No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARK A. JONES,
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

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[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-13448

Non-Argument Calendar

MARK A. JONES,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:19-cv-00538-GKS-GJK

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

Mark Jones, a counseled state prisoner, appeals the district court's dismissal with prejudice of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We granted a certificate of appealability ("COA") on the single issue of "[w]hether the district court erred in finding that Jones's underlying ineffective-assistance-of-trial-counsel claim for failure to convey a plea offer was not 'substantial' to overcome procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012)?" Jones argues that his underlying ineffective-assistance-of-counsel claim is substantial because his trial counsel failed to inform him of the plea-deal-deadline extension, did not use the alternate contact numbers in his file, and did not seek another extension when he could not reach Jones. Jones argues that this failure to inform him was deficient and prejudiced him because he would have accepted the plea deal after the original expiration date but within the extension.[1] After carefully reviewing the record before us, we affirm the district court's dismissal of Jones's habeas petition.

[1] Jones also contends that the state court's decision was an inadequate procedural ground on which to deny his successive post-conviction petition and that his procedural default should be excused due to newly discovered evidence. Both issues are outside the scope of the COA, so we decline to address them. *See Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010).

When evaluating a district court's denial of a § 2254 petition, we review questions of law and mixed questions of law and fact de novo, and findings of fact for clear error. *Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 651 (11th Cir. 2014).

Before bringing a federal habeas action, a petitioner must exhaust all state court remedies available for challenging his conviction, either on direct appeal or in a state post-conviction motion. 28 U.S.C. § 2254(b), (c). A federal claim is subject to procedural default where: (1) the state court concludes that the petitioner's claim is barred because of an independent and adequate ground of state procedure; or (2) the petitioner never raised the claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred under state procedural rules. *Bailey v. Nagle*, 172 F.3d 1299, 1302–03 (11th Cir. 1999). Under the procedural-default doctrine, "[i]f the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief." *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001).

The Florida Court of Appeals held that Jones's ineffective assistance of counsel claim was procedurally barred as successive. His claim is thus subject to the procedural default rule. *Id.* A procedural default may be excused if the movant establishes (1) "cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error," or (2) a fundamental miscarriage of justice, meaning actual innocence. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (emphasis omitted).

In *Martinez v. Ryan*, the Supreme Court created a "narrow exception" to procedural default in ineffective-assistance-of-counsel contexts. 566 U.S. at 9. This narrow exception allows a state prisoner to obtain federal habeas review of unexhausted, procedurally defaulted claims of ineffective assistance of trial counsel when the state does not allow ineffective assistance of counsel claims on direct review and the initial collateral-review counsel performs ineffectively. *Id.* at 17. But to overcome procedural default under *Martinez*, a petitioner must show that his underlying ineffective assistance-of-trial-counsel claim is "substantial," meaning that the claim "has some merit." *Id.* at 14. The Supreme Court compared the substantiality requirement to the standard required for a COA. *Id.* at 16. Under the COA standard, a defaulted claim is substantial if the resolution of its merits would be debatable among reasonable jurists. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

To make out a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When analyzing a claim of ineffective assistance under § 2254(d), our review is "doubly" deferential to counsel's performance. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). So "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Deficient performance "requires showing that counsel made errors so serious that counsel was not

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. We presume that counsel's conduct was reasonable, and a petitioner seeking to overcome the presumption must establish "that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Prejudice occurs when, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Failure to establish either prong is fatal. *Id.* at 697.

The Supreme Court has held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012) ("When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires."). Thus, an attorney's failure to convey a plea agreement at all is deficient performance, satisfying the first element of *Strickland*. *Id.* at 145, 147.

To satisfy the prejudice prong, a petitioner must show a reasonable probability that, but for counsel's ineffectiveness: (1) he would have accepted the plea offer; (2) the prosecution would not have cancelled or withdrawn the offer; (3) the court would have accepted the plea offer; and (4) the conviction or sentence, or both, would have been less severe than what he actually received. *See id.* at 147 (requiring the first three); *Lafler v. Cooper*, 566 U.S. 156, 168 (2012) (adding the fourth). But "after the fact testimony

concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer." *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991).

Jones's underlying ineffective-assistance claim is not substantial because he failed to show that trial counsel was deficient. Unlike in *Frye*, it's not that trial counsel failed to convey the plea offer entirely; he just tried but failed to convey the deadline extension. *Frye*, 566 U.S. at 145. In fact, trial counsel informed Jones of the deal and discussed its details with him. Trial counsel communicated to Jones that if he accepted the deal, he would receive a 15-year sentence, and if he refused, he faced life in prison because the state would seek Prison Releasee Reoffender ("PRR") status. Although Jones contested his lawyer's opinion that he would be subject to PRR status, he understood its consequences. Even so, Jones refused the deal.

Despite his refusal, trial counsel sought an extension on the plea-deal deadline in the hope that Jones might change his mind given an upcoming psychological evaluation that would determine whether he could pursue an insanity defense. After receiving the extension, trial counsel tried to contact Jones. Jones did not answer the phone call so trial counsel left a message with instructions to call him back. Trial counsel called Jones a second time, but the number was out of service. The plea-deal deadline passed, and Jones went to trial where he was sentenced to life in prison.

Under the deferential standard of *Strickland*, trial counsel's attempts to contact Jones were not perfect but nonetheless reasonable. *Chandler*, 218 F.3d at 1315. From trial counsel's "perspective at the time," Jones had rejected the 15-year plea deal. *Id.* at 1316 (quoting *Strickland*, 466 U.S. at 669). His attorney's last attempt to contact Jones was to try to change his mind given the results of his psychological evaluation. But based on his prior discussions with Jones, trial counsel didn't think that Jones would change his mind. So having failed to reach Jones twice, trial counsel reasonably relented.

With the benefit of hindsight, Jones argues that trial counsel should have tried to contact his parents or seek a deadline extension. But evaluating deficient performance "has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer [during plea negotiations] could have acted, in the circumstances, as defense counsel acted [during plea negotiations]." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) (internal citations omitted). While trial counsel could have taken those extra steps, the Sixth Amendment did not require him to do so. Trial counsel's actions were reasonable and did not fall below the standard of performance expected of attorneys. *Strickland*, 466 U.S. at 694.

Even if Jones's argument that trial counsel was deficient had merit, Jones's arguments that he was prejudiced fail because he did not show that he would have accepted the plea deal even with the

extension. *Frye*, 566 U.S. at 147. While Jones now claims that he would have accepted the offer once he knew that the insanity defense was not viable, there is little evidence in the record that shows that's true. In initial conversations with his lawyer about the plea deal, Jones stated that 15 years was too long because his loved ones would have passed away by the time he was released. Furthermore, at the state post-conviction evidentiary hearing, Jones stated that he rejected the 15-year plea deal because he thought he did not qualify as a PRR. Throughout his testimony at the evidentiary hearing, he never conveyed that his decision to reject the plea deal was based on the viability of an insanity defense. His after-the-fact statements before this Court are not enough to show that but for trial counsel's failure to tell him of the extension, he would have taken the deal. *See Diaz*, 930 F.2d at 835.

Having failed to show both deficient performance and prejudice on the underlying ineffective assistance of counsel claim, Jones has not established that his claim is "substantial." Therefore, Jones cannot overcome the procedural default bar.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13448-F

MARK A. JONES,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Mark Andrew Jones is a Florida prisoner serving a term of life imprisonment for burglary of a conveyance with an assault and attempted carjacking. In October 2019, he filed a counseled amended 28 U.S.C. § 2254 habeas corpus petition, asserting that his trial counsel was ineffective by failing to (1) convey a plea offer; (2) file a pretrial motion to suppress based on tainted show-up identifications; (3) file a motion to suppress because law-enforcement officials did not have probable cause or reasonable suspicion to conduct a stop under *Terry v. Ohio*, 392 U.S. 1 (1968); and (4) advise or consult with him on the viable defense and jury instruction of trespass and assault.[1] The district court determined that Jones procedurally defaulted Ground One, and that

[1] Jones has abandoned the fifth ground from his § 2254 petition by failing to argue it in his counseled COA motion. *See Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010).

Grounds Two, Three, and Four were meritless. Jones now moves for a certificate of appealability ("COA").

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied a constitutional claim on the merits, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). Where the district court denied a claim on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the motion states a valid claim alleging the denial of a constitutional right, and (2) whether the district court's procedural ruling was correct. *Id.*

Reasonable jurists would debate the district court's determination that Jones could not overcome procedural default of Ground One under *Martinez v. Ryan*, 566 U.S. 1, 7 (2012). His underlying ineffective-assistance-of-trial-counsel claim is substantial because counsel arguably was deficient by failing to convey a plea offer, which prejudiced Jones. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Reasonable jurists would also debate whether Jones's 28 U.S.C. § 2254 habeas corpus petition stated a facially valid claim for the denial of a constitutional right. *See Slack*, 529 U.S. at 484; *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014).

Reasonable jurists would not, however, debate the district court's determination that the state court's resolution of Grounds Two, Three, and Four was not contrary to, or an unreasonable application of, *Strickland*, or based on an unreasonable determination of the facts. As to Ground Two, given the evidence presented at trial, the state court reasonably found that the eyewitness's identification was reliable, and, thus, Jones failed to show that no reasonable attorney would have

failed to move to suppress the eyewitness's identification. *See Johnson v. Dugger*, 817 F. 2d 726, 729 (11th Cir.). As to the victim's identification, the state court reasonably found that Jones could not demonstrate prejudice because other evidence at trial established that Jones was the individual who had approached the victim. *See Strickland*, 466 U.S. at 694.

As to Ground Three, Jones cannot show that he was prejudiced by any purported deficiency in failing to file a motion to suppress the officers' stop because the state court reasonably found that the officers had reasonable suspicion to stop him, and, thus, his Fourth Amendment claim would have been meritless. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994).

As to Ground Four, Jones cannot demonstrate prejudice because, even if lesser-included-offense instructions had been given, the jury would not have been permitted to convict Jones of the lesser-included offenses, as it had concluded that the evidence established that he was guilty of the greater offenses. *See Sanders v. State*, 946 So. 2d 953, 958 (Fla. 2006); *see also Williams v. Singletary*, 78 F.3d 1510, 1515 (11th Cir. 1996) (stating that this Court is bound by decisions of the relevant state supreme court when addressing issues of state law).

Accordingly, Jones's motion for a COA is GRANTED as to the following issue only:

> Whether the district court erred in finding that Jones's underlying ineffective-assistance-of-trial-counsel claim for failure to convey a plea offer was not "substantial" to overcome procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012)?

His motion for a COA is DENIED IN PART as to all other issues.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARK A. JONES,

Petitioner,

v. **Case No: 6:19-cv-538-GKS-GJK**

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Amended Petition for Writ of Habeas Corpus is **DENIED,** and this case is **DISMISSED with prejudice.**

Date: September 7, 2021

ELIZABETH M. WARREN,
CLERK

s/SM, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARK A. JONES,

Petitioner,

v. Case No: 6:19-cv-538-GKS-GJK

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

Respondents.
_____/

ORDER

This case is before the Court on Petitioner Mark A. Jones' Amended Petition for Writ of Habeas Corpus ("Amended Petition," Doc. 12) filed by counsel pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Amended Petition ("Response," Doc. 21) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 25) and a Supplement to the Reply ("Supplement," Doc. 26).

Petitioner asserts five grounds for relief. For the following reasons, the Amended Petition is denied.

I. PROCEDURAL HISTORY

The State charged Petitioner with burglary of a conveyance with an assault

(Count One) and attempted carjacking (Count Two). (Doc. 22-8 at 28.) A jury convicted Petitioner. (*Id.* at 88-89.) The trial court sentenced Petitioner to life in prison for Count One and to a concurrent fifteen-year term of imprisonment for Count Two as a prison releasee reoffender. (*Id.* at 109.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam.* (Doc. 22-4 at 31.)

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which he amended. (*Id.* at 78-108.) The state court denied some of the claims and held an evidentiary hearing on the remainder of the claims. (*Id.* at 109-18; Doc. 22-5 at 33-36). The state court denied the remaining claims after the hearing. (Doc. 22-5 at 98-105.) Petitioner appealed, and the Fifth DCA affirmed *per curiam.* (Doc. 22-7 at 50.)

Petitioner filed a second Rule 3.850 motion. (*Id.* at 138-52.) The state court dismissed the motion. (*Id.* at 178-81.) Petitioner appealed, and the Fifth DCA affirmed *per curiam.* (*Id.* at 249.)

II. LEGAL STANDARDS

A. Standard Of Review Under The Antiterrorism Effective Death Penalty Act ("AEDPA")

Under the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an

> unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

For claims adjudicated on the merits, "section 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal

court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that

precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de novo* only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief because his counsel provided ineffective assistance. 466 U.S. 668, 687-88 (1984). To prevail under *Strickland*, a petitioner must demonstrate "(1) that his trial 'counsel's performance was deficient' and (2) that it 'prejudiced [his] defense.'" *Whatley*, 927 F.3d at 1175 (quoting *Strickland*, 466 U.S. at 687).

Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

III. ANALYSIS

A. Ground One

Petitioner asserts counsel rendered ineffective assistance by failing to convey a plea offer. (Doc. 12 at 3-12.) Petitioner complains that counsel failed to notify him that the State extended the fifteen-year plea offer deadline from November 10, 2011 to November 16, 2011. (*Id.* at 6.) According to Petitioner, he rejected the State's plea offer "based on defense counsel's advice that the offer was rather high in light of a potential insanity defense." (*Id.* at 4.) Petitioner maintains that if counsel had advised him that the plea offer deadline had been extended, he would have accepted plea offer after he learned that Dr. Danziger would not be able to support an insanity defense. (*Id.* at 7.)

Respondents argue that this ground is procedurally barred from review because the state court dismissed the claim as successive. (Doc. 21 at 9.) Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–44 (1999). Federal courts must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

Procedural default may be excused only in two narrow circumstances: if a petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). "To establish 'cause' for a procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright*, 169 F.3d at 703. To show "prejudice" to warrant review of a procedurally defaulted claim, a petitioner must show that "there is at least a reasonable probability that the result of the proceeding would have been different." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (citations omitted).

The Supreme Court of the United States has held that a prisoner may demonstrate cause for failing to raise a claim of ineffective assistance of trial counsel if (1) "the state courts did not appoint counsel in the initial-review collateral proceeding" or (2) "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective" pursuant to *Strickland*. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). The petitioner, however, "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* "The substantiality of the ineffective-assistance-of-trial-counsel claim. . . [is] analyzed" under the framework of *Strickland*. *Ayestas v. Davis*,

138 S. Ct. 1080, 1096 (2018).

The second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case in which a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998).

Petitioner raised this ground in his second Rule 3.850 motion. The state court dismissed the claim as successive because it was not newly discovered. (Doc. 22-7 at 179-81.) The state court further noted that the evidence established that trial counsel called Petitioner to try to convince him to accept the plea offer before it expired, despite Petitioner's rejection of the offer, but counsel was unable reach Petitioner. (*Id.* at 180.) The state court also noted that Petitioner's testimony that he rejected the plea offer because he did not think he qualified as a PRR contradicted this claim. (*Id.* at 180.)

The Court concludes that this ground is not substantial. At the Rule 3.850 evidentiary hearing, Petitioner testified that he did not accept the plea offer because he did not believe he qualified as a PRR. (Doc. 22-6 at 45-46.) Petitioner never indicated that his decision to accept or reject the plea was premised on counsel's purported advice concerning a possible insanity defense or the fact that Dr. Danziger had not yet rendered an opinion.

Moreover, counsel testified, contrary to Petitioner's testimony and contentions in this ground, that the reason Petitioner said he could not accept the fifteen-year offer was because his family would be dead before he was released. (Doc. 22-6 at 13.) Furthermore, counsel called Petitioner at the number Petitioner provided to him on November 15, 2011 to try to persuade him to accept the plea offer, but counsel did not reach Petitioner and left him a message. (*Id.* at 23.) Counsel called Petitioner again the following day, but Petitioner's number was no longer in service. (*Id.*) Consequently, Petitioner has not shown that counsel was deficient in failing to advise him about the extension of the plea deadline or that a reasonable probability exists that he would have accepted the offer but for counsel's purported deficient performance. Accordingly, Ground One is not substantial, is procedurally barred, and is denied.

B. Ground Two

Petitioner contends counsel was ineffective for failing to move to suppress the show-up identifications of the victim Eunice Hopkins ("Hopkins") and eyewitness Randall Stewart ("Stewart"). (Doc. 12 at 10-14.) To support this ground, Petitioner argues that Hopkins's description of the perpetrator was minimal and inconsistent with Petitioner's appearance, and prior to the show-up identification, the 911-operator told Hopkins four times that police had apprehended the perpetrator. (*Id.* at 10-11.) With respect to Stewart's identification, Petitioner

complains that Stewart's description of the perpetrator was not consistent with Petitioner's appearance, Stewart could only identify the perpetrator by his clothing and did not view Petitioner at the show-up from behind, and the placement of the hat on Petitioner by police was unduly suggestive. (*Id.* at 11-12.)

Petitioner raised this ground in his Rule 3.850 motion. With respect to Stewart's identification, the state court found that the offenses occurred in the middle of the afternoon, Stewart had an opportunity to observe the perpetrator from behind, saw the perpetrator's clothing (hat, sleeveless shirt, shorts, and sneakers), and identified Petitioner a half an hour after the offenses from his clothing and body build. (Doc. 22-4 at 112.) The state court reasoned that any inconsistencies in Stewart's description of Petitioner's clothing and Petitioner's actual clothing was a matter for the jury to decide, not a basis for suppression. (*Id.*) The state court concluded that a motion to suppress Stewart's identification would have been futile and counsel was not deficient for failing to raise a futile motion. (*Id.*)

As to Hopkins' identification, the state court concluded that Petitioner could not demonstrate prejudice. (Doc. 22-5 at 34.) The state court reasoned that Stewart identified Petitioner and Petitioner admitted in two jail phone calls and at trial that he was the person who approached the victim, albeit not with the purpose of committing the offenses. (*Id.*) The Fifth DCA affirmed *per curiam*. (Doc. 22-7 at 50.)

The Supreme Court of the United States has explained that "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). However, suggestive "show-up" identifications are admissible if, based on the totality of the circumstances, the identification was reliable. *Id.* at 199. "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200. "The state court's findings on each of the *Biggers* factors are entitled to a presumption of correctness, and [the petitioner must show] that those findings were clearly erroneous." *Hawkins v. Sec'y, Fla. Dep't of Corr.*, 219 F. App'x 904, 907 (11th Cir. 2007).

The record establishes that Stewart testified that he heard the victim scream at which time he observed the perpetrator from approximately forty feet away. (Doc. 22-3 at 19.) Stewart watched the perpetrator walk away and said that the perpetrator was wearing a sleeveless shirt, shorts, a hat, and sneakers. (*Id.* at 20-21.) The incident occurred in the middle of the day. (*Id.* at 18.) Stewart identified

Petitioner a half an hour later based on Petitioner's body mass, shape, and clothing. (*Id.* at 22-23.) Based on the totality of the circumstances, Stewart's identification of Petitioner was reliable, and the state court's determination that a motion to suppress would have been futile is reasonable.

Likewise, Petitioner corroborated the accuracy of Stewart and Hopkins' identifications. Specifically, Petitioner admitted in recorded jail conversations with his mother and girlfriend that he approached the victim on the date of the offenses. (*Id.* at 96-97.) Consequently, Petitioner has not demonstrated that prejudice resulted from counsel's failure to move to suppress Hopkins' identification. Accordingly, Ground Two is denied pursuant to § 2254(d).

C. Ground Three

Petitioner asserts counsel rendered ineffective assistance by failing to file a motion to suppress because law enforcement did not have a reasonable suspicion to conduct a *Terry* stop. (Doc. 12 at 14.) According to Petitioner, the "Be On the Look Out" ("BOLO") described the suspect as wearing a straw hat, a blue tank top, and khaki shorts, whereas he was not wearing a hat and was wearing a gray tank top and white shorts. (*Id.* at 17.)

Petitioner raised this ground in his Rule 3.850 motion. In denying relief, the state court considered the testimony of the officers who apprehended Petitioner as well as Petitioner's testimony. (Doc. 22-5 at 99-103.) Specifically, Officer Foley

testified that the BOLO indicated that the suspect was a large muscular built white male wearing a tank top and boonie hat and was heading toward the Eastern Pearl restaurant, which was near the Altamonte Mall. (*Id.* at 99.) About fifteen minutes later, Officer Foley, who was in an unmarked vehicle, saw Petitioner sitting on a bench outside the mall and radioed that he saw someone matching the description of the suspect. (*Id.*) Officer Foley said that when a patrol car responded and Petitioner saw it, Petitioner got up from the bench, attempted to throw away his hat, and headed into the mall. (*Id.*)

According to Officer Foley and Officer Roman, when they approached Petitioner, before they said anything, Petitioner said, "You've got the wrong guy." (*Id.*) Petitioner, however, maintained that he did not deny being the person the officers were looking for until the officers had accused him. (*Id.* at 101.) The officers indicated that there are often slight inconsistencies in descriptions given by witnesses and acknowledged that the hat worn by the subject was described in different ways, including straw beach hat, big floppy hat, and canvas hat. (*Id.* at 100.) Nevertheless, the officers testified that Petitioner was the only person matching the BOLO description of the suspect. (*Id.*)

The state court found the officers' testimony to be credible. (*Id.* at 102.) The state court concluded, based on the totality of circumstances, that the officers lawfully detained Petitioner. (*Id.*) The state court reasoned that Petitioner was in

the vicinity near the offenses, was wearing clothing consistent with descriptions given by witnesses to the offenses, matched the build of the perpetrator, was the only person in the vicinity who matched the description, and denied being the suspect before the police said anything to him. (*Id.*) The state court determined, therefore, that counsel was not deficient for failing to file a motion to suppress and prejudice did not result. (*Id.* at 102-03.) The Fifth DCA affirmed *per curiam*. (Doc. 22-7 at 50.)

Petitioner has not shown that the state courts' denial of this ground is contrary to, or an unreasonable application of, *Strickland* or an unreasonable determination of the facts.

> A law-enforcement officer may conduct a brief, investigatory stop of an individual if there is a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); *see also Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Despite reasonable suspicion being a less demanding standard than probable cause, a *Terry* stop cannot be based on an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27, 88 S.Ct. 1868; *Wardlow*, 528 U.S. at 123–24, 120 S.Ct. 673. When evaluating reasonable suspicion, we consider the totality of the circumstances, which must be viewed in "light of the officer's special training and experience." *United States v. Matchett*, 802 F.3d 1185, 1192 (11th Cir. 2015). This is because "behavior, seemingly innocuous to the ordinary citizen, may appear suspect to one familiar with [criminal] practices." *Ibid.* (citation omitted); *see also Terry*, 392 U.S. at 27, 88 S.Ct. 1868 (noting that a reasonable suspicion must be based on "the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience").

United States v. Hardy, 806 F. App'x 718, 721 (11th Cir. 2020).

Here, the state court found the officers' testimony to be credible. "Credibility

determinations are factual findings and therefore 'are presumed to be correct absent clear and convincing evidence to the contrary.'" *Guerra v. Sec'y, Dep't of Corr.*, 271 F. App'x 870, 871 (11th Cir. 2008) (quoting *Miller El v. Cockrell*, 537 U.S. 322, 340 (2003)). The officers testified that Petitioner matched the description of the suspect, was near the scene of the offenses, attempted to dispose of his hat, moved into the mall after seeing a patrol car, and blurted out that they had the wrong guy before the officers said anything to him. (Doc. 22-6 at 74-111.) Based on the totality of the circumstances, the officers had a reasonable suspicion warranting Petitioner's detention. Petitioner has not established by clear and convincing evidence that the lower court's factual findings are incorrect. Counsel, therefore, was not deficient for failing to file a motion to suppress nor did prejudice result from counsel's failure to do so. Accordingly, Ground Three is denied under § 2254(d).

D. Ground Four

Petitioner contends counsel was ineffective for failing to advise him about a viable defense and request jury instructions on the lesser offenses of trespass and assault. (Doc. 12 at 20-22.) Petitioner complains that counsel did not explain to him that he was entitled to have the jury instructed on the lesser offenses of trespass and assault. (*Id.*)

Petitioner raised this ground in his first Rule 3.850 motion. The state court

denied relief, reasoning that Petitioner failed to demonstrate prejudice. (Doc. 22-4 at 116.) The Fifth DCA affirmed *per curiam*. (Doc. 22-7 at 50.)

