didn't find these important items in the truck the day

after the crime would have been main feature of the defense. It would have been the strongest point that the defense could have presented in the case, apart from maybe putting the defendant on the stand. And if he had a felony prior record, which he did, I wouldn't have wanted to put him on the stand.

What you're talking about here is a difference between a speculative doubt, which the jury instruction says is not reasonable doubt. Maybe the police could have searched it if they should have. If they had, they wouldn't have found any of these things; that's speculation what the police might have found. But if you actually had affirmative proof that they did search, they did search the very next day and they didn't find these things, that would have been very very important and it would have been the main -- it should have been the main feature of the defense presentation because it does tend to contradict or undermine the accuracy of the identification witnesses.

And these people actually were robbed. They are basically telling the truth as they believe it to be, but that doesn't mean they are right. And here's important evidence that at worse, casts doubt on whether or not they are right. So yes, I would have presented it a whole lot differently if I, as the trial lawyer, knew the truck had been searched.

Q Now, in reviewing the record and the motion, there


RANGER