The state courts' denial of this ground is not contrary to, or an unreasonable application of, *Strickland*. "'A defendant has no entitlement to the luck of a lawless decisionmaker' and . . . the prejudice inquiry excludes the 'particular idiosyncrasies' of the jury and 'the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like,' such as a jury pardon." *Crapser v. Sec'y, Dep't of Corr.*, No. 20-12898, 2021 WL 1955871, at *3 (11th Cir. May 17, 2021) (quoting *Strickland*, 466 U.S. at 695). Therefore, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Magnotti v. Sec'y for Dep't of Corr.*, 222 F. App'x 934, 940 (11th Cir. 2007). The jury in this case found sufficient evidence existed to convict Petitioner of the offenses of burglary of a conveyance with an assault and attempted carjacking. Consequently, Petitioner has not shown that prejudice resulted from counsel's failure to request an assault or trespass jury instruction. Accordingly, Ground Four is denied pursuant to § 2254(d).

E. Ground Five

Petitioner asserts counsel was ineffective for failing to object to erroneous/confusing jury instructions. (Doc. 12 at 22.) Petitioner also complains that counsel failed to (1) file a motion for a statement of particulars, and (2) object

to the prosecutor's improper closing argument. (*Id.*) To support this ground, Petitioner argues that the burglary charge in Count One only alleged that Petitioner had the "intent to commit an offense therein[,]" and thus, the jury should not have been instructed that the underlying "offense" he intended to commit was assault, carjacking, or grand theft of a motor vehicle. (*Id.* at 23.) According to Petitioner, the Amended Information lacked specificity and counsel should have filed a motion for a statement of particulars to allow him to know the specific charge to which to prepare his defense. (*Id.* at 25.) Petitioner further notes that the trial court erroneously instructed the jury that "[e]ven though an unlawful entering of a conveyance is proved, *if the Defendant does not establish* it was done with the intent to commit an assault, the Defendant must be found not guilty of burglary." (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief. (Doc. 22-4 at 113-15.) The state court reasoned that the burglary jury instruction narrowed the manner in which the State had to prove the charge and the Amended Information charged Petitioner with burglary with an assault and attempted carjacking, which provided Petitioner with notice of the offenses underlying the burglary charge, namely assault, carjacking, or grand theft of a motor vehicle, a lesser included offense of carjacking. (*Id.* at 113-14.) The state court further reasoned that under Florida law, the State is not required to allege in the

information the specific offense intended to be committed. (*Id.* at 115) (citing *Rivera v. State*, 992 So. 2d 361, 362 (Fla. 5th DCA 2008)). The state court also determined that the trial court's misstatement did not shift the burden to Petitioner to prove his innocence and inured to Petitioner's benefit. (*Id.*) For these reasons, the state court concluded that Petitioner failed to demonstrate prejudice. (*Id.* at 113-15.) The Fifth DCA affirmed *per curiam*. (Doc. 22-7 at 50.)

Petitioner has not demonstrated that the state courts' denial of this ground is contrary to, or an unreasonable application of, *Strickland*. Under Florida law, when charging the offense of burglary, "[t]he State is not required to allege in the information the specific offense intended to be committed, nor is the court required to instruct as to a specific offense." *Rivera*, 992 So. 2d at 362. Consequently, the Amended Information complied with state law.

Moreover, the Amended Information charged Petitioner with committing the offenses of assault, in conjunction with the burglary, and attempted carjacking. Grand theft is a lesser included offense of carjacking. *Lovett v. State*, 781 So. 2d 466, 467 (Fla. 1st DCA 2001). Therefore, Petitioner was on notice of the underlying offenses for the burglary charge.

Furthermore, although the trial court misspoke when reading a portion of the burglary jury instruction, the error inured to Petitioner's benefit. In addition, the jury was provided a copy of the jury instructions containing the correct

burglary instruction. Thus, Petitioner has not shown that prejudice resulted from counsel's failure to object to erroneous/confusing jury instructions, file a motion for a statement of particulars, or object to the prosecutor's closing argument. Accordingly, Ground Five is denied pursuant to § 2254(d).

Any allegations not specifically addressed are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "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.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED** and **ADJUDGED:**

1. The Amended Petition (Doc. 12) is **DENIED**, and this case is **DISMISSED with prejudice.**
2. Petitioner is **DENIED** a Certificate of Appealability.
3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on August 1, 2021.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

IN THE EIGHTEENTH JUDICIAL CIRCUIT COURT IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

MARK JONES,
Defendant.
_____/

FELONY DIVISION
Case No.: 2011-CF-2979-A

MOTION FOR POSTCONVICTION RELIEF PURSUANT TO RULE 3.850(b)(1), NEWLY DISCOVERED EVIDENCE

1. **Name and location of the court which entered the judgment of conviction under attack was:** The Eighteenth Judicial Circuit Court in and for Seminole County, Florida

2. **Date of judgment of conviction was:** July 25, 2012

3. **Length of sentences:** Life on count I and a concurrent 15 years on count II

4. **Nature of offenses involved:** Burglary (count I) and attempted carjacking (count II)

5. **What was your plea?**

(a)	Not Guilty	[X]
(b)	Guilty	[ ]
(c)	Nolo Contendere	[ ]
(d)	Not Guilty by Reason of insanity	[ ]

If you entered a plea to one count and a different plea to another, give details: N/A

6. **Kind of trial:**

(a)	Jury	[X]
(b)	Judge only without Jury	[ ]

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

If yes, list each such occasion: Mr. Jones testified at his trial and at a postconviction evidentiary hearing regarding a Rule 3.850 motion.

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

9. **If you did appeal, answer the following:**

(a) Name of court: Fifth District Court of Appeal
(b) Result: Per curiam affirmed
(c) Date of result: May 14, 2013, mandate issued on June 7, 2013
(d) Case number: 5D12-3180

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

11. **If you answer to number 10 was "yes," give the following information:**

(a) (1) Nature of proceeding: Amended Rule 3.850 motion
(2) Grounds raised: 9 grounds of ineffective assistance of counsel
(3) Did you receive an evidentiary hearing on your motion? Yes
(4) Result: Denied
(5) Date of result: July 20, 2017

(b) **As to any second petition, application, motion, etc., give the same**: N/A

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

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

14. **GROUND FOR RELIEF**:

NEWLY DISCOVERED EVIDENCE OF TRIAL COUNSEL'S FAILURE TO CONVEY A PLEA OFFER

Supporting Facts:

The Defendant, hereinafter, Mr. Jones asserts that his counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to convey a 15-year plea offer before the offer expired on November 16, 2011. Mr. Jones was prejudiced where, had counsel properly conveyed the plea offer, which was less onerous than the sentence

ultimately imposed; he would have accepted it; the prosecutor would not have withdrawn the offer; and the trial court would have accepted the offer as is the custom in Seminole County, Florida.

On May 26, 2017, during an evidentiary hearing, assistant state attorney, Thomas Hastings, introduced into evidence the following printed version of an e-mail thread between himself and defense counsel, Stuart Bryson:

> 4/28/2016 Tom HASTINGS-RE: Mark Jones Page 1
>
> **From:** Tom HASTINGS
> **To:** Stuart Bryson
> **Date:** 11/3/2011 11:18 AM
> **Subject:** RE: Mark Jones
>
> [Y]our expert will at least be able to give you a verbal report by the new deadline. Tom
>
> >>>"Stuart Bryson"<sbryson@pd18.net> 11/3/2011 10:22 AM>>>
> I may not have my evaluation results by then, but I guess we can cross that bridge when we get there.
>
> -----Original Message----
> From: Tom HASTINGS [mail to: THASTINGS@sa18.state.fl.us]
> Sent: Tuesday, November 01, 2011 1:10 PM
> To: Stuart Bryson
> Subject: Re: Mark Jones
>
> Will extend offer's deadline to 11/16/2011. Tom H.
>
> >>>"Stuart Bryson"<sbryson@pd18.net> 11/1/2011 9:26 AM>>>
> Tom, I gave you an[] incorrect date on the evaluation. [I]t is actually November 14, 2011.
>
> Stuart A. Bryson
> Assistant Public Defender

(See Exhibit A - attached)

The e-mail thread, dated April 28, 2016, was introduced at the May 26, 2017 evidentiary hearing (hereinafter 'the evidentiary hearing') for the purpose of disproving Mr. Jones' claim that

counsel failed to correctly inform him of the maximum penalty he faced before rejecting the State's 15-year plea offer. During Mr. Hastings' cross-examination of Mr. Bryson, the following exchange occurred:

> A. Having looked at the e-mail conversation between your office and myself, it appears that the reason that I had asked for the extension was because of psychological evaluations that were being pursued.
>
> Q. Uh-huh.
>
> A. My thought would have been perhaps that at this point I'm not going to accept any offer because maybe I'm going to end up with this defense. Once I had conversation with the doctors who had evaluated Mr. Jones, I knew that was no longer an option, I asked for an extension and attempted to reach out to Mr. Jones to encourage him that we don't have the defense that we hoped we were going to have.
>
> Q. Okay and he had provided you with a phone number to reach him?[1]
>
> A. Indeed.
>
> Q. And you tried to reach him?
>
> A. I did on two occasions.
>
> Q. And were you able to reach him on the 15th or the 16th?
>
> A. I was not. I did leave a message on the 15th; on the 16th when I returned the phone call to the same number that phone was -- that number was no longer in service.[2]

The original written plea agreement the State offered included a November 10, 2011 deadline. (See Exhibit D, State's plea offer) At the time of the evidentiary hearing, neither Mr. Jones nor his postconviction counsel, Michael Ufferman, had any knowledge that Mr. Jones' trial

[1] See Exhibit B, contact information on attorney file.

[2] See Exhibit C, excerpts from evidentiary hearing.

counsel, Stuart Bryson, had asked for and received an extension of the State's 15-year plea offer. Mr. Bryson requested the extension of the State's plea offer from November 10th to November 16th for the sole purpose of exploring an insanity defense based on the results of Mr. Jones' November 14th psychological evaluation.

Mr. Bryson *only* informed Mr. Jones of the State's original plea offer's expiration date of November 10, 2011; thereby requiring Mr. Jones to make a decision on the plea without knowing whether or not an insanity defense was a viable defense for him. And as Mr. Bryson testified to at the evidentiary hearing, (Exhibit C) the extension of the State's plea offer to include the November 16, 2011 deadline was never conveyed to Mr. Jones.

The failure to convey the State's extension of the deadline was deficient performance that prejudiced Mr. Jones. He only delayed his immediate acceptance of the favorable 15-year plea offer because he relied on Mr. Bryson's advice that the State's plea offer was rather high in light of a potential insanity defense. However, when Mr. Jones' psychological evaluation on November 14, 2011, negated that defense, he would have accepted the 15-year plea offer had he known the deadline for acceptance had been extended. This especially, because his sole anticipated trial defense was negated two days prior to the plea offer's *new* expiration date of November 16, 2011. Mr. Jones also supports this claim with affidavits from Mr. Lewis Jones, his father, from Mrs. Marian Jones, his mother, and from Rose Ruiz, his girlfriend. All three gave statements that Mr. Bryson never conveyed to them that the State had extended the plea offer beyond the date of the psychological evaluation.

Mr. Jones, his parents, and his girlfriend met with Mr. Bryson and agreed that it was in Mr. Jones' best interest to pursue a potential insanity defense because he had an extensive prior history of documented mental health issues. At the meeting, Mr. Bryson made it clear that an

insanity defense hinged entirely upon the outcome of November 14, 2011 psychological evaluation. Mr. Bryson also made it clear that he did not consider the State's 15-year plea offer to be a good offer if Mr. Jones could assert a valid insanity defense. He explained that if the results of the psychological evaluation negated the insanity defense, Mr. Jones would be left without any defense at trial.

Mr. Jones' parents and Ms. Ruiz state in their affidavits that the possible insanity defense played a significant role in his decision to not accept the State's offer prior to the original deadline of November 10th. They also state that they gave Mr. Bryson their contact information and it had been *explicitly* agreed to among the parties that Mr. Bryson would treat the Mr. Jones' parents as his primary contact to convey information about Mr. Jones' case, and could also rely on Ms. Ruiz to reach Mr. Jones.[3] Despite this fact, neither Mr. Jones' parents, or Ms. Ruiz were ever contacted by Mr. Bryson with the information that the 15-year plea offer had been extended.

Mr. Jones relies solely upon the e-mail thread between Mr. Hastings and Mr. Bryson regarding a new deadline extension to include the date of November 16, 2011 (Exhibit A) as newly discovered facts under Rule 3.850(b)(1). All other documents herein are presented in support of his claim.

The Rule 3.850(b)(1) and the *Alcorn* Standard

Fla. R. Crim. P. 3.850(b)(1) requires that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence."

[3] See Exhibit B, which listed on the front of Mr. Bryson's case file Mr. and Mrs. Jones's and Ms. Ruiz's contact information.

There are two conditions that must be met in order for a conviction to be set aside because of newly discovered evidence. First, the evidence cannot have been known by the defendant, his counsel, or the trial court at the time of trial, and it cannot appear that the defendant or his counsel could have learned of the evidence through the exercise of diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial; or yield a less severe sentence. *See Jones v. State,* 709 So.2d 512, 521-22 (Fla. 1998) (*Jones II)*; *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991) (*Jones I*); *Davis v. State,* 26 So.3d 519, 526 (Fla. 2009).

The burden is on the defendant to demonstrate that the newly discovered evidence is sufficient to warrant an evidentiary hearing. *See McGuffey v. State,* 515 So.2d 1057, 1058 (Fla. 4th DCA 1987). If the newly discovered evidence is credible, the trial court must hold an evidentiary hearing to evaluate the quality of the evidence which meets the criteria above.

In order to be credible, a defendant must support the allegation with new, reliable evidence, be it trustworthy eyewitness accounts, exculpatory scientific evidence, or critical evidence that was not introduced at trial. *See Schlup v. Delo,* 115 S.Ct. 851, 856 (1995).

A defendant's allegations must be advanced in a manner that utilizes the corroborating circumstances surrounding the case to demonstrate the trustworthiness of the evidence, and to show that the result of the proceeding probably would have been different had it been known or introduced at the time of trial. *See Johnson v. Singletary,* 647 So.2d 106, 111 (Fla. 1994).

In order to show prejudice in a claim that counsel failed to convey a favorable plea offer, a criminal defendant must demonstrate a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn

the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. *Alcorn v. State,* 121 So. 3d 419 (Fla. 2013).

Mr. Jones now submits his claim that Mr. Bryson failed to inform him that the 15-year plea offer had been extended until November 16, 2011 and that he was prejudiced as a result, meets the criteria above:

First, Mr. Jones and his attorney, Michael Ufferman, are able to confirm and testify that the e-mail thread between assistant state attorney, Mr. Hastings and Mr. Bryson was not known by either of them and could not have been ascertained by the exercise of due diligence since it was first introduced into evidence at the evidentiary hearing.

Second this claim is filed within two years following the discovery of the e-mail thread. Mr. Jones relies on either the date Mr. Hastings printed the e-mail thread, April 28, 2016, (see Exhibit A) or the date Mr. Hastings introduced the e-mail thread into evidence at the May 26, 2017 hearing. In either instance, this claim is timely under the rule.

To satisfy the requirements of *Alcorn*, Mr. Jones asserts that (1) had counsel advised him that the State's plea offer was still available to him after his psychological evaluation negated his sole insanity defense—he would have accepted the 15-year offer; (2) Mr. Hastings would not have withdrawn the offer; (3) the trial court would have accepted the offer as is the custom in Seminole County, Florida; and, (4) the 15-year plea offer would have been much less onerous than the life sentence that was ultimately imposed.

Rule 3.171(c)(2)(A) and (B), required Mr. Bryson to advise Mr. Jones of all plea offers; and all pertinent matter bearing on the choice of that plea. Mr. Bryson's decision to allow the offer to expire without advising Mr. Jones or allowing him to consider it violated this rule.

Furthermore, in *Missouri v. Frye*, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), the United States Supreme Court held:

> This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. **When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.** *Id.* at 1408 (Emphasis added)

Here, the e-mail thread reveals that Mr. Bryson received the State's extension of the plea offer on November 1, 2011. His testimony at the evidentiary hearing was that he tried to, but did not; contact Mr. Jones either on the day before or the day of the plea's deadline of November 16, 2011, *some two weeks after he received the extension*. Thus, "defense counsel allowed the offer to expire without advising defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Id.*

The e-mail thread reveals that Mr. Hastings knew the Mr. Bryson wanted the results of the psychological evaluation before advising Mr. Jones on whether or not to take the State's plea offer. Nothing in the record indicates that Mr. Hastings would have changed his mind and withdrawn the offer. Further, it is the routine custom and practice in Seminole County, Florida to resolve cases through the use of plea bargaining. The 15-year offer was reasonable under the circumstances of this case, and there is no record evidence that the trial court would have departed from its regular practice of accepting plea agreements in cases of this nature. The court would have accepted the offer. Finally, Defendant's sentence of 15 years would have been significantly less burdensome than the life sentence he is currently serving.

As noted above, Mr. Bryson claims to only have called Mr. Jones the day after his psychological evaluation in an attempt to convey that the deadline for accepting the 15-year offer had been extended, even though he had the State's extension granted 14 days prior to the psychological evaluation. The trial court briefly addressed this issue in its June 12, 2017 denial of Mr. Jones' Rule 3.850 motion for postconviction relief.

The court noted that "trial counsel properly advised the Defendant of the plea offer and the consequences of rejecting the plea offer" (Exhibit D – Page 2 ¶ 3). The court also found that the "Defendant chose to ignore the advice of counsel in favor of his own limited research on the PRR issue." The preceding statements were made in the court's denial of Ground 8 of Mr. Jones' postconviction motion. In a footnote to that ground, the court stated:

> At the hearing, counsel also argued that the Defendant could not make an informed decision regarding whether to accept the plea or not because trial counsel had not discussed with him the results of the psychological evaluation and the viability of an insanity defense. However, this claim was not raised in the Defendant's motion and any attempt to raise an additional claim would be untimely.
>
> Furthermore Attorney Bryson testified that the Defendant firmly rejected the plea offer **prior to learning the results of the psychological evaluation When Attorney Bryson attempted to contact the Defendant just prior to the to discuss the evaluation and to make another attempt to convince the Defendant to accept the offer, he was unable to the reach the Defendant but left him messages.**
>
> Then the next day, Attorney Bryson again attempted to contact the Defendant but the Defendant's phone was disconnected. **Therefore, Attorney Byron made a good faith effort to contact the Defendant and was not ineffective.**

(Emphasis added)(Exhibit D at n. 3)

Mr. Jones respectfully submits that there are a number of issues related to the trial court's statements above. First, while counsel certainly did discuss the plea offer and its ramifications

with Mr. Jones prior to his initially rejecting the offer, counsel *also* advised Mr. Jones that he considered the offer to be "high" i.e., to be excessive in light of the potential insanity defense. Mr. Jones reasonably believed and expected that the psychological evaluation would yield results that enabled him to assert an insanity defense at trial. While he also had questions regarding the applicability of the PRR statute, his potentially available insanity defense formed the primary basis for his rejection of the 15-year offer.

Second, the trial court acknowledges that Mr. Jones rejected the offer *prior* to learning the results of the psychological evaluation. The trial court, and the record in this case does not refute his claim that he would have accepted the offer after learning that he could not rely on an insanity defense. Indeed, Mr. Bryson advised him that if his insanity defense were to become not viable, he would be left with *no* defense at trial. Had Mr. Jones learned both: (1) that he did not have an insanity defense, and (2) that Mr. Hastings had agreed to extend the 15-year offer for six days so that he could re-evaluate the offer—he would have viewed the offer in a much different light. He would have accepted the 15 years rather than risk a potential life sentence without a defense.

Another point in contention regarding Mr. Jones' claim that Mr. Bryson failed to convey Mr. Hastings' extension of the 15-year plea offer deadline—is the trial court's finding that Mr. Bryson made a "good faith effort" to reach Mr. Jones.

As noted above, in a meeting with Mr. Bryson regarding various issues in Mr. Jones' case, the parties explicitly agreed that Mr. Jones' parents and Ms. Ruiz would be the primary and secondary contacts Mr. Bryson would use to convey information to Mr. Jones. This decision was not taken arbitrarily. There were serious questions surrounding Mr. Jones' competency throughout the proceedings in this case. The record reflects that he suffered from severe

alcoholism, bi-polar disorder, and post-traumatic stress disorder. He was contemplating an insanity defense at trial based upon these conditions.[4]

Thus, the trial court's contention that Mr. Bryson's failure to convey the plea offer can be excused because he made a "good faith" effort to reach Mr. Jones fails in two key respects: (1) Mr. Bryson's failure to contact either Mr. Jones' parents, or Ms. Ruiz with the information was not reasonable; and (2) the critically important nature of the information cannot support Mr. Bryson's failure to attempt to reach readily available parties that he had previously agreed would be his primary contacts, especially since he had the State's extension granted on November 1, 2011. Given the stakes involved, Mr. Bryson's effort to reach Mr. Jones was not prompt or diligent and constitutes ineffective assistance of counsel. He did not make a good faith, i.e., diligent effort to convey the information. This failure cannot be excused by reliance on a mere cursory attempt to do so.

Additionally, a separate and distinct factual dispute exists. At the evidentiary hearing, Mr. Bryson testified that when he attempted to call Mr. Jones a second time to convey the extension, the number he called was not in service. Mr. Jones asserts that his telephone number had been in service during the times relevant to this claim. Nevertheless, he expected and relied on Mr.

[4] Further indicia supporting Mr. Jones's contention can be discerned from an examination of Exhibit B herein. Although a phone number is listed under 'Phone number' on this form, his parent's telephone number (407) 753-3459 is the only number listed in the center of the document along with address information etc...(where the word 'Re-File" is stamped). His girlfriend's telephone number (407) 462-8658 along with her name "Rose" is also listed at the very top of the document. Thus, even accepting *arguendo* that the Mr. Jones could not be reached at the number listed for him, counsel had a selection of other available contact numbers that he could have, and should have used in an attempt to convey the extension of the plea offer to Mr. Jones.

Bryson to abide by the agreed upon method of calling his parents or Ms. Ruiz in order to convey information about his case.

REMEDY

Postconviction remedies for Sixth amendment violations are not a one-size-fits-all proposition. A remedy must instead be specifically tailored to the particular factual and procedural circumstances before the court.[5]

The United States Supreme Court has summarized the relevant considerations as follows: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered by the constitutional violation and should not necessarily infringe upon competing interests...our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *United States v. Morrison,* 499 U.S. 361, 364-65 (1981) *accord Lafler v. Cooper*, 132 S. Ct. 1376, 1391, 182 L. Ed. 2d 398 (2012) "The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement."

Accordingly, Mr. Jones seeks an *actual cure* to the Sixth Amendment violation and resulting *actual harm* caused by Mr. Byron's ineffective assistance: He requests that he receive the sentence he would have received but for the ineffective assistance of counsel—15 years prison. Alternatively, Mr. Jones requests that his convictions and sentence set aside, and that his case be returned to this Court for further proceedings; that the State be ordered to re-offer the 15 year plea or to otherwise engage in good faith plea negotiations.

[5] WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE - § 21.3(*b) (2014 ed.) ("[T]he fairest possible [remedy] from the standpoint of overcoming the effect of ineffective representation is to give the defendant the benefit of the lost favorable plea offer.")

Mr. Jones has presented a timely claim for postconviction relief based upon newly discovered evidence. His claim is cognizable and has been pled sufficiently. An evidentiary hearing is warranted in order to resolve factual disputes related to this claim and for the Mr. Jones to meet his burden of demonstrating his entitlement to relief.

15. **If any of the grounds listed in 14 were not previously presented on your direct appeal, state briefly what grounds were not so presented and give your reasons why they were not presented:** This ground is based on newly discovered evidence not known at the time of Defendant's direct appeal.

16. **Do you have any petitions, applications, motions, etc., now pending in any court, either state or federal, as to the judgment under attack?** Yes

17. **If your answer to number 16 was "yes," give the following information:**

    (a) Name of court: Fifth District Court of Appeal
    (b) Nature of proceeding: Appeal from denial after evidentiary hearing
    (c) Grounds raised: Abuse of discretion
    (d) Status of proceedings: The appeal is still pending

18. **Give the names and address, if known, of each attorney who represented you in the following stages:**

    (a) **At preliminary hearing:** Stuart Bryson and Timothy Caudill, 101 Bush Boulevard, Sanford, FL 32773
    (b) **At arraignment and plea:** Stuart Bryson and Timothy Caudill, 101 Bush Boulevard, Sanford, FL 32773
    (c) **At trial:** Stuart Bryson and Timothy Caudill, 101 Bush Boulevard, Sanford, FL 32773
    (d) **At sentencing:** Stuart Bryson and Timothy Caudill, 101 Bush Boulevard, Sanford, FL 32773
    (e) **On appeal:** Noel A. Pelella, 101 Bush Boulevard, Sanford, FL 32773
    (f) **If any postconviction proceeding:** Michael Ufferman, 2022-1 Raymond Diehl Road, Tallahassee, FL 32308
    (g) **On appeal from any adverse ruling in a postconviction proceeding:** Michael Ufferman, 2022-1 Raymond Diehl Road, Tallahassee, FL 32308

WHEREFORE, based on the facts and authorities cited above, Mr. Jones respectfully moves this court to:

1. Grant this motion for postconviction relief, and resentence Mr. Jones to 15 years in prison with credit for all time previously served; or

2. Vacate the judgment and sentence as entered and remand this cause for *de novo* trial proceedings, ordering the State to reoffer the 15-year plea or otherwise engage in good faith plea negotiations;

3. Order a full and fair evidentiary hearing with Mr. Jones present and represented by counsel in order for Mr. Jones to sustain his burden of proof and persuasion; and,

4. Grant all other relief this Court deems just and proper.

CERTIFICATE OF DEFENDANT

UNDER PENALTIES OF PERJURY, and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English and have read the foregoing motion or had it read to me.

Mark Jones, DC # E14833

CERTIFICATE OF SERVICE

I CERTIFY THAT a true and correct copy of the foregoing has been hand delivered to Columbia Correctional Institution staff for mailing to: The Office of the State Attorney, P.O. Box 8006, Sanford, FL 32772-8006.; on this 22 day of March 2018.

Mark Jones

Mark Jones, DC # E14833

Original sent to:
The Office of the Clerk of the Court
Eighteenth Judicial Circuit Court in and for Seminole County, Florida
P.O. Box 8099
Sanford, FL 32772-8099

AFFIDAVIT OF LEWIS P. JONES

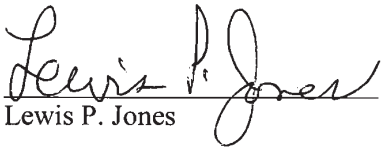
This affidavit is in reference to the State of Florida vs. Mark A. Jones Case No. 2011-CF-2979-A. I was actively involved in this case from the arrest in June of 2011 through the sentencing in July of 2012 and I continue to be in his appeal. My wife and I met with Stuart Bryson because of the seriousness of this case in October 2011 and we were informed of the plea offer from the State of 15 years with the November 10, 2011 deadline. We informed Stuart Bryson that, because of our son Mark's alcoholism and mental health issues, our phone number was to be the primary contact phone number in the file for all telephonic correspondence. We were also aware of a November 14, 2011 psychological evaluation Mark was to undergo. Our family was counting on a medical defense for Mark. Had we known that the State's plea offer still existed after the his medical examination—which left Mark with no defense my wife and I would have urged Mark to accept the offer and he would have followed our advice.

I never received a phone call from Stuart Bryson and he never left a message on my phone regarding a plea deal with a new deadline of November 16, 2011. I have had the same telephone number since 1995 and it has never been out of service. If called upon, I will testify to the above stated facts under oath in any court of law.

I, LEWIS P. JONES, do hereby swear, under penalty of perjury, that the above statement is true and correct, made of my own free will, and from my personal knowledge:

Contact information:

Lewis P. Jones
6046 Topsail Road
Lady Lake, FL 32159
(352) 753-3459



Lewis P. Jones

AFFIDAVIT OF MARIAN G. JONES

This affidavit is in reference to the State of Florida vs. Mark A. Jones Case No. 2011-CF-2979-A. I was actively involved in this case from the arrest in June of 2011 through the sentencing in July of 2012 and I continue to be in his appeal. My husband and I met with Stuart Bryson because of the seriousness of this case in October 2011 and we were informed of the plea offer from the State of 15 years with the November 10, 2011 deadline. My husband and I informed Stuart Bryson that, because of my son Mark's alcoholism and mental health issues that our phone number was to be the primary contact phone number in the file for all telephonic correspondence. I was also aware of a November 14, 2011 psychological evaluation Mark was to undergo. Our family was counting on a medical defense for Mark. Had we known that the State's plea offer still existed after the his medical examination—which left Mark with no defense my wife and I would have urged Mark to accept the offer and he would have followed our advice.

I never received a phone call from Stuart Bryson and he never left a message on my phone regarding a plea deal with a new deadline of November 16, 2011. I have had the same telephone number since 1995 and it has never been out of service. If called upon, I will testify to the above stated facts under oath in any court of law.

I, Marian G. Jones, do hereby swear, under penalty of perjury, that the above statement is true and correct, made of my own free will, and from my personal knowledge:

Contact information:

Marian G. Jones
6046 Topsail Road
Lady Lake, FL 32159
(352) 753-3459

Marian G. Jones
Marian G. Jones

AFFIDAVIT OF ROSE RUIZ

This affidavit is in reference to the State of Florida vs. Mark A. Jones Case No. 2011-CF-2979-A. I was actively involved in this case from the arrest in June of 2011 through the sentencing in July of 2012 and I continue to be in his appeal. I met with Stuart Bryson because of the seriousness of this case in October 2011 and I was informed of the plea offer from the State of 15 years with the November 10, 2011 deadline. Mark and I discussed this plea in depth and its ramifications. Mark's parents and I met with Stuart Bryson and we agreed that it was in Mark's best interest to purse a medical insanity defense because of his extensive documented veteran's medical history. I informed Stuart Bryson that, because of Mark's alcoholism and mental health issues, my phone number was to be added as a secondary contact telephone number in his file for all telephonic correspondence.

I work at the Veteran's Administration and assisted Mr. Bryson in obtaining medical reports for Mark and his defense. I was also aware the potential insanity defense was contingent on the November 14, 2011 psychological evaluation and drove Mark to the doctor appointment. I never received a phone call from Stuart Bryson and he never left a message on my phone regarding a plea deal with a new deadline of November 16, 2011. Had Mark known that the State's plea offer still existed after the his medical examination—which left him with no defense—Mark would have accepted the 15-year plea deal. Myself, and Mark's parents would have encouraged Mark to accept the plea deal if he had no medical defense. I have had the same telephone number since 2009 and it has never been out of service. If called upon, I will testify to the above stated facts under oath in any court of law.

I, Rose Ruiz, do hereby swear, under penalty of perjury, that the above statement is true and correct, made of my own free will, and from my personal knowledge:

Contact information:

Rose Ruiz
453 Howard Avenue
Longwood, FL 32750
(407) 462-8658

Rose Ruiz

September 2011

Lewis and Marian Jones
6046 Topsail Road
Lady Lake, FL 32159

RE: Mark A. Jones
Case Number: 11-2979CFA

Dear Judge Recksiedler,

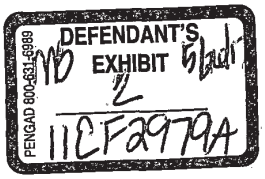
This is a letter from the family of Mark A. Jones, Case number 11-2979CFA. Our hopes are that in your handling of his case and resolution, you will be able to evaluate his person, not only by his crimes, but also by who he is and was as a citizen, brother, uncle, cousin, son, etc.

Mark was an exemplary young man...sunny disposition, good grades, active in the church, captain of the football team, etc. until the end of his second year at the United States Military Academy at West Point (Appendix A). It was then, in 1993, that he was beaten, sexually assaulted, and sodomized by a group of at least seven fellow football players/cadets in the football team locker room during a hazing incident. From that time on, his life changed dramatically. Despite having unlimited potential for success validated by the attached congressional support letter (Appendix B), he became disillusioned about his military career (a life goal), and sought withdrawal from the Academy. He never shared the incident with anyone except his roommate, Captain Nadeau (partially), and two football coaches, now coaching in the NFL, who sadly told him to keep it to himself and "drive on".

After leaving West Point, Mark transferred to West Virginia University, where he got married. His grades weren't what they had been before and he struggled to maintain his focus academically. Ultimately, Mark was able to graduate with a Bachelor of Science in Mathematics and a Master of Science in Industrial Engineering but he continued to spiral downward as a direct result of the attack and his marriage suffered and quickly ended in divorce.

In 2000, after the divorce, Mark moved to Florida and continued to use alcohol to deal with his "secret" and its shame and embarrassment. Over the years, the alcohol use increased leading to criminal arrests and jail time. He developed a substantial criminal record and went to prison in 2008 for a few months.

In 2010, Mark sought treatment at the VA for nightmares, flashbacks, and panic attacks linked to the West Point attack. It was at this time, during the counseling/treatment in 2010, that Mark first disclosed the attack to anyone in his family. In attempt to alleviate the nightmares, flashbacks, and panic attacks, psychiatrists prescribed drug after drug, exacerbating the problem, before diagnosing him with service-related, chronic PTSD, bipolar disorder, and anti-social issues (Appendix C). In August of 2010, Mark applied for an "in-house" VA military sexual assault program in St. Petersburg, Florida. He was put onto a waiting list and continued



to struggle while the VA merely shuffled his request and continued to ignore his pleas for help (Appendix D). Finally, after his long wait and while on the cusp of obtaining admittance, he was arrested for this particular incident.

It seems the Prosecutor is now seeking to send Mark to prison for the rest of his life. Brian Kurz, a VA social worker, has attempted to speak to the Prosecutor's office and Mark's public defenders on his behalf to no avail.

Judge Recksiedler, after all these years of not knowing what was causing Mark to act in the manner that he was, we are now aware of the real problem. He has admitted the heinous details despite his shame and embarrassment, the military has confirmed it, and he continues to seek help today, just as he did prior to his arrest. Mark served his country, was an upstanding citizen until this occurred, and has unlimited potential and value that he can offer society and the world around us. He has a good family (father - retired FBI agent, mother – retired school teacher, brother – Chiropractor, brother – security product expert/West Point grad). We are asking you, Judge Recksiedler as the ultimate authority, for some sort of pretrial intervention such as a plea negotiation with treatment included or some other solution short of life in prison.

Please contact any one of us if you have questions. Thank you and we pray for your judicial wisdom. May God guide your decision.

Sincerely,

The Jones Family

Lewis Jones
6046 Topsail Rd
Lady Lake, FL 32159
352-753-3459

Marian Jones
6046 Topsail Rd
Lady Lake, FL 32159
352-753-3459

David Jones
4 Stonehenge Dr
Lumberton, NJ 08048
609-668-2954

Robert Jones
45 Trailwood Lane
Newnan, GA 30265
404-486-3116

Appendix A: West Point cadet photo – Mark Jones
Appendix B: Congressional Nomination from US House of Representatives
Appendix C: Medical Record - Diagnosis
Appendix D: Verification of in-treatment enrollment request and VA delay for treatment (2 pages)

Rose

1163219 Close

7/2012

CLIENT ADDRESS: 407-462-8658

CITY: STATE: ZIP CODE:

PHONE NUMBER: 321-263-8551 WORK:

DATES OF: ARREST: 6/27/11 APPOINTMENT:

NEXT APPEARANCE: 8/9 9/28 11/23 BOND HEARING:

INITIAL APPEARANCE ATTORNEY CODE:

RE FILE

DO NOT COVER WITH LABEL:
JAIL STATUS: JAIL ROR
BOND AMOUNT: $
DATE DISCOVERY RECEIVED:
LIEN AMOUNTS:
REQUESTED:
GRANTED:
CONTINUANCE COURT DATE:
DATES OF PLEA:
SENTENCED:
APPEAL INFORMATION:
RIGHTS EXPLAINED:
WAIVED:
FILE DATE:

DATE ARRAIGNED: DATE PETITION FILED:
TRIAL INFORMATION:
DATE: LOCATION:
TRIAL CODES: ATTORNEY: SB JUDGE: JR
OFFENSE CODE: ADDITIONAL CASES (Misd. & Traffic Only)

CHECK THE APPROPRIATE DISPOSITION CODE:
TRIAL
[X] GTY CONVICTED AT TRIAL
[ ] NG ACQUITTED
[ ] NGI NOT GUILTY INSANITY
[ ] MST MISTRIAL
[ ] JOA JUDGMENT OF ACQUITTAL
PLEAS
[ ] PGN PLED GUILTY - NEGOTIATED
[ ] PGO PLED GUILTY - OPEN COURT
[ ] PNC PLED NO CONTEST

OTHER:
[ ] SPD SPEEDY TRIAL DISCHARGE
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[ ] EST BOND ESTREATURE
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[ ] MOC MERGED WITH OTHER CASE
[ ] NI NO INFORMATION
[ ] NP NOLLE PROSSED
[ ] PDR PD RELIEVED
[ ] TCC TRANSFER TO OTHER COURT

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[ ] BAC BAKER ACT CANCELL
[ ] INC INCOMPLETE
[ ] DEL ADJUDICATED/DELINQ
[ ] PDT PRETRIAL DIVERSION

NAME JONES, MARK A 2011002979CFA 3 28 DS
550 HATTAWAY DR APT 26 CITY ALT SPRINGS
STATE FL ZIP 32701-0000 PHONE (352)753-3459 7/16 JS
APPTD 2011/06/28 2ND APP 2011/06/28
ARRAIGN 2011/06/28 DATE 2011/09/28 TRIAL ATTY STUART BRYSON
CHGS BURGLARY OF STRUCURE/CONVEYANCE
CARJACKING
TRIAL JUDGE JESSICA RECKSIEDLER
LIEN DISPO DISPOSITION DATE

RE FILE 8/2011

Mark Andrew

CLOSE

COMPUTER USE ONLY:
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DATE: PLEA
INITIAL
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DISPOSITION
ADMINISTRATIVE DISPOSAL INF
PLEA W/PB DATE OF
PLEA W/NO PB
OTHER

DO NOT DES

33D 7/30 3/29 CTS 7/24

COURT PROCEEDINGS AND DISPOSITION

* 8-9-11 SFT 9-28-11 arraign SB D in court.
9/28 - Cont to 11/23
10/18/11 Faxed Cost Approval & Dual Request to Dantziger pl
10/20/11 Refaxed same to Dantziger plw
11/15 - Called Δ to talk about psych eval - no answer left m
for Δ to call back; offer expires tomorrow
11/16 - Called again - phone no longer in service
11/23 - Δ FTA for DS - BW issued no bond
1/4 - cont to 2/29
2/29 - Cont to 3/28
3/28 - Cont to 4/25 DS
4/25 - Cont to 5/23
5/23 - Cont to 6/20
6/20 - PTC on 6/27
6/27 - JS on 7/16
7/31 - guilty @ trial, mandatory life
... Copy of power of attorney provided ... Maria

From: Tom HASTINGS
To: Stuart Bryson
Date: 11/3/2011 11:18 AM
Subject: RE: Mark Jones

your expert will at least be able to give you a verbal report by the new deadline. Tom

>>> "Stuart Bryson" <sbryson@pd18.net> 11/3/2011 10:22 AM >>>
I may not have my evaluation results by then, but I guess we can cross that bridge when we get there.

-----Original Message-----
From: Tom HASTINGS [mailto:THASTINGS@sa18.state.fl.us]
Sent: Tuesday, November 01, 2011 1:10 PM
To: Stuart Bryson
Subject: Re: Mark Jones

Will extend offer's deadline to 11/16/2011. Tom H.

>>> "Stuart Bryson" <sbryson@pd18.net> 11/1/2011 9:26 AM >>>
Tom, I gave you and incorrect date on the evaluation.it is actually November 14, 2011.

Stuart A. Bryson

Assistant Public Defender

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

MARK JONES, Petitioner, v. SECRETARY, DEPARTMENT OF CORRECTIONS, and ATTORNEY GENERAL, STATE OF FLORIDA, Respondents.	Case No. 2:20-cv-265-FtM-29NPM

AFFIDAVIT OF CRYSTAL FRUSCIANTE, ESQUIRE

STATE OF Florida,

COUNTY OF Brevard.

I, CRYSTAL FRUSCIANTE, having been duly sworn, hereby affirm and state the following as true and correct:

1. My name is Crystal Frusciante. I am over eighteen years of age. I am an attorney licensed to practice law in the State of Florida.

2. I was counsel for Mark Jones during his postconviction proceedings in state court. One of the claims I raised in Mr. Jones' state postconviction motion was that defense counsel (Stuart Bryson) was ineffective for failing to properly advise Mr. Jones regarding the State's pretrial plea offer. Specifically, the original information in this case charged Mr. Jones with burglary with an assault or battery, and the State filed a notice that Mr. Jones was eligible for sentencing as a prison

releasee reoffender ("PRR"). In October of 2011, the State extended a plea offer of "15 years and a day," and the offer indicated that if Mr. Jones rejected the plea offer, the State would file an amended information charging Mr. Jones with burglary with assault (i.e., removing the "or battery" allegation), which the State asserted meant that Mr. Jones would face a mandatory PRR sentence of life imprisonment if convicted as charged. The documents I had in my possession demonstrated that the plea offer expired on November 10, 2011. In Mr. Jones' state postconviction motion, I argued that when defense counsel discussed the plea offer with Mr. Jones, defense counsel incorrectly informed Mr. Jones that his charge (burglary with assault or battery) did not qualify for PRR sentencing.

3. The state postconviction court granted an evidentiary hearing on this claim. The evidentiary hearing was held on May 26, 2017, and during an evidentiary hearing, the prosecutor (Assistant State Attorney Tom Hastings) introduced into evidence the following printed version of an email thread between the State and defense counsel:

> 4/28/2016 Tom HASTINGS - RE: Mark Jones Page 1
> From: Tom HASTINGS [the prosecutor]
>
> To: Stuart Bryson [defense counsel]
> Date: 11/3/2011 11:18 AM
> Subject: RE: Mark Jones
>
> [Y]our expert will at least be able to give you a verbal report by the new deadline. Tom
>
> >>>"Stuart Bryson" <sbryson@odl8.net> 11/3/2011 10:22AM>>>
> I may not have my evaluation results by then, but I guess we can cross that bridge when we get there.
>
> -----Original Message----
> From: Tom HASTINGS [mail to: THASTINGS@sal 8.state.fl.us]
> Sent: Tuesday, November 01, 2011 1:10 PM

To: Stuart Bryson
Subject: Re: Mark Jones

Will extend offer's deadline to 11/16/2011. Tom H.

>>>"Stuart Bryson"<sbryson@pd18.net> 11/1/2011 9:26 AM>>>
Tom, I gave you an[] incorrect date on the evaluation. [I]t is actually November 14, 2011.

Stuart A. Bryson
Assistant Public Defender

The email thread, dated April 28, 2016, was introduced at the evidentiary hearing for the purpose of disproving Mr. Jones' claim that defense counsel failed to correctly inform him of the maximum penalty he faced before rejecting the State's fifteen-year plea offer. During Mr. Hastings' cross-examination of Mr. Bryson, the following exchange occurred:

A. Having looked at the email conversation between your office and myself, it appears that the reason that I had asked for the extension was because of psychological evaluations that were being pursued.

Q. Uh-huh.

A. My thought would have been perhaps that at this point I'm not going to accept any offer because maybe I'm going to end up with this defense. Once I had conversation with the doctors who had evaluated Mr. Jones, I knew that was no longer an option, I asked for an extension and attempted to reach out to Mr. Jones to encourage him that we don't have the defense that we hoped we were going to have.

Q. Okay and he had provided you with a phone number to reach him?

A. Indeed.

Q. And you tried to reach him?

A. I did on two occasions.

Q. And were you able to reach him on the 15th or the 16th?

A. I was not. I did leave a message on the 15th; on the 16th when I

returned the phone call to the same number that phone was - that number was no longer in service.

(EH-22-3).

4. As explained above, the original written plea agreement the State offered to Mr. Jones included a November 10, 2011, deadline. At the time of the evidentiary hearing, I was unaware that Mr. Bryson had asked for and received an extension of the State's fifteen-year plea offer. Additionally, Mr. Jones told me at that time (i.e., when we heard Mr. Bryson's testimony during the evidentiary hearing) that he too was unaware of the extension. Prior to the evidentiary hearing, Mr. Jones and I were diligent in our search for information regarding the plea and its surrounding circumstances. We even ordered the State Attorney's file and the Public Defender's file. Nothing about the extension was in either.

5. I declare that I have read the above document and that the facts stated therein are true.

Executed on this 09 day of October, 2020.

Crystal Frusciante

Sworn to and subscribed before me by Crystal Frusciante, who is personally known to me or who has produced FLDL as identification this 9th day of October, 2020.

Notary Public

My commission expires:
Feb 20 2021

Zukeyri Leyva
My Commission Expires
February 20, 2021
Commission No. GG 74646

ORIGINAL

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARK ANDREW JONES,

Defendant.

_____/

CASE No.: 2011-CF-2979

3.850 HEARING

FILED IN OFFICE
GRANT MALOY
CLERK CIRCUIT COURT
17 OCT 24 PM 1:26
BY SEMINOLE CO. FLA
D.C.

BEFORE THE HONORABLE

DEBRA S. NELSON

JUDGE OF THE COURT

ELECTRONICALLY RECORDED:
In Courtroom 5D
101 Eslinger Way
Sanford, Florida
May 26, 2017

APPEARANCES:

OFFICE OF THE STATE ATTORNEY
EIGHTEENTH JUDICIAL CIRCUIT
101 Bush Boulevard, 2nd Floor
Sanford, Florida 32773
Attorney for Plaintiff
BY: TOM HASTINGS, ESQUIRE

MICHAEL UFFERMAN LAW FIRM, P.A.
2022 Raymond Diehl Road, Suite 1
Tallahassee, Florida 32308
Attorneys for Defendant
BY: MICHAEL UFFERMAN, ESQUIRE

APPEARANCES: (Cont'd)

FRUSCIANTE LAW FIRM, P.A.
11110 West Oakland Park Blvd, Ste 388
SUNRISE, Florida 33351
Attorneys for Defendant
BY: CRYSTAL FRUSCIANTE, ESQUIRE

I N D E X

TRANSCRIPT OF PROCEEDINGS

Hearing Held May 26, 2017

TESTIMONY OF **STUART BRYSON**

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Cross-Examination by Mr. Hastings	17
Redirect Examination by Ms. Frusciante	27

TESTIMONY OF **MARK JONES**

Direct Examination by Mr. Ufferman	33
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CERTIFICATE 154

WHEREUPON:

The following proceedings were had:

THE COURT: Okay. Is everybody ready in Case Number 11-CF-2979, State versus Mark Jones, 3.850 hearing?

MR. UFFERMAN: Yes, Your Honor.

THE COURT: Okay. Please have a seat. Mr. Jones, the record reflects that on July 25th, 2012, you were convicted after a jury trial of burglary of a conveyance with an assault, which was Count I; attempted car jacking, Count II. You were sentenced on Count I life imprisonment as a PRR, prison releasee re-offender. And to 15 years with a 15-year mandatory minimum on Count II as a PRR.

You have filed your motion for 3.850. The Court had reviewed the motion, issued its order requesting the State to respond to grounds 4, 6, 7, and 8 for which this Court has granted a hearing. Ground, and I'm paraphrasing, ground 4, failing to -- counsel failing to notify the Court of a sleeping juror. Count VI, failure to provide defense of voluntary intoxication. Count VII, failure to file a motion to suppress about an unlawful detention. Count VIII, failure to inform regarding the maximum penalties. And Count IX

would be cumulative errors. Am I missing something?

MR. UFFERMAN: Your Honor, although we would like a hearing on ground 6, I think to be clear in your order, I think you denied relief on ground 6.

THE COURT: Okay. I denied relief on ground 6.

MR. UFFERMAN: So I think the hearing today is set for grounds 4, 7 --

THE COURT: -- and 8. And then 9 as --

MR. UFFERMAN: Cumulative error, yes, Your Honor.

THE COURT: Okay. Are you ready to proceed?

MR. UFFERMAN: Yes, Your Honor. May it please the Court. I have a couple of housekeeping matters to address to the Court if I can.

THE COURT: Yes, you may.

MR. UFFERMAN: Again, Michael Ufferman on behalf of Mr. Jones. Seated with me at counsel table is Crystal Frusciante, co-counsel, and Mark Jones, the Defendant, Your Honor.

To begin with, we would invoke the rule at this time.

THE COURT: Okay.

MR. UFFERMAN: Defense is going to have

three or four witnesses, and I know the State has a couple of witnesses as well. So if we can ask those witnesses that are going to be testifying today if they can leave the courtroom.

THE COURT: Okay. Those of you who are testifying, please remain outside the courtroom. You are not to discuss the case amongst yourselves or with anybody else. Those of you who are seated in here are not to go out and let these witnesses know what's going on in the courtroom. Please remain outside the courtroom until you're called.

MR. UFFERMAN: Thank you, Your Honor. The only other housekeeping matter is I would ask the Court take judicial notice of the court file in this case containing the transcript of the trial. I think that's standard in these 3.850 hearings, and I don't think the State has any objection to that request.

MR. HASTINGS: That's correct. No objection.

THE COURT: The only problem is I don't think I have all those transcripts here with me, but the Judge's opportunity to look at the Clerk's file is messed up, so we can't see it. And I've got volume 1 and volume 7 of Mr. Oliver's case, so

the transcript's probably within the other files, we can get them up here.

THE CLERK: I will.

THE COURT: Okay. We'll get them up here.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: Okay. Thank you.

MR. UFFERMAN: And with that I believe we're ready to begin. The first witness that we'll call would be one of Mr. Jones' defense attorneys from the trial, Stuart Bryson, Your Honor.

THE COURT: Okay.

MS. FRUSCIANTE: Your Honor, do I question from back here or should I --

THE COURT: The podium would probably be easier but if you need to use any of those tables, feel free to do so.

THE CLERK: Do you swear or affirm that the testimony you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. BRYSON: I do.

THE CLERK: Thank you.

THE COURT: You may proceed.

STUART BRYSON

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. FRUSCIANTE:

Q. Sir, would you state your name, please?

A. Stuart Bryson.

Q. And you represented the Defendant in this case --

A. I did.

Q. -- at trial. Yes.

And prior to trial, did you have discussions with him about his sentencing?

A. I did.

Q. And what did you tell him?

A. Based on the plea form -- excuse me, not the plea form, the plea offer that had been provided to me by the State Attorney's Office, Mr. Hastings in particular, would have informed him first what he was charged with and what the plea offer would have been, which I believe if memory serves, I don't have a copy of the plea offer in front of me any more, would have been 15 years, and 15 years and 1 day as the sentences to the attempted carjacking and the burglary of a conveyance with an assault.

Q. Okay. And during that discussion did you discuss with Mr. Jones what his maximum sentence he was looking at?

A. I did, Your Honor -- I'm sorry, you're Your Honor, you're counsel. Because the plea form would have indicated that if the Defendant refused, or if Mr. Jones refused or rejected your offer, then the State would have filed the notices of intent to seek sentencing as a prison releasee re-offender and I would have explained to him that that would have carried a mandatory life sentence.

Q. Okay. Now, was there discussion about whether or not the Defendant qualified for the prison releasee re-offender?

A. I don't remember specifically, but he would have, so I would assume that I would have had that conversation with him.

Q. Okay. And at that period of time was the state of the law -- what was the state of the law with regard to PRR at that time?

A. I'm not sure I understand.

Q. That he would have qualified because -- why would he qualify?

A. Because he had been released from prison within three years of the offenses --

Q. Okay.
A. -- that he was charged with.
Q. And so you advised him that he qualified for --
A. Yes.
Q. Okay. Now, prior to -- when did you have this conversation with him?
A. My memory is not a hundred percent accurate, but if I could refer to the front of my file, I could at least give you a time frame.
Q. Okay.
THE COURT: Do you have any objections to him referring to his file?
MS. FRUSCIANTE: I do not.
THE COURT: State, have any objections?
MR. HASTINGS: No, Your Honor.
THE COURT: Okay. Go ahead and do so.
A. My first contact with Mr. Jones would have been on or around September 28th, which would have been his first docket sounding with me in this courtroom.
BY MS. FRUSCIANTE:
Q. Okay.
A. My notes indicate that between that date and November 23rd, which is when he failed to appear for a docket sounding, I had at least made one phone -- no,

two, no, three -- excuse me, no, it is two, on both November the 15th and November the 16th I would have made phone calls to him to talk about evaluations that has been completed on him. So my recollection or my thought would be that sometime between September 28th and probably the end of October we would have had a meeting in my office to discuss the case.

Q. Okay. And that's when you would have discussed the plea offer with him?

A. Correct.

Q. Okay. Do you recall when you received that plea offer?

A. I do not.

MS. FRUSCIANTE: If I can approach, Your Honor.

THE COURT: Yes, you may. If you want to show counsel first before you approach.

BY MS. FRUSCIANTE:

Q. Do you recognize that, sir?

A. I do. It's a copy of the front of my file, which I have sitting in front of me. So now I have both of them.

Q. Okay. I can take that then?

A. Certainly.

Q. And does that appear to be an accurate copy

of the front?

A. It appears to be an accurate representation of my file.

Q. On 11/15 and 11/16 your notes indicate that you made phone calls?

A. Correct.

Q. And what was the purpose of the phone calls on 11/15?

A. If I may once again refer to the front of my file.

Q. Yes, please.

A. On 11/15 my note indicates at first I'd called him to talk about the psychological evaluation that we had on him and that there was no answer, I left a message for him to call me back. And also that to let him know that he had until the next day to accept the State's offer.

Q. Okay. Now, when you discussed the plea offer with him, what was his response?

A. If memory serves, and my memory is pretty good, we had a conversation about the 15-year sentence that he could accept, we also talked about if he went to trial and lost he would be facing a mandatory life sentence. And I specifically remember him making a comment to me that he could not accept the 15-year

sentence because if he went to prison for that long everyone who was involved in his life, including his mother and father would be dead before he got out.

Q. Okay. And yet on the 15th when you called, you called to let him know the offer expired, was going to expire?

A. Yes.

Q. So it was still an idea in your mind that he might accept the plea offer at that time?

A. I don't know. I don't know what was in his mind. I know it was in my mind that I wanted to have a firm answer for Mr. Jones and what he was going to do. Letting him know tomorrow is the deadline, I must have an answer by then.

Q. Okay.

A. And if memory serves, I believe that Mr. Hastings was even gracious enough to give us a bit of extension on the time.

Q. Okay. And was that at your request?

A. Yes.

Q. Because you wanted to find out whether the Defendant was going to accept the plea offer or not?

A. I was fairly confident that he was not, based on the conversations that we had had. However, sometimes when a person's out of custody they have a

certain mindset, but then when they get taken into custody, which Mr. Jones had done because of his failure to appear, that may change how they view their circumstances. So it would not be unheard of in a situation like this for me to reach out to a prosecutor, even Mr. Hastings, who typically does not ever change his position on his plea offers, just to see if maybe we could have a little more time to see if we could get it worked out.

Q. Okay. Was Mr. Jones in or out of custody at this time?

A. He actually -- it appears the warrant, according to my notes, would be issued on the 23rd. My notes don't indicate when he was picked back up, I know I did not see him again until January the 4th.

Q. Okay. But you were not trying to contact him at the jail?

A. I'm sorry?

Q. You were not trying to contact him at the jail during the 11th and the -- I mean the 15th and 16th?

A. No.

Q. Right. Because --

A. He wasn't in the jail, he was free.

Q. Okay.

A. He was out on bond.

Q. Did you attempt to get in touch with him any other way?

A. No.

Q. Had you met his parents?

A. Actually, yes, they came in for office conferences as well.

Q. And you had met his girlfriend, Rose?

A. I want to say, yes, but I'm not a hundred percent positive. I'm pretty certain I did though.

Q. Okay. And you had their phone numbers?

A. Indeed, yes, I believe I spoke to Rose on the phone --

Q. Okay.

A. -- at least once.

Q. Okay. Did you call them and attempt to get in touch with the Defendant?

A. Actually that's why they were contacting me, I believe it was Rose that contacted me to explain what was going on and why he failed to appear and I believe -- and, again, I don't have any notice or note written down of this, but it seems like there was a conversation between either, I believe it was Rose, indicating he had other issues going on or maybe he had gone off on a bender over in Tampa. And, again, my

memory is not a hundred percent, but there was something going on which caused him to not show up.

Q. Okay. But that was after the plea expired, correct? That conversation?

A. I would assume so.

Q. Because he failed to appear 11/23; is that correct?

A. That is correct.

Q. Okay. But you didn't call Rose or his parents in an attempt to reach him?

A. No.

Q. About the plea?

A. No.

MS. FRUSCIANTE: Okay. One moment, please.

THE COURT: Yes.

BY MS. FRUSCIANTE:

Q. So you were never able to ultimately get an answer about the plea from him before it expired; is that correct?

A. Yes, I was. He indicated to me he would not accept a 15-year sentence because everyone he loved would be dead.

Q. Okay. But you were still trying to contact him to get his answer after -- subsequent to that, correct?

A. No, I was not trying to get an answer. I was trying to contact him to see if I could persuade him to take the 15 years.

Q. Okay. With regard to during the trial were you approached about a sleeping juror issue?

A. Not during the trial, no.

Q. Okay. When were you contacted about that?

A. After the trial.

Q. Okay. And who contacted you?

A. If I remember it may have been his mother.

Q. And what did she --

A. She indicated that she believed that a particular juror had been asleep during parts of the proceedings.

Q. Okay. And what action did you take, what did you do?

A. I didn't take any because I never noticed a juror sleeping during the trial.

MS. FRUSCIANTE: Okay. No further questions.

THE COURT: Thank you very much. Cross.

CROSS-EXAMINATION

BY MR. HASTINGS:

Q. Now, Mr. Bryson. . .

MR. HASTINGS: May I approach the bench or

the witness?

THE COURT: Yes, you may.

BY MR. HASTINGS:

Q. Showing you State's Exhibit E as in Edward, if you can take a look at that. And then there's a second page to that exhibit as well.

A. Yes.

Q. Okay. Now, the plea offer, is that the plea offer you spoke of?

A. It appears to be an accurate representation of the offer that had been sent to me.

Q. And in the date of that plea offer was when?

A. It's dated October the 6th, 2011.

Q. Okay. So we -- so you received that on or shortly after October the 6th, would that be your recollection?

A. I would assume so.

Q. Okay. And it had a deadline for acceptance did it not?

A. It does.

Q. The original. And what was that deadline?

A. The original deadline was November 10th.

Q. Okay. And then was that deadline later extended?

A. It was.

Q. At your request?
A. It was.
Q. And that was extended until November 16th, I believe, correct?
A. Yes.
Q. That came to you by way of an e-mail from me?
A. Yes.
Q. At your request, right?
A. That's correct.
Q. And the plea offer essentially was that the Defendant was at that time charged with burglary of a conveyance with an assault or battery, correct?
A. That's correct.
Q. First degree felony punishable by life?
A. Yes, sir.
Q. And also he was charged with attempted carjacking?
A. Yes, sir.
Q. And he qualified at that time to be sentenced as a prison releasee re-offender on Count II, correct?
A. That is correct.
Q. And then it was indicated to you with a case cite, the State versus Shaw, the Fifth District Court of

Appeal opinion, if he chose not to accept it, then his exposure would be life as a prison releasee re-offender on Count I once the battery was deleted as part of the amended information, correct?

A. That is correct.

Q. Because it would therefore transfer the first degree felony punishable by life to a prison releasee re-offender charge?

A. That is correct.

Q. And you have handled a number of cases where a Defendant was facing potential sentencing as a prison releasee re-offender, correct?

A. Yes, I have.

Q. And as an habitual felony offender?

A. Yes, I have.

Q. You're well-versed in the law regarding that?

A. I'm not as well-versed now as I was back then.

Q. Okay.

A. But it's a different circumstance now.

Q. Right. Okay. And you would -- did you go over that, the alternative that Mr. Jones faced if he did not accept the 15-year offer?

A. As a matter of course I handle every single

law office conference with every single client the same way every time.

Q. Okay.

A. I explain charges, I explain maximum exposure, especially in a case where there's PRR, VCC, HFO, any of the habitual felony offenders any of those cases I explain maximum exposure, what would need to be proved in order to prove that enhancement, and it's just something that I do as a matter of course in every single case. And I've been doing this for ten years, so it's a lot of times.

Q. Okay. So there's no question in your mind Mr. Jones was fully aware of what his circumstances were when you gave him that offer?

A. I have no question in my mind at all.

Q. Okay. And his response once you laid it all out for him was, I can't take 15 years because my family members may not be alive when I get out?

A. That's correct.

Q. And I might as well roll the dice or something like that?

A. And I have a specific memory of that conversation.

Q. Okay.

A. I don't remember specifically when it

occurred, I just remember the content.

Q. Now, you indicated to counsel that you -- nonetheless you felt -- I guess you tried to encourage him to do it even after he said I don't want to take that.

A. Yes.

Q. You wanted to try to reach out to him and try to convince him that that probably would be in his best interest given the circumstances of this case?

A. Having looked at the e-mail conversation between your office and myself, it appears that the reason that I had asked for the extension was because of psychological evaluations that were being pursued.

Q. Uh-huh.

A. My thought would have been perhaps that at this point I'm not going to accept any offer because maybe I'm going to end up with this defense. Once I had conversation with the doctors who had evaluated Mr. Jones, I knew that was no longer an option, I asked for an extension and attempted to reach out to Mr. Jones to encourage him that we don't have the defense that we hoped we were going to have.

Q. Okay. And he had provided you with a phone number to reach him?

A. Indeed.

Q. And you tried to reach him?
A. I did on two occasions.
Q. And were you able to reach him on the 15th or the 16th?
A. I was not. I did leave a message on the 15th; on the 16th when I returned the phone call to the same number that phone was -- that number was no longer in service.
Q. Okay. Subsequent to that or shortly after that the Defendant failed to appear the next time he was due in court?
A. That would have been November 23rd, yes.
Q. Bench warrant issued?
A. Yes.
Q. And he subsequently was taken into custody?
A. Yes.
Q. By that point there was no plea offer, correct?
A. The offer had long since expired by then.
Q. And the information was then amended as indicated that it would be, correct?
A. Yes, it was.
Q. Now, have you -- is it your understanding and is it your understanding of the practice when a habitual felony offender and prison releasee re-offender

notices and so forth are sent to you that a notice is also sent to your client?

A. I don't know that for a fact, but I think that is the policy.

Q. Okay. Have you ever encountered any issues where your client, who's in the jail, claims that he or she didn't receive any such notice?

A. Maybe on a 3.850, but I don't have any independent recollection of somebody calling me and saying, you never told me about this.

Q. Okay. Now, regarding the claim of a juror sleeping during the trial, do you in your practice and your -- you've tried many cases, correct?

A. Well over 150.

Q. Do you take note of jurors during the trial, I mean, some attorneys may do that and some may not?

A. It -- actually it's one of my fortes as a defense attorney, that I am able to build an extremely good rapport with jurors. I pay attention to them almost to the exclusion of paying attention to witnesses. I don't, obviously, I'm going to watch the witnesses too, but I am extremely focused on the jury. I like to get a sense of their body language, what are they doing, what are they thinking. Obviously, I don't know what they're thinking, but I can make assumptions

as to how -- as to their body language what's going on in their heads.

Q. During the trial itself, whether during testimony or argument, did you ever note any juror appearing to be either sleeping or dozing off or having his or her eyes closed or anything like that?

A. I did not.

Q. Okay.

A. Now, I'm not saying that I've never seen that, because, well, as we all know as trial attorneys, opening and closing tends to put jurors straight to sleep. But during any of the -- I never noticed any of that in Mr. Jones' proceedings.

Q. Okay. You had co-counsel at this time, Mr. Caudill?

A. I did.

Q. And he was very experienced trial attorney as well?

A. Mr. Caudill has been an attorney for going on almost 30 years now.

Q. Okay. Was it ever brought to your attention by either your client, by Mr. Caudill, by any spectators that may have been in the courtroom, anyone during the trial that any juror had appeared to either be sleeping or dozing off?

A. I do not have any recollection of anybody saying anything during the trial. My recollection is that it was after trial it was brought to my attention that maybe somebody was asleep.

Q. Okay. And did you attempt with the assistance -- and you believe you thought it was the Defendant's mother who made this claim to you?

A. It may have been, yes.

Q. Okay. Did you attempt to try to ascertain which juror she may have been speaking of by description or whatever?

A. Yes.

Q. And were you able to determine that?

A. That the person who was described to me would have been the alternate juror.

Q. Okay. Now, the alternate juror did not deliberate in this case?

A. Correct.

Q. Was excused prior to the jury deliberating?

A. Correct.

Q. Did the mother indicate to you to your recollection any specific part of the trial that this alternate juror may have appeared to have been sleeping or dozing off?

A. I don't have any recollection of anything

specific.

MR. HASTINGS: Okay. That's all the questions I have, Your Honor.

THE COURT: Thank you. Any redirect?

MR. HASTINGS: We'd move State's Exhibit, whatever it is, E into evidence.

THE COURT: Any objections? That's the plea offer.

MR. UFFERMAN: No objection, Your Honor.

THE COURT: Okay. State's Exhibit E will come into evidence as State's Exhibit 1.

(Whereupon, State's Exhibit was admitted into evidence.)

REDIRECT EXAMINATION

BY MS. FRUSCIANTE:

Q. You indicated that the State's plea offer referenced the shah case. What was your conversation with Mr. Jones about the Shaw case?

A. I don't remember having a discussion about the Shaw case in specific. The discussions would have been what the ramifications were; that if we take out the battery portion of a burglary with an assault and battery. If you take out the battery, then it automatically qualifies it as a PRR offense.

MS. FRUSCIANTE: Okay. Your Honor, I would

like to introduce -- this is a copy of the front of his file.

THE COURT: Has it been marked as A already?

MS. FRUSCIANTE: It has not been marked.

THE COURT: Okay. It will come in as Defendant's Exhibit Number 1.

(Whereupon, Defense Exhibit 1 was admitted into evidence.)

MR. UFFERMAN: Your Honor, nothing further of this witness.

THE COURT: Okay. Thank you. May Mr. Bryson be excused.

MR. HASTINGS: Well, I'll need him for another issue that was brought up, so I'll ask he remain subject to recall.

THE COURT: Okay. You're excused from the courtroom but you're subject to recall.

MR. BRYSON: I'll sit outside, then.

THE COURT: Call your next witness, please.

MR. UFFERMAN: Your Honor, at this moment can we have a brief three-minute discussion to discuss a situation that may save some time over the next hour.

THE COURT: Yes. Is there a room available they can meet with Mr. Jones?

THE DEPUTY: Yeah.

THE COURT: Okay. We'll be in recess for --

MR. UFFERMAN: Ten minutes that would be --

THE COURT: Ten-minute recess and you'll be able to meet with Mr. Jones back in the security room.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: Okay.

(Whereupon, a recess was had. After which, the proceedings resumed as follows:)

THE DEPUTY: Come to order. Court's back in session.

THE COURT: Okay. Please be seated. Did you have enough time to have the discussions with your client?

MR. UFFERMAN: We did, Your Honor. Thank you for allowing that.

THE COURT: Okay.

MR. UFFERMAN: We do have an announcement to make in light of that.

THE COURT: Okay.

MR. UFFERMAN: Because of Mr. Bryson's testimony regarding the sleeping juror claim, at this point we're in a position to waive that claim. I believe it's ground 4 of the motion.

THE COURT: Okay.

MR. UFFERMAN: We talked to Mr. Jones about that, we actually in preparing prior to today we knew that may be a possibility based on Mr. Bryson's testimony so this has been something we considered for a while and we finalized that discussion right now. If you'd like, I'm happy to -- if you want to put Mr. Jones under oath I can certainly make sure that he --

THE COURT: Okay. Sure. Mr. Jones if you'll raise your right hand to be sworn.

THE CLERK: Do you swear or affirm that the testimony you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. JONES: Yes, ma'am.

MR. UFFERMAN: And I can question him, Your Honor.

THE COURT: Go ahead.

BY MR. UFFERMAN:

Q. Mr. Jones, you just heard me announce that the Defense made a decision at this stage to waive with prejudice ground 4 of your postconviction motion, which means we're not going to have the Judge decide on that claim today and it means you won't be able to raise that

claim at any time in the future because your waiver will be with prejudice so that would be the end of that claim. Do you agree with that decision?

A. Yes, I do.

Q. And have you had enough time to consider that and talk to us about making that decision?

A. Yes, I have.

MR. UFFERMAN: I have nothing further, Your Honor, unless you have any additional questions.

THE COURT: No, I don't. Thank you very much. You can have a seat. Call your next witness, please.

MR. UFFERMAN: Thank you, Your Honor. The next witness will be Mr. Jones, the Defendant.

THE COURT: Okay. Mr. Jones, be careful walking up here. Just so you know, if we're going to go over 12:00, I will break for lunch and then we can do the afternoon if we're available.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: We'll try to get it done, but. . .

MR. HASTINGS: Yeah. I've got another matter at 1:30.

THE COURT: For how long?

MR. HASTINGS: Probably I'm guessing an

hour.

THE COURT: Okay. We can do 2:30.

MR. HASTINGS: Do what?

THE COURT: If we're going to go over, we can do at 2:30.

MR. HASTINGS: Okay.

MR. UFFERMAN: Your Honor, the other thing I should have announced and I apologize, the two witnesses -- the other witness we have for the Defense were my client's girlfriend and his mother, they were sleeping juror witnesses. Now that we've waived that claim, and we don't have any other purpose for them, can I ask them to come back into the courtroom.

THE COURT: Yes, you can.

MR. UFFERMAN: Thank you.

THE COURT: If you'll please stand up and raise your right hand to be sworn.

THE CLERK: Do you swear or affirm that the testimony you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. JONES: Yes, I do.

THE CLERK: Thank you.

THE COURT: Okay. You can have a seat.

MARK JONES

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. UFFERMAN:

Q. Mr. Jones, will you please state your name and spell your last name for the record?

A. Mark Jones, J-O-N-E-S.

Q. And you were the Defendant in this particular case, Case Number 2011-CF-2979?

A. Yes, sir.

Q. I want to ask you about ground 8 the plea claim first. Do you remember when you were charged in this case?

A. I was charged in the month of June, 2011.

Q. And do you remember was an information, which is a charging document filed shortly after that?

A. Yes, sir.

Q. And do you remember what the charges were from the original information?

A. The original information was burglary with assault or battery and attempted carjacking.

Q. And at that point in time did you have any initial discussions with your attorney Mr. Bryson about what type of maximum sentence you'd be looking at for

those charges?

A. In September they came to see me in the jail and informed me I'd be facing live in prison if I was convicted.

Q. And you said the jail. So when you were originally charged did you remain in the jail for a period of time?

A. Yes, for about four months.

Q. And was there a period of time then that you bonded out?

A. Yes.

Q. Okay. So they initially told you, you were looking at life in prison as a possibility for Count I, the burglary charge; is that correct?

A. Yes, sir.

Q. And let me ask you at that point in time were you open to any type of plea discussion in your case?

A. Yes.

Q. And do you remember having a discussion with your parents about writing a letter to the Judge at the time about possibly trying to pursue some type of plea deal?

A. Yes, I do.

MR. UFFERMAN: Your Honor, may I approach?

THE COURT: Yes, you may. Do you want to show it to counsel first.

MR. UFFERMAN: I already showed it to the prosecutor, Your Honor.

THE COURT: Okay. Thank you.

BY MR. UFFERMAN:

Q. Do you recognize the document I'm handing you?

A. Yes, I do.

Q. And can you tell the Court what is that document?

A. It's basically a packet my family and I put together to look for some sort of early, I guess, mitigating circumstance or something in lieu of going to trial, a document put together that way just to show my background so you didn't see all the bad stuff, you saw good stuff, that sort of thing, and told you about me as a person and that sort of thing.

Q. Is it a two page letter?

A. No, it's about --

Q. The letter itself, is it a two page letter?

A. Yes, sir.

Q. And, in fact, if I could refer you to the second page of the letter. And the last sentence of the second to last paragraph, do you mind reading that for

the court?

MR. HASTINGS: Objection, it's not in evidence.

THE COURT: Sustained.

MR. UFFERMAN: Well, Your Honor, at this point I would move this into evidence as a document that was given --

BY MR. UFFERMAN:

Q. Well, let me ask you this: Did you give that document to your attorney in an effort to ask him to pursue some type of plea negotiation in your case?

A. Yes, sir.

Q. And does that document demonstrate that you were open to a plea deal in this case?

A. Yes.

Q. And is there a sentence in that document that specifically says we would be open to a plea negotiation?

A. I have to look at it.

It says right here, for some sort of pretrial --

THE COURT: You can't read that.

MR. HASTINGS: Objection.

MR. UFFERMAN: Your Honor, at this point I would move this into evidence I would like it to be

Exhibit 2.

THE COURT: Any objection?

MR. HASTINGS: Yes, I'd like to voir dire the witness on this.

THE COURT: You may do so.

BY MR. HASTINGS:

Q. Now, Mr. Jones, you indicated that the date -- what's the exact date of that letter?

A. September of 2011.

Q. September what?

A. It doesn't have an exact --

Q. It just has a month and a day?

A. Yes.

Q. Okay. And you've heard the testimony previously that the plea offer in this case never even went out until October, correct?

A. Yes.

Q. And there's nothing in that letter that says what you would be -- what your family says and you didn't sign that letter, did you?

A. I never signed this letter, no, sir.

Q. In fact, did anyone sign that?

A. No, it was kind of a form thing, I put the whole family at the bottom.

Q. And you're saying -- and your understanding,

that was sent directly to the Judge?

A. No, this was -- this is for -- this was given to my attorney back then.

Q. For whose --

A. For the Judge's review.

Q. For the Judge's review?

A. Yes.

Q. And you didn't sign that, your name doesn't appear down at the bottom, there's -- in fact, that copy there nobody signed it, right?

A. No, sir.

Q. And you hadn't even received a plea offer at that point?

A. No, not yet.

Q. And there's no mention in there what you felt or what your family thought would be a plea offer that you would accept, correct?

A. That's correct, sir.

Q. Now, you had already by that time received, while you were in the jail, the initial prison releasee re-offender notice, correct?

A. No, sir, I never got that. I got a habitual notice, the only notice I got while in the county jail, I got two of them.

Q. At two different times?

A. No, at one time. I received two habitual felony offender notices.

Q. On the same day?

A. Yes, sir. In the same mailing.

Q. And what day was -- what month would that have been?

MR. UFFERMAN: Your Honor, at this point I object I think we're going beyond the scope of voir dire on this issue. Clearly these are things Mr. Hastings is going to have an opportunity to cross-examination --

THE COURT: Right. You can cross-examine him on that issue, but right now we're doing the voir dire on what they're intending to offer as Defendant's Exhibit 2.

BY MR. HASTINGS:

Q. Well, at that time this letter was written, you knew that you were facing a minimum 15 years, didn't you?

A. At the minimum.

Q. Okay. I would -- and that was just by virtue of what, your lawyer telling you that?

A. No, it said it on there, the habitual offender notice.

MR. HASTINGS: May I approach the witness,

please, Your Honor?

THE COURT: Yes, you may.

BY MR. HASTINGS:

Q. Mr. Jones, I'm going to show you State's Exhibit H and I, both dated July the 22nd. Are those the two notices that you received?

A. No, I received this one only. And, you know what, it probably was my attorney then that informed me of it, too.

Q. So your attorney told you, you were a prison releasee re-offender?

A. Yes.

Q. And you're claiming you never got this --

A. No, sir, I never got --

Q. This PRR notice, State's Exhibit I, in July, but you did receive --

A. I did receive --

Q. -- during the same day?

A. Yes, sir, I got two of those the same day in the same mailing.

Q. The identical pleading?

A. Yes, sir.

Q. So you told your attorney at some point that you would be happy to -- that you would accept a 15-year sentence; is that what you're telling us?

A. At that time they came to see me in the jail and told me about the mandatory life, and I asked them if we could find some sort of plea, you know, something along those lines, and that's when we -- after I bonded out, then we submitted this letter, and then at that time I was asking them if they could find some sort of plea that we could accept.

Q. When did you bond out?

A. It would have been late September.

Q. And that letter's not dated, so you don't know when the letter, if it was indeed provided --

A. Well, I know -- I'm not sure what date it was, my family and I met with Mr. Bryson and, you know, we provided him that letter, and then, I don't know, I signed a waiver of appearance, so I think the waiver of appearance was for 9/28, so it would have been prior to that.

Q. Well, my question -- what sentence did you have in mind?

A. I didn't have anything in mind at the time. I just knew I was facing a lot of time.

MR. UFFERMAN: Your Honor, we're getting way beyond voir dire on --

MR. HASTINGS: Okay.

MR. UFFERMAN: -- a document that -- the

relevance from the Defense side is we believe it shows he was open to a plea, that's the only point we're trying to establish.

MR. HASTINGS: It wouldn't matter. I'm sure he would have been open to a plea if it would have been, I don't know, a year in prison.

THE COURT: Is there any objection.

MR. HASTINGS: This is not relevant, this particular document is something -- a copy --

THE COURT: The only problem I have is that it's not signed and there's no evidence that it was actually given to Mr. Bryson.

MR. UFFERMAN: He said that, Your Honor.

MR. HASTINGS: The problem is relevance, Your Honor, as I see it. This is a letter authored --

THE COURT: Well, let me --

MR. HASTINGS: -- sometime in September before any plea offer was even offered, there's no indication on there either by the Defendant's testimony or in the letter what it was that he would have been open to, and it's simply not relevant to any issue that we have here. That is, whether or not Mr. Bryson communicated the plea offer on October 6, 2011, to Mr. Jones.

THE COURT: I'm going to accept it into evidence only as for the limited purposes that it shows that he was open to a plea offer. However, the Court does acknowledge that the testimony states that the offer was not made until after the date of this letter, and the testimony that I heard from Mr. Bryson and from Mr. Jones. So I'll let it in for the limited purpose as Exhibit 2.

THE CLERK: (Inaudible).

THE COURT: You don't have to mark it B, you can just mark it 2.

(Whereupon, Defense Exhibit 2 was admitted into evidence.)

MR. UFFERMAN: Thank you, Your Honor, and that's the limited purpose we wanted to introduce it. May I approach the witness again?

THE COURT: Yes, you may.

MR. UFFERMAN: And I'll provide the exhibit to the clerk so it can be marked as Defendant's Exhibit B.

THE COURT: 2.

MR. UFFERMAN: 2. You object said that, I apologize. Thank you.

BY MR. UFFERMAN:

Q. So Mr. Jones, I'm going to back up a little

bit so I want to make sure we go over what we talked about before. So after you were released from jail, you were aware that you had an exposure of life on Count I; is that correct?

A. Yes.

Q. Okay. And you were aware that there was some discussion about the State possibly trying to make you a prison releasee re-offender; is that correct?

A. Yes, I was.

Q. Okay. And was your attorney looking into a possible defense if this case were to proceed to trial?

A. Well, he was looking, you know, he said he was talking about going to see a doctor about me being criminally insane.

Q. Okay. And at some point did he approach you with a plea offer that the State had extended?

A. Yes, he did.

Q. And was that after you were released from jail?

A. Yes.

Q. And tell me, do you remember when you had a discussion with him about the plea offer?

A. It was either November 1st or 2nd on the telephone.

Q. And tell me about that discussion.

A. He called me in November -- it was right after Halloween, and offered me 15 years on the telephone. And at the time I had done some research on my own on, you know, Google and that sort of thing, and I found that with my information what it said I didn't qualify for PRR.

Q. And why is that?

A. Because of the assault or battery, I guess because the battery's involved.

Q. Okay.

A. So at that time there was, you know, I didn't qualify so I talked to him about it on the phone and he didn't seem to understand whether I qualified or not. At that time his response was that he's going to check current caselaw, talk to the State Attorney about it, and, you know, we left the plea open at the time. But I told them -- I did tell them, I said if I don't qualify I'm not going to take the plea, because I was only facing 15 years mandatory on attempted carjacking at the time so I said I'm not going to take the plea unless I qualify.

Q. And let's be clear. At that time the information that you'd been charged with, charged you for Count I burglary with battery or assault?

A. Yes, sir.

Q. And you believe there was caselaw out there at that time that said that type of charge does not subject someone to a PRR sentence?

A. I read it and -- I read it off the computer and I told Mr. Bryson about it.

Q. Okay. And was there some discussion about if the charge could be changed to something different that would allow you to qualify?

A. He didn't say a word about that.

Q. Okay. Did you know if the charge could be changed that would but you in an area that you might qualify?

A. No.

Q. So you knew burglary with battery or assault didn't qualify, did you know if burglary with assault did qualify?

A. I wasn't -- no, I didn't know at that time.

Q. Okay.

A. I just -- you know, I knew what I was charged with, I didn't qualify for PRR.

Q. If he'd have told you after you brought this issue about I'm not sure the charge I have qualifies that, no, you're wrong, you definitely qualify either they're going to charge you with something different or this current charge does qualify and you will get

definitive life, no exceptions if you go to trial and lose, would you have accepted a 15-year plea offer?

A. Yes, I would have.

Q. And why did you reject this 15-year plea offer?

A. Because I didn't qualify for PRR.

Q. And --

A. It wasn't reject -- I didn't actually reject it, it was contingent upon him finding out whether I qualify or not, checking the caselaw, and speaking to the State Attorney about it.

Q. Okay. And on that point on November 1st or 2nd had he given you any updates on this defense he was looking into?

A. No.

Q. Okay. Did he tell you at that time on the 1st or 2nd that the plea offer would expire soon?

A. He told me it would expire on November 10th.

Q. Did you get a copy of the plea offer?

A. No.

Q. The written copy is what I mean, to be clear for the record.

He didn't provide you with the State's written plea offer?

A. I never saw a copy of the plea, and when I

spoke to him on the telephone he didn't have the plea in front of him, he just told me 15 years is what they're offering.

Q. And what's your next conversation with your attorney after November 1st or 2nd?

A. I didn't speak to him again until probably January or February of the next year.

Q. And let me ask you, when you were in the jail after you initially got arrested in June of 2011 were you aware of which judge had been assigned to your case?

A. Yes.

Q. And did you have any discussions with inmates -- well, at that time were you hopeful your case could result in some type of plea deal?

A. Absolutely.

Q. And did you have discussions with other inmates in the jail or learn from others about whether or not the judge that was assigned to your case would be open to a plea deal if you were able to resolve it?

A. It was Judge Recksiedler, and yes, I did.

Q. And what did you learn?

A. She would accept -- she'd accepted pleas from people, that she didn't prohibit them and she didn't contest them.

Q. Okay. I want to switch gears to ground 8 of your 3.850 motion and ask you about the day you were arrested. And specifically I want to take you to the point in time that you were sitting on the bench out in front of the Elephant Bar, do you remember that?

A. Yes, I do.

Q. And on the day you were -- at that point you were sitting on the elephant -- the bench out in front of the Elephant Bar, what were you wearing?

A. I had white shorts on, a gray tank top, and sneakers.

Q. Anything else?

A. No.

Q. And what happened?

A. I got up, walked -- went to walk into the mall on the right side door there, and as I was walking into the mall I heard a police officer behind me say, police, stop right where you are, and as I went to turn around, kind of put his hand on my shoulder, turned me around, and there was other officers coming in, and, you know, right away he said to me, you know, we know you just tried to take a lady's purse across the street. And another officer came running in the doors asking me questions and that sort of thing and at that point I said, whoa, I said you've got the wrong guy here.

Q. Let me ask you, prior to saying you've got the wrong guy, had he already put his hands on you?

A. Yes.

Q. And did he say anything to you when he put his hands on you?

A. Well, he accused me of stealing a lady's purse across the street.

Q. That was after he'd already put his hands on you?

A. Yes, that was after. Put his hands on me right behind me -- said, police, stop where you are first, and then there was a hand on my shoulder, and he turned me around a little bit and said we know you just tried to take this lady's purse across the street.

Q. And where did that occur, was that outside the mall or inside the mall?

A. Right inside the doors, sir.

Q. Just inside the doors?

A. Yes, sir.

MR. UFFERMAN: Okay. May I have a moment, Your Honor?

THE COURT: Yes.

MR. UFFERMAN: No further questions, Your Honor.

THE COURT: Thank you. Cross.

CROSS-EXAMINATION

BY MR. HASTINGS:

Q. Now, Mr. Jones, you swore in your amended motion that counsel failed to advise you regarding the plea offer and the, quote, maximum sentence you would receive if convicted, end quote. You're now backing up on that claim that you stated under oath?

A. Could you repeat what was written?

Q. Yes. That you swore that counsel failed to advise you regarding the plea offer and the, quote, maximum sentence he would receive if convicted, end quote.

A. He didn't advise --

Q. So you're now saying you knew you were subject to a life sentence pretty much from the beginning?

A. No. I knew it was a potential up to the discretion of the -- initially I thought it was a mandatory minimum, but then when I did the research it was not mandatory for that. So I didn't know -- I didn't think I was facing a mandatory life sentence, I thought it was a discretionary thing.

Q. Now --

A. You know, the maximum penalty.

Q. So you have legal training, do you?

A. No, sir.

Q. Okay. Well, what legal research did you do that led you to conclude that you couldn't be charged with a mandatory life sentence?

A. Well, I just -- you Google Florida law and I put my charges in there, burglary of a conveyance with assault or battery, and a whole bunch of stuff comes out.

Q. Okay. And what was the rationale behind that, that you read?

A. Well, I wanted to research what I was charged with.

Q. Okay.

A. And when they told me I was facing mandatory I really wanted to find out.

Q. They told you you're facing mandatory life if the battery was redacted from the information?

A. No, at the time I did the research it was right after Tim, Mr. Caudill, and Stuart had come to visit me in the jail and told me I was facing mandatory life, and then I went and researched it.

Q. If you didn't accept the plea, correct?

A. That's right, yes, sir, if I went to trial.

Q. And now what was the rash -- you say you Googled this, did you just put down the charge and it

said this is not a PRR crime or something like that?

A. It just said it didn't qualify for PRR per -- and it had a couple of cases there and that sort of thing.

Q. Well, what did the cases say, what was the rationale that you read behind the fact that a burglary of a conveyance with a battery or an assault would not be a prison releasee re-offender crime?

A. At the time I was a little ignorant to it, but it said I did not qualify because the battery is an intentional touch or strike, so it doesn't reach the level of violence that's necessary for PRR.

Q. So you basically chose to go on your own legal research rather than your lawyers' advice and your lawyers' counsel; is that correct?

A. No, sir, that's why I asked them about it. I told them about the cases and I asked what his response would be and he didn't know at the time either.

Q. You were out of custody at this time?

A. Yes, sir.

Q. So you continued to try to reach him to see if he had an answer for you, did you?

A. Yes, sir.

Q. And never could reach him, is that what you're telling us?

A. I called him three times on the 10th of November and I didn't get an answer, response, or return phone call, and he wasn't available all day.

Q. End of November?

A. It was on the 10th of November.

Q. And then at some point you just took off, right?

A. Well, the 10th of November was the day before Veteran's Day, I remember that, but there after I didn't take off, is what I think you would testify to. I missed court in fact -- I called my fath -- I worked all day that day, I called my father at the end of the day and he told me he said, Mark, you missed court, and I didn't even -- I said what are you talking about, it it's tomorrow, and he said, no, you missed court today. My father's here today also.

Q. So you missed court and then you immediately came up to the courtroom the next day and said, gee, I'm sorry I missed court?

A. No, sir. What I did was -- I probably should have done that, but I understood a bench warrant was issued so what I did was tried to get all my personal things together and, in fact, I got over to the VA to get all my medications before I would have to turn myself in. In fact, I was apprehend as I was at the VA

getting my medications.

MR. HASTINGS: May I approach the witness, please?

THE COURT: Yes, you may.

BY MR. HASTINGS:

Q. Mr. Jones, I'm going to show you State's Exhibit C and State's Exhibit D for identification. First of all, C, do you recognize who's depicted in that photograph?

A. Yes, sir.

Q. Next to the police officer?

A. Yes, sir.

Q. And who is that?

A. That's myself.

Q. And that's how you appeared after you had been taken into custody?

A. Yes, sir.

Q. And State's Exhibit D for identification. For the purposes of the 3.850 hearing, are those the clothes that you had in your custody at the time that you were initially accosted by the police?

A. All the clothing, yes, but that hat was not in my custody when I was accosted by the police.

Q. You tried to get rid of the hat by pitching it into the garbage can, didn't you, when the police

offer approached you?

A. I did not.

Q. What did you do with the hat?

A. I didn't have a hat on, I didn't have a hat in my possession at that time.

Q. What had you done with the hat?

A. I don't know where the hat was at the time, it was not on me, I was not wearing a hat, I did not try to throw a hat in the trash can.

Q. But you wore a hat that day, didn't you?

A. Earlier in the day I had a ball cap on.

Q. You wore that hat over in the Publix parking lot right before hand, didn't you?

A. That hat, no.

Q. What hat did you say you had on across the street at the Publix parking lot 15 minutes before that, approximately?

MR. UFFERMAN: Your Honor, I object from that standpoint. The testimony in this regard is akin to a motion to suppress. The issue is whether or not the police had reasonable suspicion to make a stop of my client. At a suppression hearing my client wouldn't be required to discuss the facts of the actual crime itself, that's not relevant to this claim either. So I object to asking questions

about anything relating to the crime itself. That's not relevant to the suppression type issue for this hearing.

MR. HASTINGS: I'm asking whether he was wearing this hat before, Your Honor.

THE COURT: Okay. Overruled.

A. I don't know if that is the hat that I was wearing before earlier or not, sir. I don't know where that hat -- that particular hat came from.

MR. HASTINGS: I would move State's Exhibits C and D into evidence as exhibits next.

THE COURT: Any objection?

MR. UFFERMAN: No objection, Your Honor.

THE COURT: C will come in as State's Exhibit 3, D will come in as State's Exhibit 4.

(Whereupon, State's Exhibits 3 and 4 were admitted into evidence.)

BY MR. HASTINGS:

Q. You would agree that you were of a muscular build, wouldn't you?

A. No, sir.

Q. No?

A. No, sir.

Q. Are you familiar with the Altamonte Mall area?

A. Yes, sir.
Q. You were living in that area at the time?
A. Yes, sir.
Q. Are you aware of all the other businesses that are in the vicinity?
A. Yes, sir, most of them.
Q. Okay. Are you aware of any sort of gyms that are in that area?
A. Yes, sir.
Q. And what gyms are in that area? Gymnasiums?
A. There was a Lifestyle Fitness.
Q. Lifestyle Fitness, and where is that?
A. That's over on -- next to the mall there.
Q. On what street?
A. I don't have it on me right now. I don't know the name of the street.
Q. Is it part of the mall?
A. No, sir, it's a separate building.
Q. What other --
A. It's right next to Cranes Roost Park, you know.
Q. Over in Cranes Roost Park?
A. Right.
Q. What other gym or gyms are you familiar with?

A. There's a Gold's Gym right across the street of 436 there, and there's also an Orange Theory gym which is right next to --

Q. Well, Gold's Gym is over where the Burlington Coat Factory is.

A. Right.

Q. And the interstate -- what used to be called the Interstate Mall, correct?

A. I guess.

Q. That's way up by the interstate?

A. Yes.

Q. I'm talking about gyms very close to the Altamonte Mall.

A. There's an Orange Theory gym right there also.

Q. Orange what?

A. Theory.

Q. Spell that.

A. T-H-E-R-O -- T-H-E-O-R-Y.

Q. And where is that?

A. It's right there almost in the same parking lot as the -- that area, the Elephant Bar and Sears, et cetera.

Q. Okay. Now, so you're denying that you tried to pitch that hat in the garbage can when the officers

moved in on you?

A. Yes, sir.

Q. What caused you to get up from that seat where you were out in front of the Elephant Bar?

A. I just got up, I was just walking into the mall.

Q. No particular reason, just happened to get up?

A. I can't think of why I got up, I might have been going to use the phone or go inside to the air conditioning.

Q. Well, isn't it true that your getting up from that seat corresponded with a marked patrol unit pulling up right near you?

A. Yes, sir.

Q. But that didn't have anything to do with it according to you?

A. No.

Q. And you walked quickly into the mall continuing to look back at the police, didn't you?

A. No, sir, I walked into the mall, I just walked, and I didn't look back at the police until they said, police, stop right there.

Q. Now, isn't it true that you told Mr. Bryson that your parents were old and you thought they would be

dead, or words to that effect, in 15 years and you couldn't take and didn't want to take the 15 years?

A. I said something -- I guess something to that effect, I don't recall. But if I did, it was along the lines of if I don't qualify, I'm not going to take 15 years, because that's a long time.

Q. And Mr. Bryson told you that you qualified, correct?

A. Mr. Bryson told me I qualified initially in jail, and then when he called me and I informed him that I didn't qualify he was -- he then backed away from his position and he said he had to research the cases and speak to you personally. He had no idea whether I qualified once I gave him those cases.

MR. HASTINGS: I would move State's Exhibit H and I into evidence.

THE COURT: Any objection?

MR. UFFERMAN: What are H and I?

MR. HASTINGS: Those.

THE COURT: Okay. The Court had misspoke before about the exhibits, so C was introduced a State's Exhibit 2, D as State's Exhibit 3. So H will come in as State's Exhibit 4 and I will come in as State's Exhibit 5.

(Whereupon, State's Exhibits 4 and 5 were

admitted into evidence.)

BY MR. HASTINGS:

Q. Mr. Jones, you've previously been convicted of a felony?

A. Yes, sir.

Q. As of the sentencing date here, how many have you been convicted of in this case?

A. 13.

Q. 13. And then these make 15?

A. Yes, sir.

Q. Wouldn't you agree that you have a lot to gain or lose by the outcome of this particular proceeding?

A. Yes, sir. I'm in prison for life.

MR. HASTINGS: Nothing further, Your Honor.

MR. UFFERMAN: Yes, Your Honor, briefly.

May it please the Court.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. UFFERMAN:

Q. Mr. Jones, let me start where the prosecutor left off. You had previous felonies in your background, how many times prior to going to prison for this case have you been to prison?

A. One time.

Q. One time, and what was your sentence for that prison sentence?

A. A year and a day.

Q. How much time did you actually spend in prison?

A. About two months.

Q. Let me ask you about the Altamonte Mall and Elephant Bar area. Are you familiar with that area?

A. Yes.

Q. Were you familiar with the area back then?

A. Yes.

Q. Is it fair to say the makeup of the people that frequent that area are generally white Caucasians?

A. Yes, absolutely. I would say 99 percent of the people that go to that mall are.

Q. And let me ask you about the plea offer, because I want to be clear what your claim is. At the time the 15-year plea offer in your case was rejected, had you been given a definitive answer about whether your charge for Count I qualified for treatment as PRR?

A. No.

Q. And is that your claim, that you weren't given that information about the minimum mandatory sentence, which was the maximum sentence in your case?

A. That's my claim. I didn't know what I was

facing.

Q. And just to clarify one more time. Had you known, had you been given a definitive answer in that regard, that, yes, you qualify for PRR for this Count, you will get life if convicted at trial, would you have accepted the 15-year plea offer?

A. I was prepared to accept it. I had talked it over with my family.

MR. UFFERMAN: No further questions, Your Honor.

THE COURT: Okay. Thank you. Any recross?

MR. HASTINGS: No, Your Honor.

THE COURT: Thank you. You can go ahead and step down.

MR. JONES: Thank you.

THE COURT: Watch your step as you're stepping down. Call your next witness, please.

MR. UFFERMAN: Your Honor, we may have -- but can I talk to my client once he gets back to the table. I don't need a break just to talk to him for a minute.

Your Honor, at this time the Defense would rest.

THE COURT: Okay. Thank you. State.

MR. HASTINGS: Call Stuart Bryson.

THE COURT: Mr. Bryson I'll remind you that you're still under oath.

You may proceed.

MR. HASTINGS: Thank you.

STUART BRYSON

having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HASTINGS:

Q. Mr. Bryson, regarding the plea offer that you received in October, October 6th, I believe, or shortly there after in 2011 and communicated to the defendant, did you advise him about the prison releasee re-offender and the -- while perhaps you didn't say -- talk about the Shaw case specifically, tell him how he qualified or would qualify as set forth in the document?

A. Yes.

Q. Was there ever a point subsequent to that that Mr. Jones told you he had done his own research and determined that burglary of a conveyance with an assault and battery was not a PRR crime?

A. I don't recall any conversation like that.

Q. Okay. Is that something you'd recall if he had tried to question -- question your advice?

A. I would think I'd remember that because then

I would have advised him that I'm actually a lawyer and I do understand these things.

Q. Were you familiar with why burglary of a conveyance with a battery and an assault is not a PRR crime, where as burglary of a conveyance with an assault is?

A. Yes.

Q. And were you at that time?

A. Yes.

Q. You're familiar with the Shaw case --

A. Yes.

Q. -- that happened here in Seminole County and your office represented that individual?

A. I am familiar.

Q. Was there ever a time where the Defendant would have called you and asked you about that and you saying, I don't know about that, or I'd have to research and get back to you on that issue?

A. If that was said, I wouldn't need to research it because I would have it right there in front of me.

Q. Okay. Let me move to a different subject. You were provided with full discovery in this case early on, correct?

A. That's correct.

Q. And among the things that you would have received was the event report, which is marked for identification State's Exhibit A?

A. I'm familiar with this document.

Q. And, of course, police statements and so forth from the various -- any police officers that were involved and who wrote a statement, correct?

A. That's correct.

Q. Officer Roman and Officer Foley included?

A. Yes.

Q. Now, did you consider the filing of any sort of pretrial motion to suppress based upon an alleged illegal stop that wasn't based upon reasonable suspicion in this case?

A. No.

Q. Why not?

A. I had reviewed the discovery and didn't feel that I had a good faith basis to go forward with any motion to suppress based on the stop; based on what I had read through all the police reports.

Q. Okay. Why did you feel that there wasn't a good faith basis, what factors?

A. Well, the complainant in the particular case alleges that certain things happened at a certain time, gave a specific or relative description of the person

that she believed had committed the offense, there was a subsequent witness who said he saw what happened, and he gave not an identical description but a similar type description of the person. Fifteen minutes later the police come into contact with a person they later identify as Mr. Jones in the direction that the person -- that the complainant the victim and the witness said that the person was going who had done the things that they had accused him of; law enforcement says we ran into him, 15 minutes later or approximately 15 minutes later in the direction that that person was going. They said in the police reports that he appeared to be nervous and sweating. And when they approached him, they alleged that he stated you got the wrong guy. I didn't feel that any of those facts rose to the level of an illegal detention.

Q. Okay. Have you filed motions to suppress based upon an alleged illegal detention --

A. Many times.

Q. -- not founded with reasonable suspicion?

A. Many times.

Q. Okay.

A. I've even won some.

MR. HASTINGS: Okay. I would move State's Exhibit A into evidence as State's next.

THE COURT: Any objections.

MR. UFFERMAN: No, Your Honor.

THE COURT: State's Exhibit A will come into evidence as State's Exhibit 6.

(Whereupon, State's Exhibit 6 was admitted into evidence.)

MR. HASTINGS: Nothing further, Your Honor.

THE COURT: Thank you. Cross.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: You're welcome.

MR. UFFERMAN: May it please the Court.

CROSS-EXAMINATION

BY MR. UFFERMAN:

Q. Mr. Bryson, I want to ask you about what you believe the law to have been at the time of the State's 15-year plea offer. I believe you indicated that the initial charging document in this case said that Count I was burglary of -- burglary with an assault or battery. I need to understand, does that offense itself qualify for treatment as a PRR?

A. No.

Q. Why not?

A. Because of the battery element.

Q. What about the battery element makes it so it doesn't apply?

A. It's not actually the -- it's the assault that makes it apply, the battery doesn't meet one of the criteria, and if my remembrance or my memory is correct, assault actually has an element of harm, threat, threat of harm, that is an element that is missing from the battery. Because the battery is just a touch or a strike. So it's a -- I can't remember the exact verbiage that the Shaw case uses to say why the assault applies and the battery does not, but I do know that there is a differentiation between assault and battery in that particular case.

Q. So are you aware that cases say burglary -- someone's been convicted of a burglary with an assault and battery that person does not qualify as PRR?

A. I'm not aware of a case like that. I'm aware of the Shaw case. It says if we take the battery out, then the assault would qualify as PRR.

Q. And what district was the Shaw case?

A. I believe it was this district, Fifth.

Q. And were there any other district courts at the time that reached a different conclusion?

A. I'm not aware of any.

Q. So to your knowledge at the time Shaw was the law of the entire state?

A. Yes, and still is.

Q. And still is, okay. And if hypothetically another district reached a different conclusion, would that change your analysis if you're talking to a client?

A. No.

Q. What would you say?

A. I would say that the Fifth District Court of Appeal controls this circuit.

Q. If another district had reached a different conclusion and certified the conflict and the Florida Supreme Court was considering the issue, would you not advise your client of that?

A. Perhaps.

Q. Perhaps. You may tell him that the issue deciding whether or not you're looking at automatic life or not automatic life is pending in the Florida Supreme Court or you may not?

A. Well, that didn't happen, so I don't know what I would do in that situation.

Q. Okay.

A. Those facts didn't exist.

Q. Okay. I believe you indicated that one of the things that caused you to believe you didn't have a good faith basis to file a motion to suppress in this case is the complainant had called in with some type of description; is that correct?

A. Yes.

Q. Would it surprise you to know that the complainant didn't call into 911 until after Mr. Jones was stopped in this case?

A. I wouldn't be surprised at all, I tried the case.

Q. So if that's true, if the complainant had not called in yet at the time of the stop, do you agree that anything the complainant would have said after the fact doesn't add to whether or not there was probable cause or reasonable suspicion to conduct a stop in this case?

A. Well, perhaps, but the witness who was also present did immediately give a description.

Q. But you earlier said one of the factors you considered was the complainant's description as well.

A. Yes.

Q. Okay.

A. Because it matched the witness', similarly.

Q. Well, to be clear, you agree as a lawyer that a complainants call would have come in after the fact is not part of the equation when considering whether there's reasonable suspicion or probable cause, correct?

A. Unless it's corroborated by other testimony.

Q. So you believe the law is that something that came in after the fact can corroborate something the police knew at the time?

A. I'm not suggesting that that is giving the police knowledge, I'm suggesting from my perspective as to filing a motion that it did not -- the grounds did not rise to the level of me having a good faith basis.

Q. Well, you have to -- I'm sorry, I'm not -- I'm being dense and I don't understand you. In deciding whether or not the police had probable cause to conduct a stop in this case, what does the complainant's call add to the equation at all?

A. It doesn't.

MR. UFFERMAN: Okay. May I have a moment, Your Honor.

THE COURT: Yes, you may.

MR. UFFERMAN: Nothing further, Your Honor.

THE COURT: Thank you. Any redirect?

MR. HASTINGS: No, Your Honor.

THE COURT: Thank you. May Mr. Bryson be excused?

MR. HASTINGS: Yes.

THE COURT: You are excused. Thank you.

Call your next witness, please.

MR. HASTINGS: Lieutenant Brian Foley.

THE CLERK: Do you swear or affirm that the testimony you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. FOLEY: Yes, I do.

THE COURT: You may proceed.

MR. HASTINGS: Thank you, Your Honor.

BRIAN FOLEY

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HASTINGS:

Q. Sir, would you please tell us your name.

A. Brian Foley of the Altamonte Springs Police Department.

Q. And what is your position there at the Altamonte Springs Police Department?

A. Currently I'm a lieutenant in charge of our community oriented policing division.

Q. And for how long have you been an Altamonte Springs police officer?

A. I've been employed there since November of 1999.

Q. And were you so employed back on June the 27th, 2011?

A. Yes.
Q. Do you recall being on duty that afternoon, specifically in the time frame of roughly beginning at 2:30 in the afternoon?
A. Yes.
Q. And what were your duties or what were you doing around that time?
A. At that time I was assigned to a street crimes unit and I was patrolling the city in an unmarked vehicle in plain clothes.
Q. Okay. Did there come a point in time where you heard a call come out from a reported purse snatching or car -- attempted carjacking that occurred at the Publix parking lot there in your city on Palm Springs Drive and 436?
A. Yes.
Q. And were you in the vicinity at that time?
A. I was close by, yes.
Q. When calls go out and you're patrolling in the area, do you -- are you able to hear on the police radio descriptions that may come out through your dispatcher?
A. Yes.
Q. Over the radio?
A. Yes.

Q. And once you -- was there descriptions given? Various descriptions given of the suspect?

A. Yes, there were.

Q. And were there some slight inconsistencies?

A. Yes.

Q. And is that typical?

A. Yes.

Q. Why's that?

A. Various reasons. The stress of an incident can cause someone to perceive something differently, or just like with anything else someone -- witnesses can have conflicting views of what something may look like to them.

Q. Okay. Do you have -- as an experienced police officer do you have to kind of filter that and take everything into account when you receive information?

A. Yes.

Q. When you're looking for an individual on a BOLO or be on the lookout?

A. Yes, I do.

Q. Okay. Now, were you made aware of the fact that the information provided you indicated that the suspect that you all would be looking for was a white male?

A. Yes.
Q. And that the person was muscular?
A. Correct, yes.
Q. And the -- was there a landmark that was provided after -- other than the Publix parking lot so as to provide you some indication to which -- what the direction of travel was?
A. There's a -- I want to say Chinese or similar type food restaurant nearby the Publix or at the time there was called the Eastern Pearl, so that was the last landmark -- one of the larks was given over the radio.
Q. What is beyond the Eastern Pearl if one were to start in the Publix parking lot and proceed in that same direction?
A. If you were to leave Publix and walk toward or move toward the Eastern Pearl you would be traveling northbound and you would approach State Road 436 and as a reference point right across from 436 would then be the Altamonte Mall.
Q. Okay. Now, from the call did it appear that this event had just happened around 2:30 in that vicinity?
A. Yes. It's what we consider an in progress call, yes.

Q. Okay. What was the response of you and the other officers in the area?

What did you do and what is done when something like this occurs?

A. My response is a little different from the other units that were responding, the way I would describe that would be we have marked patrol units that are on duty, on patrol, and marked police vehicles that you would see with the lights and the police markings on them. Traditionally on a call in progress we set up a perimeter and try to get someone on the scene to give out a description of the subject to make sure a crime was committed. But because I was in undercover or plain clothes capacity I didn't go to the perimeter, I continued to search the area in the vehicle I was assigned to.

Q. Okay. And where did you go shortly before 2:45 in the afternoon?

A. I traveled to the Altamonte Mall area to start scanning the parking lot.

Q. Okay. And as you were scanning the parking lot, were you looking for someone that matched or was at least similar to the description -- descriptions that had been provided?

A. Yes.

Q. And did you come across an individual that met that description?

A. I did, yes.

Q. Was that the only individual you came across that met that description?

A. It was the only individual that matched the description close enough to where I believed I was looking at the correct person.

Q. Okay. And where did you see this individual?

A. Sitting on a bench near what at the time was a restaurant called the Elephant Bar.

Q. And did the -- was that -- did that individual turn out to be the Defendant, Mark Jones?

A. Yes.

Q. Now, you were in plain clothes and in an unmarked car you indicated, correct?

A. Correct.

Q. And about what time did you make visual -- have a visual sighting of him, if you recall?

A. Somewhere within 10 to 15 minutes within the initial call going out.

Q. Okay. And when you observed him, what did you observe him doing other than just sitting on the bench?

A. He was sitting on the bench and he appeared to be looking around, and at that point believing that I had the correct person, I continued to watch him from my vehicle.

Q. His clothing, what about his clothing resembled the description that had been given to you?

A. The description was, as far as clothing-wise, was a tank top and then a description of a hat, similar to what I would describe as a boony hat, which is not commonly worn, so that stood out to me. And the Defendant happened to be wearing that style hat combined with a tank top, so that drew my attention even more.

Q. Was there a description of the build of this -- it was a white male --

A. I'm sorry --

Q. -- the individual you're looking for?

A. Yes, a large muscular individual.

Q. And was the individual as you watched Mr. Jones did he have a large musk -- was he large and has a muscular build?

A. Yes, he fit the description.

Q. Okay. Now, was there any indication on his part that he realized that you were a police officer watching him when you initially started observing him?

A. No, I don't believe he observed me.
Q. You were still in your car?
A. Yes.
Q. What did you do once you made the observations you just described?
A. I watched him for a few minutes, a few moments, possibly a few minutes, I watched him for a period of time.
Q. Okay. At some point did you alert other law enforcement officers of what you were -- saw and --
A. Yes, over the radio I let the responding units know that I believe I had somebody matching the description of the suspect.
Q. Okay. And did -- were you expecting at least one or more uniformed officers to respond to that communication?
A. Yes.
Q. And did an officer respond?
A. Yes.
Q. Who was the first officer to respond?
A. Officer Luis Roman.
Q. And was he in a marked patrol car with a -- in a uniform at that time?
A. He was, yes.
Q. And did he make his way over to the area of

this bench at the Elephant Bar, outside the Elephant Bar?

A. He did, yes.

Q. In his car. When the car came up to the area where the Defendant was seated at the bench, what, if anything, did you observe?

A. At the time the Officer Roman pulled in with his marked vehicle, the Defendant then realized he was a police officer and at that point in time he tried to -- I would describe leave the area. He took off to walk in toward the mall, there's a mall entrance right on the side of the restaurant. He attempted to enter it.

Q. Okay. Did he -- as he was entering did he look back or did he just walk straight into the mall?

A. I can't recall if he looked back or not.

Q. Okay.

A. I'm not sure.

Q. Describe his pace.

A. It wasn't running, but it wasn't consistent with the rest of the foot traffic you would see for people traditionally walking to the mall, it was a hurried pace.

Q. Okay. At the time he got up, did that correspond with when Officer Roman pulled up?

A. It seemed --

Q. At the time the Defendant got up from the bench.

A. It seemed to be a reaction to the marked patrol vehicle pulling up, yes.

Q. Okay. What did you do at that point?

A. At that point in time I exited my vehicle and -- in effort to stop the suspect before he was able to flee into the mall.

Q. Now, did there come a point in time between your first observation of the Defendant when he was wearing this boony type hat that he took the hat off?

A. Yes.

Q. Tell us about that, please.

A. As the Defendant or suspect left the bench and started walking into the mall it appeared to me he was -- in an effort to conceal himself from the police officer or the police, and at the same time he was doing that as he was walking into the mall, he took off his hat and he approached a trash can and attempted to throw his hat away in the trash can.

Q. Were you right behind him at this point?

A. I was observing him from behind, yes.

Q. Okay. Did the Defendant continue on through the -- into the mall?

A. Yes.

Q. Continued at his hurried pace?
A. He did.
Q. At that point was he looking back at you, do you recall?
A. I can't recall if he looked back or not, I'm not sure.
Q. Okay. Tell us what happened next.
A. Shortly after -- he wasn't -- because of his pace and the way he was walking, I don't believe he was able to successfully get his hat into the garbage can, and shortly or almost immediately right after he tried to get rid of the hat at that point Officer Roman made contact with him.
Q. Okay. Officer Roman was present as well?
A. Yes.
Q. And tell us about that contact.
A. Officer Roman, position-wise, if you will, I let him, because he was the officer in uniform, I let him be the initial officer making contact with him.
Q. Okay.
A. However, I was close enough to him as supporting a backup officer role, as Officer Roman made contact with him, the Defendant immediately blurted out you have the wrong guy, or something to that effect.
Q. Okay. Was this before -- did you at some

point advise him of why you were interested in speaking with him?

A. We did, but he shouted that before we informed him of why we were checking out with him.

Q. Okay. Did Mr. Jones appear to you to be nervous at this point?

A. Um. . . I'm sorry, I'm pausing -- he appeared to -- if not nervous, confused or searching for a response to questions that we were asking.

Q. Okay. How about was he sweating at all?

A. I believe he was, yes.

Q. Okay. Did you write a statement very close in time to that event?

A. I did.

Q. And was your memory fresher at that time than it might be now of an event that you're recalling from 2011?

A. I would definitely say so, yes.

MR. HASTINGS: May I approach the witness, please?

THE COURT: Yes, you may.

BY MR. HASTINGS:

Q. Take a look at the last paragraph, if you will, and see if that refreshes your memory.

A. It does, yes.

Q. Okay. And at the time did Mr. Jones appear nervous to you, your impression at that time?

A. Yes.

Q. And was he sweating?

A. Yes.

Q. Showing you State's Exhibits 2 and 3. 2 first of all, is that -- it's already in evidence -- is that the way Mr. Jones appeared when you -- after he was taken into custody?

A. Correct, yes.

Q. And State's 3, is that the clothing that Mr. Jones was wearing on your first initial sighting of him?

A. Yes.

Q. Including the hat?

A. It is.

Q. Is that what you refer to as a boony hat?

A. It is, yes.

Q. Okay. Now, was it apparent to you that the information that was being disseminated through the radio was information that was coming from individuals who were watching the event who were actual witnesses to the event? People that are giving descriptions and. . .

A. I believe the information was coming over the radio to be either from the victim or from on scene witnesses.

MR. HASTINGS: Okay. Nothing further.

THE COURT: Thank you. Cross.

MR. UFFERMAN: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. FRUSCIANTE:

Q. Lieutenant, is that correct?

A. Yes.

Q. Now, you indicated that you wrote a report shortly after. How long after did you write a report?

A. I'm not sure how soon afterwards I would have written a supplemental report.

MS. FRUSCIANTE: Okay. May I approach?

THE COURT: Yes, you may.

MS. FRUSCIANTE: If I could have these marked for identification.

THE COURT: You want it as a composite?

MS. FRUSCIANTE: Yes.

BY MS. FRUSCIANTE:

Q. I'm showing you what has been marked for identification purposes as Exhibit B. Would you take a look at that, please?

A. Okay.

Q. And there's three documents, would you look at. . .

A. Okay.

Q. Does that help you remember when your report was written?

A. Somewhat. Do I recall whether or not in this particular case I wrote the report right after or it was requested by the State Attorney's Office, that -- those documents helped me remember, yes.

Q. Okay. And what was it? What happened?

A. Being the fact that I wasn't the lead or the arresting officer in the case, I didn't initially write a supplemental narrative to the arrest report. And at the request of the State Attorney's Office I believe that's from the State Attorney's Office, a supplemental narrative from myself was added to the report.

Q. Okay. And that eventually occurred after prompting from the State Attorney's Office in October?

A. That's what the date on the document says, yes.

Q. Okay. So that was some four months after the event?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Okay. Now, in your report you refer to a -- that he was wearing the same unique style hat, which you refer to as a brown boony hat, I think is your reference

to it.

A. I remember referring to it as a boony hat, I'm not sure if I called it a brown boony hat.

Q. Well, let's look and see.

Okay. And would seeing your report again refresh your memory about that?

A. Yes. I have it in front of me if I'm able to look at it myself.

Q. Yes.

A. If that's okay.

Q. Yes.

A. Tan, a tan boony hat.

Q. A tan boony hat?

A. Yes.

Q. Okay. Now, do you recall what descriptions you received by radio of what the -- what the BOLO said. How did it describe what he was wearing?

A. A muscular white male wearing a tank top and a similar type boony hat.

Q. Okay. So you don't recall specifically what the description of the hat was?

A. No.

Q. Okay. Is it possible that the description of the hat came from the hat that was actually in evidence rather than the description that you were given

over the radio?

A. No, I don't believe so.

MS. FRUSCIANTE: Okay. Well, if I could approach again, Your Honor.

THE COURT: Yes, you may.

BY MS. FRUSCIANTE:

Q. Can you tell me what that document is?

A. This appears to be an event report that are created by dispatch for every call that is created.

Q. Can you tell me in that report is there any description of a tan boony hat?

A. A boony, that may be my terminology for it, so I'm not sure if I'll be able to locate the exact phrase, boony. I might say boony, somebody might say fishing, somebody might say beach, but they're all --

Q. Somebody might say a straw hat?

A. It's possible, yes.

Q. And would that qualify as a boony hat?

A. For responding to an in progress call somebody might describe that boony hat as a straw hat, yes.

Q. Okay. Is there anything in the description of the color of the hat?

A. At 1437 a description was given of a male near the Eastern Pearl, muscular subject, tank top,

shorts, and a big, floppy hat. If I look further from the notes that are put in through dispatch, I'm not finding the color given describing the hat, unless I'm missing it.

Q. Okay. So perhaps that's something you added after the fact that you recall a hat looked like that, but perhaps that was not part of the BOLO that you responded to?

A. Or perhaps it was and dispatch just didn't add that comment to the event log.

Q. But you don't remember?

A. No. I would say I don't remember a hundred percent.

Q. Now, you refer to the Eastern Pearl, the Asian or Chinese restaurant; is that correct?

A. Yes.

Q. And isn't that west of the Publix shopping center?

A. It's in the Publix -- I'm sorry.

Q. Of the --

A. It was in the Publix shopping center, and if you're looking at it on a map, it would be above it, so it would actually be north. And you can describe it as northwest, but north of the Publix, yes.

Q. Okay. Where was the trash can located?

A. Somewhere near the entrance of the mall.
Q. Can you be more specific?
A. No, I can't remember exactly where the trash can was located that day.
Q. Okay. You mean outside of the mall?
A. Um. . .
Q. You don't remember if it was inside or outside of the mall?
A. I remember it being near the door, there was at the time for that entrance a large glass sliding and also pull doors, there were both styles. And there were trash cans on the front and also inside the mall location close there, and I can't remember at this time which one he attempted to throw the hat in.
MS. FRUSCIANTE: Okay. No further questions.
THE COURT: Thank you. Any redirect.
MR. HASTINGS: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. HASTINGS:
Q. Lieutenant Foley, I'm going to show you State's Exhibit B, which is an aerial photograph that had been introduced at trial as State's Exhibit 1. Do you recognize what that photograph depicts?
MR. UFFERMAN: Your Honor, can I approach to

look at this so I can see what he's looking at?

THE COURT: Yes.

BY MR. HASTINGS:

Q. Do you recognize what that depicts?

A. This is an area of the city of Altamonte Springs and almost in the center of it is the intersection of Palm Springs and State Road 436.

Q. Okay. Does that aerial photograph include the Publix, the Publix parking lot, the Eastern Pearl restaurant, and the Altamonte Mall area where the Elephant Bar was located at the time?

A. It does, yes.

Q. Okay. Would that assist you in describing for the Court the direction of travel as you understood it from the BOLO?

A. Yes.

MR. HASTINGS: Okay. I would move this B into evidence as State's next.

THE COURT: Any objections?

MR. UFFERMAN: No, Your Honor.

THE COURT: B will come in as State's Exhibit 7.

(Whereupon, State's Exhibit 7 was admitted into evidence.)

MR. HASTINGS: May I publish it on the

overhead?

THE COURT: Yes, you may.

BY MR. HASTINGS:

Q. Now, Lieutenant Foley, if you could show us where the -- to orient us, where the Publix is in this aerial photograph?

MR. UFFERMAN: Do you want him to --

THE COURT: There's a laser pointer.

MR. HASTINGS: You have a laser pointer.

A. I do. I should be able to. This structure right here is the Publix.

Q. Okay. And the Publix parking lot where this event took place?

A. That was the information I had at the time, yes.

Q. Okay. And where is that?

A. This is the parking lot area and that's the Publix.

Q. Okay. And where is the Eastern Pearl?

A. The Eastern Pearl was this structure right here.

Q. Okay. And then State Road 436, that you made reference to, is where?

A. The large highway right here.

Q. And the area of the mall where the Elephant

Bar was and where you initially spotted the Defendant sitting on the bench is where?

A. This large structure is the whole mall, this right here is Sears, and this is JC Penny, the Elephant Bar at the time was right in this corner tucked in between the two.

Q. Okay. Now, as a dispatcher is providing information the dispatcher is also typing information as well.

A. I believe so, yes.

Q. Okay.

A. I'm not a dispatcher, but, yes.

Q. It's not a verbatim type of thing?

A. Correct.

Q. They try to get down the key information that goes into the event report and you hear whatever comes over the radio, correct?

A. Yes.

Q. It wouldn't be identical?

A. Correct.

Q. Okay. The descriptions had been, of this hat, had been three, at least per the event report, which may or may not correspond exactly what you heard, correct?

A. Yes.

Q. The first one would be straw beach hat, right?

A. Yes. Floppy.

Q. And then a big floppy hat, right?

A. Correct.

Q. And then canvas hat, correct?

A. Correct.

Q. So you have those three descriptions of this particular hat that you saw the Defendant wearing and then trying to conceal it fairly quickly after you -- after he was approached by law enforcement, correct?

A. Yes.

Q. Did that seem suspicious to you?

A. It did.

MR. HASTINGS: Nothing further.

THE COURT: Okay. Any recross?

MR. UFFERMAN: Can I look at an exhibit, Your Honor?

THE COURT: Yes, you may.

MR. UFFERMAN: Your Honor, just briefly to ask one question about an exhibit.

MR. HASTINGS: I think -- wasn't this Ms. Frusciante's witness and they moved --

MR. UFFERMAN: She can ask the question if she wants.

THE COURT: No. We have a rule that the person who starts with a witness ends with the witness.

MR. UFFERMAN: I'll let her ask the question then, Your Honor, I apologize.

THE COURT: Thank you.

RECROSS EXAMINATION

BY MS. FRUSCIANTE:

Q. So the north -- this is pointing north, correct?

A. I imagine so, yes, like any map.

MR. UFFERMAN: I just wanted to verify that orientation.

THE COURT: Okay. Thank you. Any other questions?

MR. UFFERMAN: No, Your Honor.

THE COURT: Okay. May the lieutenant be excused?

MR. HASTINGS: Yes, Your Honor.

THE COURT: Thank you very much. You are excused.

It's 11:56, do you want to break for lunch, you have one witness?

MR. HASTINGS: I do have one witness, yes.

THE COURT: Okay. Are you available to come

back at 2:30?

MR. UFFERMAN: We are, I need to go pick up a car that's in Exit 88 on I4, but I should have time to go there and get back and we'd be fine for 2:30.

THE COURT: Okay. Because we have a 1:30 hearing.

MR. HASTINGS: Well, it's not a hearing.

THE COURT: Or a matter.

MR. HASTINGS: Yes.

THE COURT: Okay. So it'll be -- we'll recess until 2:30 as to this matter. We'll make sure that Mr. Jones stays here.

Did they bring lunch or something.

UNIDENTIFIED SPEAKER: We'll take care of that.

THE COURT: Okay. Thank you.

MR. UFFERMAN: Your Honor, can we have access to him before we start up again when we get back in the courtroom?

THE COURT: You tell us when you want to have access to him and we'll have him available.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: T, can you make that happen?

THE DEPUTY: Yes, Judge.

THE COURT: Okay. Thank you. Court is in recess.

(Whereupon, a recess was had. After which, the proceedings resumed as follows:)

THE COURT: Please be seated. Okay. So we're here to finish up Case Number 11-CF-2979, State versus Mark Jones. State was going to call your next witness.

MR. HASTINGS: Yes. Officer Roman.

THE CLERK: Do you swear or affirm that the testimony you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. ROMAN: Yes.

THE CLERK: Thank you.

THE COURT: You may proceed.

MR. HASTINGS: Thank you, Your Honor.

LEWIS ROMAN

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HASTINGS:

Q. Okay. Sir, could you please tell us your name and spell it for us?

A. Lewis Roman.

Q. Okay. R-O-M-A-N?
A. Yes, sir.
Q. And what is your profession or occupation?
A. Law enforcement officer with the city of Altamonte Springs.
Q. How long have you been a law enforcement officer at the city of Altamonte Springs?
A. I'm on my eighteenth year.
Q. And do you have any previous law enforcement experience?
A. Yes, sir.
Q. Where was that?
A. I was a Deputy Sheriff with Hudson County, New Jersey.
Q. Okay. I want to direct your attention back to the afternoon hours of June the 27th, 2011. Were you on duty that day?
A. Yes, sir.
Q. Were you in uniform similar to the way you're dressed here?
A. Yes, sir.
Q. Driving a marked patrol vehicle?
A. Yes, sir.
Q. Around 2:30 or so that afternoon did you have occasion to hear a radio broadcast of an event that

reportedly occurred in the Publix parking lot?

A. Yes, sir.

Q. And that's at Palm Springs and 436?

A. That's correct.

Q. That Publix. When you heard the report come out over the radio, what did you do?

A. I started -- we started forming a perimeter around that area and my area where I was coming from, I was over by the Men's Warehouse, which is close to Essex and 436.

Q. Okay. And so you set up over in that area?

A. That general area.

Q. And that would be west --

A. West of the Publix.

Q. -- of the Publix. Okay. And could you tell by way of radio that other officers were setting up a perimeter in other areas surrounding this general area of the Publix parking lot?

A. That's correct. There were other units setting up around the Publix.

Q. Was there a description given of the suspect?

A. That's correct.

Q. In this event?

A. Yes, sir.

Q. And were there several different descriptions that came out as time went on in the few minutes following 2:30?

A. Yes, sir.

Q. Okay. The description, was there a description of the race and sex of the subject?

A. That's correct.

Q. And what was that?

A. It was a white muscular built male.

Q. Okay. Was there a description -- was there any head gear mentioned?

A. Yes, sir.

Q. And what was that?

A. The description I got was a brown hat.

Q. Okay. And description of the shirt?

A. Was a blue shirt and khaki pants.

Q. Okay. What kind of shirt was it?

A. Like a tank top style shirt.

Q. Okay. Now, was there an indication given in the minutes following the event as to which direction the Defendant may have been headed or where he was seen subsequent to the event?

A. That's correct. Towards the pearl restaurant, Chinese restaurant there on the northwestern part of the Publix.

Q. Okay. If one were to start in the Publix parking lot and then pass the Chinese restaurant you speak of and keep going in that direction, where would he or she wind up?

A. Towards the -- towards Sears by the mall, which is northwest, or that general area.

Q. The Altamonte Mall?

A. The Altamonte Mall.

Q. And is that on the other side of highway 436?

A. That's correct.

Q. And the Publix?

A. That's correct.

Q. Approximately how far is the Publix parking lot, I guess, in minutes to either walk to the Elephant Bar, just outside the Elephant Bar?

A. As far as minutes, well, it is a six or eight lane highway which is pretty congested, so. . .

Q. Likely one would have to wait for a walk light to cross?

A. That's correct.

Q. Okay. Do you have any idea -- can you give us some sort of estimate as to --

A. From the Publix, five, ten minutes from there all the way up to the mall, yeah, with traffic and

everything.

Q. That includes waiting for the light at 436?

A. It would probably be longer if you're going to wait for the light.

Q. Okay. Now, the radio broadcast that was coming out over, did that -- did you -- did that seem to be from individuals who were observing the event or who had observed the event?

A. That's correct, everybody involved, yeah.

Q. So what typically would happen in a situation like this, is people would call in or provide information to the dispatcher and they would broadcast it to the officers, correct?

A. That's correct.

Q. Okay. Did there come a point in time when you were asked to go over to the mall area?

A. Yes, sir.

Q. And was that by -- who was already over there when you got there?

A. We had an undercover unit that was stationed by the Elephant Bar which was right near the Sears and he saw somebody matching that description in that general area right there.

Q. Okay. And did you pull up to that area where he said he saw this subject?

A. That's correct where I was I had an easy access on Essex to get across 436 quickly enough to get to that area so I was the first one on scene there where he was.

Q. When you pulled up into the vicinity of the entrance there that went into the, what was then the Elephant Bar restaurant, did you see the individual that was seated on the bench?

A. Yes, sir.

Q. Did he match the description to you that had been broadcast?

A. Yes, he did.

Q. And as you approached that area you were in a marked patrol car and in uniform?

A. That's correct.

Q. Did the individual who was seated on that bench look in your direction?

A. Yes, he did.

Q. And upon doing that what happened?

A. He turned around and started walking inside the mall, inside the entrance right by the Elephant Bar.

Q. Characterize how he was walking, please.

A. He turned around at a brisk pace, walked quickly through the mall as I was exiting my car towards his direction.

Q. Did he walk straight in or did he look over his shoulder at you?

A. He looked behind as I was walking towards him as he was entering the mall.

Q. More than once?

A. Yeah, more than once, yes, sir.

Q. Was -- Lieutenant Foley was there as well?

A. He was the undercover unit at that time, yes.

Q. Did he go in immediately after the Defendant did and then you followed?

A. We were both together at that point.

Q. Okay. Once the Defendant was in the mall, did he say anything prior to you putting hands on him?

A. That's correct, he did.

Q. Tell us about that.

A. As I closed the gap between him and I he turned around one last time and said, you got the wrong guy.

Q. Okay.

A. And at that point --

Q. At that point had you said anything to him?

A. I didn't say a word.

Q. Had Lieutenant Foley said anything to him?

A. Nothing.

Q. Okay. What happened -- what transpired then?

A. At that point we detained him and put handcuffs on him for identification because he matched the physical and clothing description.

Q. Okay. In your experience as a law enforcement officer over your many years, have you responded to BOLO calls and looked for individuals?

A. Yes, sir.

Q. On BOLO calls based upon descriptions that are given by witnesses?

A. That's correct, yes, sir.

Q. Is it common for descriptions to vary a little bit?

A. Yes, it is.

Q. Do you have to kind of filter all of your information down as to what you're looking for as an experienced law enforcement officer?

A. That's correct.

Q. Are you familiar with any gyms where someone goes to work out or lift weights or anything like that in the immediate vicinity of the Altamonte Mall?

A. Of the mall, there's no gyms at the mall.

Q. Okay. Is the mall surrounded by a large parking lot?

A. Yes, it is.
Q. Okay. Is there a Gold's Gym some place?
A. There's a Gold's Gym down off Lake BOULEVARD down by the Hilton Hotel down to the west.
Q. Well from the west?
A. Yes.
Q. And are you familiar with an Orange Theory gym?
A. There's another gym across the street by the BP gas station.
Q. That's further down towards --
A. That is right towards I4, closer to I4.
Q. Okay. How about the Lifestyle Fitness gym?
A. Lifestyle, that's also closer to I4.
Q. Okay. So those are all over toward I4 and not in the immediate vicinity to the mall?
A. That's correct.
Q. Okay. Did you see anyone else other than the Defendant that matched the description that had been provided to you?
A. In that general area, no.
MR. HASTINGS: Okay. I don't have any further questions, Your Honor.
THE COURT: Okay. Cross.
MR. UFFERMAN: May we have a moment, Your

Honor?

THE COURT: Yes, you may.

CROSS-EXAMINATION

BY MS. FRUSCIANTE:

Q. Officer Roman.

A. Yes, ma'am.

Q. Did you prepare a report?

A. Yes, ma'am.

MS. FRUSCIANTE: Can I approach?

THE COURT: Yes, you may.

MS. FRUSCIANTE: Actually I'm going to offer into evidence, if there's no objection.

MR. HASTINGS: No objection.

THE COURT: Okay. It will come in as Defendant's Exhibit 3, is it.

MS. FRUSCIANTE: Yes, Judge.

(Whereupon, Defense Exhibit Number 3 was admitted into evidence.)

BY MS. FRUSCIANTE:

Q. Can you tell me if this is indeed your report?

A. That's correct.

Q. Were there other individuals walking around this area of the mall?

A. No.

Q. There was nobody else at the mall that day?
A. Sure, there were people, yeah.
Q. Okay. And dressed casually?
A. Other people in the area?
Q. Yes.
A. Yes, ma'am.
Q. Now -- can I put this back up?
THE COURT: Do you need to zoom in or zoom out?
MS. FRUSCIANTE: Excuse me?
THE COURT: Do you need to zoom in or zoom out?
BY MS. FRUSCIANTE:
Q. Do you have a pointer?
A. Yes, ma'am.
Q. Now, can you show us the Publix parking lot?
A. That would be right there.
Q. Okay. And where is Publix?
A. There.
Q. And where is the Chinese restaurant?
A. Right -- somewhere right here.
Q. Okay. So from the Publix parking lot which direction is the Chinese restaurant?
A. Northwest.
Q. Okay. Now, heading to the next building,

which I believe is the bank?

A. So that would be right around here.

Q. And where is the Altamonte Mall?

A. That is right up here.

MS. FRUSCIANTE: All right. Thank you. No further questions.

THE COURT: Thank you. Any redirect?

MR. HASTINGS: No, Your Honor.

THE COURT: May Officer Roman be excused?

MR. HASTINGS: Yes, he may.

THE COURT: Thank you very much. You are excused. Call your next witness, please.

MR. HASTINGS: Let me just take a look at the evidence.

I would move the trial transcript of Officer Roman into evidence as part of the record.

THE COURT: Okay.

MR. HASTINGS: You've already taken judicial notice of it.

THE COURT: Well, I have to find it on here.

MR. HASTINGS: I have it here.

THE COURT: You have a copy. Any objections?

MR. UFFERMAN: No, we will be relying on that in our argument, Your Honor, so. . .

THE COURT: Okay. E will come in -- that's E?

MS. FRUSCIANTE: It's F, no, G, I'm sorry, C.

THE COURT: Right. But what letter is it?

MS. FRUSCIANTE: G as in girl.

THE COURT: Okay. G will come in as State's Exhibit 8.

(Whereupon, State's Exhibit 8 was admitted into evidence.)

THE COURT: Do you have any other witnesses?

MR. HASTINGS: No, Your Honor.

THE COURT: Okay. Any rebuttal?

MR. UFFERMAN: No, Your Honor.

THE COURT: All right. Let me hear argument.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: You're welcome.

MR. UFFERMAN: May it please the Court. I'm going to start with the plea issue and then I'll go into the BOLO issue and in between there I may --

THE COURT: Well, when you say plea issue, the plea offer.

MR. UFFERMAN: Ground 9 -- ground 8, Your Honor.

THE COURT: Because it was a trial.

MR. UFFERMAN: I apologize.

THE COURT: It's okay.

MR. UFFERMAN: Ground 8. I think you could gather somewhat from the argument that was presented during the testimony today, but let me be clear as to what the State of the law was at the time of this proceeding. Obviously the charges in this case -- this is a 2011 case, this is an incident that occurred in June of 2011 and the plea offer, and when you see the exhibits that have been introduced, you'll see the plea offer came out in October of 2011 and initially there was an indication from the prosecutor that the plea would expire on November 10th. And there was some documentation today that indicated the Defense attorney had asked for the plea offer to be extended by a couple of days, so that's the time frame we're talking about, in the fall of 2011.

The original charge in this case was -- for Count I -- and I think Count I is the count we're focusing on as far as the PRR, the prison releasee re-offender statute -- for Count I the original charge in the information was filed in July of 2011, July 22nd. There was an amended information

filed but that wasn't until December 1st of 2011, and that was after the plea offer had already expired.

Now, the charge in the original information was burglary with a battery or assault and as Mr. Bryson started to explain, he's correct, at the time the Fourth DCA had been very clear in a case called Gorham and the cite for that is 988 So.2d 152 and they cite to other cases that even predate that case of Gorham that the PRR statute -- in order to qualify for PRR, as Your Honor knows, you have to have been released from prison within a certain period of time prior to the particular incident in question and you have to be charged with an enumerated offense. Certain offenses are enumerated and there's a catchall for a violent offense.

Burglary itself is not enumerated. This type of burglary is not enumerated. So the question is does burglary with a battery or assault, is that an enumerated offense under the catchall provision is that something involved a violent offense. So when the Fourth DCA first considered that issue, and sometimes prosecutors charge burglary with a battery or assault without

specifying one or the other and the scenario for Gorham was that the jury hadn't specified on the verdict form whether it was a battery or assault; so we don't know what the jury found.

The Fourth DCA then considered, well, we're going to focus on the battery aspect of this and a battery by itself is not all the time a violent offense. There are some battery's that involve a mere touching, other battery's that can be far more severe or have violent, but because a battery can encompass a nonviolent touching, we're going to find that that doesn't meet the very strict requirements of being an enumerated offense for PRR, because obviously the repercussions if you do fall under PRR in that situation, a burglary with that type of enhancement subjects you to an automatic life sentence. So that case had been decided.

And then the Fifth DCA addressed the initial question of well what if it is only burglary with an assault not burglary with a battery or burglary with a battery or assault. And the Fifth DCA in the Shaw case prior to the plea discussions in this case did say that we think that when you're dealing with the question of an assault, that when it's

only assault not battery as an alternative, that would be sufficient to fall under the violent catchall under the PRR statute and therefore if you're convicted of burglary with an assault and otherwise qualify you're subject to an automatic life sentence.

Well, also before the plea discussions in this case the first DCA in a case called Hackley in an opinion that was filed on October 29th, 2010, and I can give Your Honor the cite for Hackley, actually, I have a Florida Law Weekly cite from the Fourth Supreme Court opinion and it's 35 Florida Law Weekly D 2436, and I think it didn't get put in the books at the time because it hadn't become final because there was further review in the Florida Supreme Court. But the first DCA reached a different conclusion, and they said if burglary with a battery doesn't qualify and burglary with a assault is a lesser burglary battery because assault's lesser than battery, if the greater offense doesn't qualify than we don't think the lesser offense can qualify either.

So in the Hackley case the first DCA affirmed the trial Court's conclusion that, no, someone convicted of burglary with an assault does

not qualify for PRR sentencing. However, at that time, and, again, this is October of 2010, almost a full year prior to the plea discussions in this case, the first DCA recognized that the Fifth DCA had reached a contrary conclusion in Shaw, and therefore they certified the conflict to the Florida Supreme Court.

At the time of the plea discussions in this case there was that certified conflict ongoing that the Florida Supreme Court had accepted review and they were going to be deciding that issue at some point in the near future at the time of these plea discussions.

So if you then apply what we know the law was at that time to the testimony you heard today, I submit that Mr. Jones' testimony is credible from the standpoint that yes he's told early on that we're charging you with burglary with battery or assault and that is a first-degree felony punishable by life, but it doesn't carry automatic life necessarily under PRR, the Gorham case would have applied to the charging document in this case.

So is there a way the State could change the charging document and make it so you are subject to automatic life or perhaps the discussion was maybe,

and then I think as you heard from my client when he had these discussions in early November of 2011 about the State's plea offer that had come out in October he then said to Mr. Bryson, look, I think there's not -- the law isn't so clear in this regard, I think there's some ambiguity between the district court's as to whether or not even an amended information only charging assault would necessarily qualify me. And I believe the testimony was at that point Mr. Bryson is going to look into this issue and come back with some time of definitive answer of either he will or will not qualify for life.

Now, of course, my client said, you know, if I didn't qualify for automatic life I wasn't going to take 15 years, I don't think that's disputed. But he said if I'd been told you definitely qualify for automatic life if you're convicted as charged at trial, then I would have taken 15 years. The reason I was willing to role the dice is if you look at the scoresheet in this case, his score is relatively low, he'll take his chance with a discretionary sentence that a judge is maybe not going to give 15 years, maybe only give 15 years, but take a chance in front of a jury.

Another important thing that was going on, and I think this is clear from the evidence, is that Mr. Bryson acknowledged that he was also looking into a viable theory of defense in this case. A viable guilt phase theory of defense, which is did insanity apply in light of my client's background and the incident that occurred when he was at Westpointe. I think the record is -- there's no conflict in this regard that during the initial discussion of the State's plea offer, Mr. Bryson didn't have an answer from the mental health experts as to the viability of that defense.

And, Your Honor, if I may approach, I want to refer to one of the exhibits.

Defendant's Exhibit 1, which are the notes on Mr. Bryson's file. If you look back to this time period, the first mention of a plea is 11/15. And it says called Defendant to talk about the psych evaluation, no answer, left a message for Defendant to call back, plea offer expires tomorrow. Very next day 11/16 called again, phone no longer in service. At no point today did Mr. Bryson say that they ever had that second discussion to go over these issues.

So now, and I also believe my memory of his

testimony was he acknowledged that it would be difficult for Mr. Jones to make a final decision about a plea offer without finding out what the experts are going to say about the viability of an underlying defense of insanity. How could he possibly make a decision about should I accept 15 years or take my chances at trial without knowing that these experts are either going to say, yes, you have a viable insanity defense or no you don't. That's something Mr. Bryson had to follow up with, with Mr. Jones. And pursuant to his testimony he at no time indicated, and Mr. Jones supports this, that there was a followup discussion between them where he does say, I've talked to the experts, there is no viable insanity defense, therefore I think you really do need to consider the plea offer; nor was there follow-up discussion to clarify any questions about the current state of the law. And there's no way Mr. Jones could make an informed decision about accepting a very serious 15-year plea offer that's certainly nothing to sneeze at without knowing the viability of the underlying defense and without knowing an answer about is there ambiguity in the law whether or not I qualify for PRR.

And for those reasons, Your Honor, we would ask this court to grant relief on ground 8 and give Mr. Jones relief in that regard, which I'm sure this Court's familiar, the answer isn't automatically he gets a plea offer from 15 years. The answer from the Florida Supreme Court in Alcorn and the U.S. Supreme Court in Laughler is that at that point the 15-year plea offer would be reextended but it would be up to the Court to decide based upon all the factors in the case what the appropriate sentence would be and whether it's 15 years, still life, or something in between, that would be discretion that the Court would have considering all those factors. It doesn't automatically mean he gets 15 years if you grant relief on that claim.

But I submit that no defendant can make a decision about giving up a constitutional right to a trial and accepting the plea without knowing, A, the viability of any defenses, and B, what the maximum sentence is, especially if there's potential ambiguity in the law and he simply didn't have those answers. The plea offer expired and he never had the opportunity to thoroughly consider that plea offer.

If I may take a moment, Your Honor, just to confer with co-counsel --

THE COURT: Yes.

MR. UFFERMAN: -- to make sure there's nothing I've missed on that claim, and I'll move on to the next claim.

The only thing I will add, you're probably aware of this as well, Your Honor, the Supreme Court did decide the Hackley the case, it was decided in July of 2012 it was decided just a couple of weeks -- I think literally three weeks before the trial in this case and they ultimately agreed with the Fifth DCA and rejected the first DCA's conclusion about assault being a lesser of battery, but of course that all came in the month after the trial and way after the plea offer expired in this case. So that's how the law was ultimately resolved when it comes to the plea claim.

Let me shift gears to claim seven. And I think for claim seven you've seen from our pleadings for the 3.850 proceeding. Our assertion is this is a bare-boned BOLO that would have applied to any number of people. This is June in Florida in the middle of the afternoon, 2:00

something in the afternoon. So someone wearing shorts and wearing a tank top, a white male, at the Altamonte Springs Mall could have applied to, I would suggest, perhaps anywhere between 20 and 30 percent of all the people walking around. So without more than someone wearing shorts and a tank top I submit they don't have reasonable suspicion to make a Terry stop.

So the point of contention, I know you gathered this and now we get to argue this, is was my client wearing this type of hat. You've heard his testimony, he says I was wearing no such hat. We've heard from Lieutenant Foley who said that he observed my client walking away from the bench in front of the Elephant Bar towards the mall and says at some point he sees him try to take off the hat and attempt, were his words, to discard it, and the reason he said an attempt because he's not sure the hat was put into the garbage can, which he can't remember was inside or outside. And this comes from a report that was written four months after the fact at the urging of the State Attorney, not just once but twice, please follow up and give us a report in this regard.

I submit if you step back and look at the

totality of the circumstances as to what was observed that day, that Officer Roman's account of what occurred that day is the accurate account. Notably no time today did he say that my client was wearing a hat when he encountered him on the bench. And my --

THE COURT: Well, he didn't say he encountered him on the bench. I think he said when he pulled up the Defendant walked -- turned around.

MR. UFFERMAN: But he was on -- he was sitting at the bench at that time.

THE COURT: Well, he didn't say that.

MR. UFFERMAN: I think his testimony in trial is very clear in that regard.

THE COURT: Okay. But today he didn't say that.

MR. UFFERMAN: Well, today he didn't mention the hat at all.

THE COURT: No. I'm saying today he didn't say he saw him on the bench.

MR. UFFERMAN: Right. And that may be true, I'll defer to Your Honor, of course, and suggested perhaps his report written contemporaneously the same day and his trial testimony several months later, but only months as oppose to years, today

would be the most accurate account. And if you look at his trial testimony, and in particular pages 57 through 66 of the trial is when he discusses what he encountered and he does say, and I'll read from 57: Now, I'm going to show you State's Exhibit 2 that was previously received into evidence, the bench you indicated you saw an individual seated on that matched a description was where?

He was sitting on this bench right here.

So at the time he's indicating that he encounters -- he received a call from Lieutenant Foley, encounters my client sitting at a bench, and then he sees my client doesn't flee from a standpoint that he runs away, they make an issue that he walked at a fast pace towards the mall, certainly he wasn't running, so he decided to get up and walked towards the mall. Whether he walked in response to seeing law enforcement or as he says he didn't, that alone isn't going to bring someone who's simply wearing a tank top and shorts and walking into the mall is not reasonable suspicion by itself.

There's some things they have tried to rely upon, but if you look at Officer Roman's report --

they try to talk about sweating profusely. The testimony from trial -- and let me be clear, Lieutenant Foley didn't testify at trial, so today is the first version other than his report he's given regarding this incident. The lead investigator in this case was Officer Roman he testified at trial, the lead investigator in police reports, he's testified again today. I submit he had the best vantage point of whatever occurred during this incident with the bench going into the mall.

Any discussion about sweating profusely, if you look at Officer Roman's report, clearly is something that's observed after they've already detained my client, Mr. Jones. Any discussion about the statement that he's supposedly made and my client says they said, you know, we got you, and his response is, you've got the wrong man, regardless, Officer Roman's report that's been introduced into evidence today I quote: I stopped him just inside of the front doors and he said to me in an excited utterance, you've got the wrong guy. I stopped him and then he said it. For this to be reasonable suspicion to justify that stop at the time of the stop is all the information they

can look at. Everything else that happens after can't be considered for Terry and reasonable suspicion for the stop. So this statement, you got the wrong guy by his own acknowledgment in the report written that day, that statement occurred after the stop, after the detention.

What do we know prior to the detention, sweating profusely is afterwards, you've got the wrong guy is afterwards. All we know is you have someone who's wearing a tank top and, again, the tank top didn't even match the color, so there's three BOLOs in this case, let me tell the Court what they are, they're in the event log or event report. There's a BOLO at 2:31, white male leaving the scene with a straw beach hat, blue tank top, and khaki pants. The shorts in this case are white, the tank top is gray, it's not blue.

BOLO number 2, 2:37 p.m., muscular subject, tank top, shorts, and big floppy hat. No color provided for the tank top or the shorts for the second BOLO.

The third BOLO is 2:45, light shirt and jeans, canvas hat. At some point when we're talking now about including jeans, pants, shorts, we're including everyone walking around in the

mall. But if we focus on the first two, which seem to be the ones that law enforcement was relying upon, we don't have the match for color for the shorts, we don't have a match of color for the tank top. All we have is someone sitting on a bench outside the mall wearing a tank top that doesn't match the color, wearing shorts that doesn't match the color. The issue is going to be the hat.

Now, I think we'll acknowledge he's also wearing this type of hat, that's going to be a pretty descriptive feature. My client was adamant he was not wearing the hat, here's the key: Today Officer Roman, nothing about the hat. More importantly in his report, contemporaneously with the incident and at trial, there is no mention from his testimony when initially describing the scene about seeing any hat at all. He is asked, and this is page 66: Now, did you -- was there a hat either on his person or found in the area that was recovered as well?

Answer: I'm sorry, I couldn't hear.

Question: A hat, did he have a hat on or was there a hat recovered in that area?

Answer: Yes, sir, there was.

So this was a two part question did he have

a hat on or was there a hat recovered in that area, the answer, yes, sir, there was. There was seemingly modifies or answers the last part of that question, i.e., a hat was recovered in the area, not that he had a hat on.

If he was answering yes to did he have a hat on, his answer would have been, yes, he had a hat on. Not, yes, sir, there was, there was a hat recovered in the area.

So the most he can say and he's being reminded about this at the end of his testimony, he didn't mention it when he initially went through the incident of encountering my client on the bench, watching him walk from the bench to the mall, walking up to him and apprehending him, supposedly having to make this statement about you got the wrong guy supposedly sweating profusely whether he's turning over his shoulder, all these details, he doesn't say a word about a hat.

I submit to you, Your Honor, it's very incriminating for someone to be wearing a hat to be then supposedly trying to elude or get out of the way of law enforcement and on their way into the mall taking off that hat and trying to discard it into a trash can we don't know is on the inside or

outside. If that had happened, that would be one of the first things Officer Roman would have been testifying to. It would have been one of the first things that would have been in this police report, and it's not even mentioned. He had to be reminded, did you even -- are you aware of the hat, and his answer seemingly indicates a hat was found at the scene.

Nothing about -- when asked that question, he's the first one there, the prosecutor today tried to even say he saw Lieutenant Foley go in first, no, no, we were together. He's right there, he's the one responding to the bench in the marked car, you would expect him when they remind you about the hat, he would say, oh, yes, I forgot, as I was following him, he tried to take off that hat and put it into the trash can. No mention of that. Their star witness, the only one they presented at trial, that's what he said.

I submit to you, Your Honor, there was no hat. They may have found some hat later on and we've got other claims in front of the court involving a suggestive lineup involving a hat. But as far as what they utilize to respond for -- to make this stop, they do not have the match of some

type of boony hat, it's simply not there.

If you take the hat out of this equation, just like the Paten case we cited in our pleadings, you have -- actually, let me quote from the Panteen case, this is from the Fourth DCA, if you give me a moment, Your Honor, I apologize. . . I'll certainly find it by the time I get up on rebuttal.

But in essence, the Fourth DCA said in the Paten case but this type of BOLO -- maybe co-counsel can help me while I'm making the argument -- this BOLO will apply to anyone there at the scene, and that's what we have here, Your Honor. We have someone sitting on a bench at 2:00 something in the afternoon in June in Florida wearing a tank top and shorts. Doesn't match the color description, not wearing a hat, and police officer pulls up, and he gets up and walks at a fast pace into a mall and according to Officer Roman's report at that point in time he grabbed him and stopped him. And if anything occurred there after doesn't contribute to the finding of is there reasonable suspicion and that simply is not enough. That would apply to a vast majority of the people that were in the area that day, and therefore that would not be enough.

I'm sorry, yes, I was looking at it and I wasn't seeing it. In this Panteen case from the Fourth DCA the cite is 872 So.2d 1000 where the Fourth DCA said in a similar type BOLO that applied to a vehicle that it wasn't specific enough to justify the stop. The BOLO could have described countless cars being driven on the roads of -- in this case, south Broward County, the same thing applies here. The BOLO in this case, and when you take out the aspect of the hat, and all you are left with is a man sitting on a bench wearing a tank top and shorts in June in Florida in the middle of the day, that could have described countless people being in and around the mall that day.

Now, whether we're going to disagree about how many gyms are in the immediate vicinity or just down the road, we have a mall in the area where other gyms are, you don't have to be going to a gym to wear a tank top. You could go to the mall today and see many people wearing tank tops. And the only other point I think I want to make and then I'll take a short break, make sure I've covered everything, and then I'll sit down and be quiet, Your Honor. But we do have this discrepancy we've

been making this point about the map, Officer Roman when he was on the stand acknowledged that the information that law enforcement was being given is that the perpetrator was moving west towards the Asian or Chinese restaurant away from the Publix parking lot.

If you take a direct line on that exhibit from the Publix parking lot by the restaurant and the bank, and that's why we're trying to establish the arrow was going straight up for north. They're moving in this direction from my vantage point is my right to left, they're moving west on that exhibit, they're not moving north. The Altamonte Mall is north, so they -- from a -- when you look at the factors of is he found in the direction they're reporting that said the perpetrator was moving in, no, he's found in the -- he's in the vicinity, I'll give you that, it's 15 minutes after the fact that he's found or 16 minutes after the fact he's found on the bench, but he's not in a westerly direction he's in a north direction from where the Publix parking lot was.

Your Honor, if I can have one moment just to --

THE COURT: Yes, you may.

MR. UFFERMAN: -- verify I've covered all the points I need to cover. Thank you.

Nothing further, Your Honor. Thank you.

THE COURT: Thank you. Mr. Hastings.

MR. HASTINGS: Well, the problem with the last argument is the bank in the event report that's in evidence was before the Eastern Pearl. And the Court had the opportunity to see the overhead and the police officers concluded that he was going in a north or northwesterly direction and right on in the Elephant Bar was right beyond 436 and right -- he had to go through the Altamonte Mall parking lot.

I wanted first to address the plea issue. Now, I would submit that the Defendant is a revisionist historian when he's coming into this court say, well, I've got my attorney's advice and everything, but I went and I Googled this and I found that this wasn't a crime punishable by the prison releasee re-offender statute. I would suggest that's completely unworthy of belief, and even if you want to agree and find any credibility in what the Defendant's telling you, he had been advised by Mr. Bryson what the State of the law was. It's clear on the plea form from the State

Attorney's Office to Mr. Bryson, Mr. Bryson said he fully went over the plea form with him. The defense is urging, well, the Gorham case -- and, of course, you know, he's looked this up and everything -- the Gorham case which, indeed said the burglary with a battery or assault of a conveyance is not a PRR crime, that was the Fourth. And then the Fifth, of course, is the Shaw case and that's what's controlling here. Mr. Bryson said I knew that the Shaw case was controlling. And the Hackley case that was brought up earlier is -- that was in another district too. And, of course, I think that was the First.

But, of course, as the -- as counsel acknowledged the Hackley case, which I've actually that is here. The Supreme Court ultimately determined that the Hackley case was the law, they agreed with Shaw. So in the end Mr. Bryson was certainly right and the Defendant certainly could not have been prejudiced and if he's trying to look up cases and second guess his attorney, he does so at his own peril.

Mr. Bryson told him if you don't accept this 15-year offer, the State is going to file what will be a mandatory life sentence, Mr. Bryson was clear

about that, and Mr. Bryson said that the Defendant -- he specifically remembers the Defendant also saying, I can't do 15 years because when I'm -- after 15 years have passed that some of my family members may not be around.

So the Defendant is basically saying, yeah, he didn't know that Mr. Bryson clearly indicated he told him, that Mr. Hackley knew about it, and the only reason Mr. Bryson -- he had clearly rejected it, the Defendant had, the only reason Mr. Bryson was trying to reach him later on was to talk to him about the doc -- the adverse doctor's report that on November 15th and then again on the 16th when the Defendant's phone was out of service.

And while Mr. Bryson said I wanted to try it since he did have one more day, I wanted to try to get him to reconsider that offer, but the Defendant had already rejected it, he had made up his mind and for the defendant to come in now at this late date and say, well, I would have taken 15 years, it's easy to look at things in hindsight and I would suggest to the court that the Defendant clearly has not met his burden under Gomez of establishing this by clear and convincing evidence, yet alone any other burden.

Ground 7, the Defense is seemingly arguing very similar to what they did in the motion itself; they overlook a lot of stuff. I mean, not one when he was up here arguing did he acknowledge this muscular white male, and you can see that photograph that's in evidence here, this isn't just a white male in a tank top and shorts.

Now, the Defendant in his motion and then in his testimony says, well, there's gyms around so there might be other people and he's trying to tell the Court that these gyms are real close. Well, we learned from Officer Roman that knows this area because he patrols the area, there aren't any gyms in that vicinity of the Altamonte Mall, and it's the Defendant that brought that up. And the gyms -- any gyms that were almost down by the interstate well on the other side of the renaissance center I think the BP station was mentioned, all of those would be right down very close to the interstate, well west of the area of the Altamonte Mall.

Now, we have two officers involved in this hearing. Officer Foley or Lieutenant Foley, he was there in plain clothes and he was able to watch the Defendant for some period of time before a marked

unit, specifically Officer Roman came on board. Lieutenant Foley clearly indicated he had this boony hat, he was booking for that and he saw the Defendant with it. Lieutenant -- Officer Roman came on the scene afterward he indicated he couldn't remember specifically from his trial testimony whether he saw the Defendant with that hat on or not, but it was recovered with all of those other clothes shown here in the original State's Exhibit 4 in evidence and State's 3.

Now, the description wasn't just shorts, tank top, and white male as the Defense would want you to believe. The description was including either a straw hat or a straw beach style hat, and, of course, from a distance, people certainly perceive things to be different. And blue tank top, this appears to be light gray, certainly not very different from blue. And these appear to be white shorts but certainly could be white khaki shorts.

So the Defendant was not different than the report, the compilation of the reports that these officers had. You couple that with the fact that they upon him seeing Officer Roman, and both of the officers testified, as soon as he put eyes on

Officer Roman he quickly moved inside the mall looking over his shoulder as he's going, and in a rapid pace. The officers then followed him, and contrary to what the Defendant claims, before they reached him, he kept turning around and looking, before they reached him he indicated something to the effect you've got the wrong guy and at that point is when they put their hands on him.

Now, lieutenant -- I'm sorry, Officer Roman in his testimony at trial he indicated has he did here walking at a fast pace that he was sweating, he was nervous, and that was on page -- sweating profusely, on page 71 of the trial transcript. And that was also --

THE COURT: Did you say page 70?

MR. HASTINGS: Page 71.

THE COURT: 71, okay.

MR. HASTINGS: So we have an individual, while not a perfect match, in all respects in all of the BOLO descriptions certainly is not dis -- is essentially in any sort of significant way, dissimilar, and we certainly have two experienced officers who based upon what they received over the radio knowing that descriptions may differ a little bit, we filtered it through and in their experience

both of them came to the conclusion that this Defendant met the description.

In Hunter versus State -- and I've provided the Court with all of these cases with copies to counsel -- Hunter versus state is 660 So.2d 244, it's a Florida Supreme Court opinion from 1995, I cited that in my response as well. There are four different factors that the Court indicated that the Court to consider in assessing legitimacy of a stop pursuant to a BOLO. Number one, the length of the distance from the offense. In here --

THE COURT: I'm sorry to interrupt you, but the Hunter case is not included here.

MR. HASTINGS: The Hunter case should be the second one under Hackley.

THE COURT: I have two Hackleys, two Hackleys, and then I start with the group that's Poles and another group.

MR. HASTINGS: You know, I probably gave you the -- there's -- did you take them apart? There should be two sections, one dealing with the --

THE COURT: Yes.

MR. HASTINGS: Sleeping juror, you can disregard those.

THE COURT: There's a group that starts with

Holmes, and then there's a Huraj, Willis, and then the next group is Sokolow, Phillips.

MR. HASTINGS: Okay. Hunter should be --

THE COURT: There is Hunter. I'm sorry. It was stuck to it. Thank you. I'm sorry. Go ahead.

MR. HASTINGS: Well, anyway, in the Hunter case -- I'm sorry, they may be a little bit out of order.

THE COURT: That's okay.

MR. HASTINGS: The length of the distance from the offense is -- here we have a distance that's approximately would take by the officer's -- Officer Roman's estimation it would take somewhere between five to ten minutes and maybe more if he had to wait for the light to cross, I guess it would be eight lanes at that point at least on 436, and that's where the Defendant was found about 15 minutes later. The route of flight, now, the defense wants to argue well it was more in a northwest or westerly direction but the testimony from what the officers heard regarding the Eastern Pearl, it is on a northwesterly track which on the other end of that track would end at the Altamonte Mall.

Specificity of description, there's no

dispute that we have a muscular white male in a tank top in a hat that was the description and then we have the photos. And of course, I don't know where the defense wants to suggest that this hat just turned up miraculously, obviously it was either with the defendant or close by as taken into evidence with all his other clothes, certainly that goes to the credibility of Lieutenant Foley who testified to that fact.

And the source of the BOLO, obviously the source of these descriptions are people that were there, and those are entitled to the high end of the reliability scale, Keller versus state, 71 So.3d 927, first DCA opinion from 2011 tells us that.

So you need to look at the totality of the circumstances rather than focusing on several explainable differences in the reports of a suspect's clothing. And when you do that, the validity of this stop I would suggest is apparent. Now, the Sokolow case, S-O-K-O-L-O-W, which is a U.S. Supreme Court case, at 109 Supreme Court 1581, Chief Justice Rehnquist writing for the court with respect to the issue of investigatory stops based on reasonable suspicions stated, and I quote: The

officer, of course, must be able to articulate something more than an un-particularized hunch and that the Fourth Amendment requires some minimal level of object justification for making the stop. That level of suspicion is considerably less than proof of wrong doing by a preponderance of the evidence. We must consider the totality of the circumstances, the whole picture.

Now, in this particular case the Defense is saying, well, there's not a perfect match between all of the descriptions in the BOLO. But in the Billips case, Billips versus Shoal, 216 West Law 395 9062, even where there is a difference between a reported and the actual color of the automobile, the different color where the stop was supported by other physical similarities as well temporal and physical proximity to the crime, that was a valid stop. That decision cites U.S. versus Hurst, which is at 228 Fed Third 751, a Sixth Circuit opinion from 2000, which held the actual difference in the car model and the number of passengers in the car from the BOLO, the actual being a dark blue Mercury Cougar with three passengers and the BOLO being the dark colored Ford Thunderbird with two passengers did not defeat the officer's assessment of

reasonable suspicion based upon their totality of the circumstances.

And Hunter, of course, as I spoke to speaks to the totality of the circumstances. Now, not only do we have the situation that we have in Hunter, the four factors that I already mentioned, we have the hurried nature of the Defendant's walk. And that was one factor that provided the law enforcement officer in the Hudson case that I've provided you, 41 So.3d 948 Second DCA from 2010, the reasonable suspicion to detain him repeating -- repeatedly looking back at a law enforcement officer, that was testified to by Officer Roman following the Defendant, has been deemed suspicious connect or conduct consistent with guilt as well; which, in addition to other factors, can justify a detention. And that was the Young case, Y-O-U-N-G, 43 So.3d 151 and that was a Florida Fourth DCA opinion from 2010.

Profuse sweating that was testified to at trial by Officer Roman and which was in the report, and also testified to by refreshing his recollection of Lieutenant Foley. Profuse sweating while in itself would not be sufficient to val idate an investigative stop, is another factor

indicative of guilt, particularly when the crime scene and location are some distance apart, the subject had ran or moved quickly from the first location. And the Davis case, at 849 So.2d 398, Fourth DCA from 2003, stands for that proposition.

So when you look at the totality of the circumstances and the burden, so to speak, as enunciated by Chief Justice Rehnquist and Sokolow, it's clear that these officers had a reasonable suspicion to temporarily detain this Defendant given all of the information that was provided to them, most of which is probably, but perhaps not all, in that event report that's in evidence.

And Mr. Bryson who's an experienced trial attorney, he's had over a hundred trials I think was his testimony, has represented many individuals of felony crimes in this court and other courts, he took a look at that issue and he determined that there was no -- that he really didn't have a good faith basis based upon all of this information as he understood it then and as he understands it now to file this motion.

And the standard, of course, is that the -- it's set forth in Strickland, which I know the Court is well familiar with; number one, was he

ineffective, was he not effectively acting as counsel. And number two, would the Defendant have been prejudiced thereby. And the answer to both those questions is clearly no with regard to both of these grounds.

We would ask the Court to deny the motion. Thank you.

THE COURT: Thank you very much. Rebuttal.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: You're welcome.

MR. UFFERMAN: May it please the Court. I'll try to be brief. I won't repeat everything I previously said. I'll sum up the plea issue very quickly. The prosecutor appears to acknowledge that there was no follow-up conversation based on the record before the Court despite Mr. Bryson's attempts on November 15th and 16th. And I think what's so key about that is not to mention there's previous discussion about ambiguity in the law and my client was waiting for that answer, but just as importantly he was waiting for the answer as to what the mental health experts were going to say as to whether he had a viable insanity defense, and how could he possibly make a decision about a plea without having that information. Based upon the

record before you there's no indication he ever relaid that information about you don't have a viable insanity defense to my client so he could consider whether he should take this plea. That combined with there being this concern about do I really even qualify for PRR, I submit that entitles him to relief on that claim.

Regarding the BOLO claim, couple of quick points I want to make and then come back to what I think is the issue to be decided in determining as to whether my client is entitled to relief on his claim, which is obviously the hat. Let me start with the overhead. I submit, Your Honor, the way the evidence has come out is this arrow indicates what's north, I tried to clarify that not very well at the conclusion of the testimony. We have Publix right here, the Publix parking lot right here, the undisputed testimony, but more importantly you can look at the map and see as I move my pen in a westerly direction where we encounter the Asian restaurant, the mall is up in the northwest corner, if you -- I thought I heard the prosecutor say if you continue on from this parking lot in the same direction towards the restaurant, you end up at the Altamonte Mall. I respectfully dispute that. If

you head west from the parking lot and go past the Asian restaurant, you're going to continue west and never come close to the Altamonte Mall. You have to turn north to go to the Altamonte Mall.

Regarding Mr. Bryson and his decision not to pursue this issue, I would acknowledge I think this is purely a legal issue. We do have to establish prejudice I acknowledge that means we have to convince you this means the issue would be successful. If we can't convince you the issue would be successful, then we lose. If we can convince you the issue would be successful, clearly it seems then he should have filed the motion to suppress. But even discussing the matter with him today, he was relying upon the victim's identification of my client, which he had to be reminded that that didn't even come until after my client was already in custody and then he even still tried to say, well, that's still a factor that can be considered. If that's -- that's clearly wrong, it's erroneous, you can't consider information that came after the fact, and if that was his belief, no disrespect to him, but no wonder he wasn't thinking there would have been a viable motion to suppress in this case. But, again, I

don't think this comes down to, you know, a strategy in deciding not to pursue it. If there's a valid motion to suppress based on the facts and you agree with that, which we're hopeful you will, he was clearly ineffective then for failing to pursue it.

A lot of these other issues I think are pretty minor in background, but we'll just go through them. I think my client clearly said there was an Orange Theory gym in the immediate vicinity when lieutenant -- or when Officer Roman was asked about that, he couldn't give an answer one way or the other about an Orange Theory, he talked about a Gold's Gym and other things but he couldn't refute from his memory or understanding of the area, and it's my understanding there is in fact an Orange Theory right there in the immediate vicinity.

The BOLO was for a muscular person, not a large person. We can have a muscular person who is four foot four or seven foot two, but the issue is, you know, the fact that my client may have been large, that doesn't necessarily match the description. Is he muscular? Perhaps, he's wearing a muscle shirt. I submit again there's a good portion of the population on a summer day in

the afternoon at the mall wearing a muscle shirt. I suspect, I may be wrong with this, most people who where muscle shirts probably have muscles they're wanting to show off and there's a good portion of the community that wears muscle shorts -- shirts, I wish I could be wearing a muscle shirt, my wife would kill me if I tried to. So I think you would expect someone wearing a muscle shirt is going to have muscles to show off, and that would, again, apply to a large portion of the people that would be walking around the mall on that day.

The sweating profusely, again, if you look at Officer Roman's report that came -- that's something that he observed after my client had been stopped. The same thing with the statement, I repeat that quickly, but, again, the State wants to rely upon that, that's all things that occurred after that stop. For this purpose whether there was reasonable suspicion is based on at the time of the stop, and from his own report all of that occurred later, it can't be considered.

This idea of looking over his shoulder Officer Roman didn't say a word in his report about looking over the shoulder. Lieutenant Foley today

was asked several times, do you remember -- he paused, a long pause in the courtroom, and he was very honest, I have no memory about whether he was looking over his shoulder or not, he couldn't say that.

And then again did they recover a hat, we don't dispute they recovered a hat, there's a picture of a hat there. But if they can't link that hat to my client, then it's not relevant to the inquiry. If they later use that hat to try to get him to match a description for some type of showup, that's a separate issue before the Court. But the entire key to this claim comes down to was my client wearing that type of hat, we will acknowledge that when you add in that descriptive feature, someone wearing a hat similar to the one in the picture or a hat described in these BOLOs, which would be straw beach hat, big floppy hat, or canvas hat, we can see that's going to put the State over the edge. But we submit that the evidence before this court, and I appreciate the prosecutor's candor, is regarding what Officer Roman said; Officer Roman doesn't have a memory about my client wearing a hat. He was the one that reported up front and center in his car, he's the

one that followed my client from the bench to the point of the mall either right outside or inside when he put his arm on him or stopped him. He would have seen him wearing a hat, he would have seen him try to discard any hat. By his testimony today, by his testimony at trial, by the information he put in the report that day, nothing about a hat. And that's the key to this case. You don't have to just believe my client. If you believe Officer Roman that my client wasn't wearing a hat, then the evidence in this case was insufficient and they did not have reasonable suspicion to stop my client. It may have been the prudent thing to do from a law enforcement standpoint, but from a legal standpoint it wasn't legal to stop him without reasonable suspicion. If he didn't have the hat on and was simply wearing a tank top and simply had on shorts in June in a summer day, in the middle of the day in Florida, it's just like the Fourth DCA said, it could have described countless people walking around that mall on that day. That's not sufficient under our law for a stop.

We'd ask you grant relief on that claim, Your Honor, thank you.

THE COURT: Thank you very much. I have to specifically go back and read -- because both of you kind of cited to Officer Roman's testimony at trial, and Defense specifically relied upon the testimony on pages 57 through 66, and the State was 71. So I'm going to go back and read Officer Roman's entire testimony at the trial and also the cases that have been presented to me today. So needless to say I'm going to reserve ruling. I thought I was going into a two-week trial and that one's not going. There are some other trials starting on Tuesday. So I should have time within the next two-weeks to get the order out.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: Okay. In the mean time, Mr. Jones, you will be sent back to DOC.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: Thank you. And with nothing else, court will be in recess.

MR. UFFERMAN: Thank you, Your Honor. Have a wonderful weekend.

THE COURT: Thank you very much.

(Whereupon, the proceedings were concluded.)

CERTIFICATE

STATE OF FLORIDA

COUNTY OF SEMINOLE

The above and foregoing transcript is a true and correct typed copy of the contents or portions of the digitally recorded proceedings identified at the beginning of the transcript.

PETER DILWORTH

Sworn to, signed and certified before me by Peter Dilworth, who is personally known to me, this 21 day of October, 2017.

Notary Public

YOSELINE ROJAS
MY COMMISSION # GG 050008
EXPIRES: December 16, 2020
Bonded Thru Notary Public Underwriters