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

THOMAS,

Appellant,

CASE NO: 4D15-
L.T. NO.: 20XX-CF-

v.

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE JUDICIAL CIRCUIT COURT

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INTRODUCTION AND QUESTIONS PRESENTED

This case is an appeal from the denial of a Rule 3.850 postconviction motion after an evidentiary hearing. Appellant/defendant Thomas ("Mr. ") was convicted by a jury of one count of home invasion robbery and sentenced to a twenty-year term of incarceration. In his Rule 3.850 motion, he claimed in relevant part that trial counsel rendered ineffective assistance because he failed to investigate and discover that the serial number on a bottle of Heineken beer linked Mr. to the crime scene approximately as reliably as a fingerprint. By the time trial counsel discovered the significance of the serial number, the initial offer to plead guilty to burglary had expired and the amended indictment charged Mr. with home invasion robbery.

Additionally, the fifteen-year plea offer for burglary was premised on the prosecution's belief that Mr. faced a thirty-year maximum sentence as a habitual felony offender. In fact, the maximum sentence Mr. could receive was fifteen years. Although the prosecutor had filed a notice of intent to seek an enhancement, trial counsel did not determine that Mr. was not actually eligible for the enhancement in time to negotiate the initial plea on that basis.

The questions presented in this appeal are:

1) Did the lower court err in finding that trial counsel's performance was constitutionally effective where he failed to investigate and discover the significance of the serial number evidence until the initial plea offer had expired?

2) Did the lower court err in finding that trial counsel's failure to negotiate further based on an accurate calculation of Mr. 's sentencing exposure was not relevant to Mr. 's ineffective assistance claims?

3) Did the lower court err by not finding that Mr. showed a reasonable probability that he would have accepted the fifteen-year plea bargain if he had been advised that the identification numbers definitively linked him to the scene of the crime?

STATEMENT OF THE CASE AND FACTS

I. Evidence at Trial

A. Carol and the Stranger

In the early morning of March 11, 2010, Carol ("Ms.") woke to find a stranger in her bedroom. (Tr. 218).[1] The lights were turned out, but the stranger was holding a cigarette lighter by his waist that provided some illumination. (Tr. 219). The stranger told Ms. "I'm not here to hurt you, just give me what you got." (Tr. 218).

The stranger allowed Ms. to put her glasses on before leaving the bedroom; however, he warned Ms. not to look at him. Ms. complied, averting her eyes from him. (Tr. 220, 245 ("I tried not to look at him . . .")). Ms. testified that the stranger wore a light blue tee-shirt, nearly the same color as his jeans. (Tr. 244). They walked down the hall together, not quite touching but very close. (Tr. 220). Ms. turned on a light in the kitchen before realizing that she had left her purse in her bedroom that night. (Tr. 221-22). She returned to her bedroom where she recovered the purse and sat on her bed. (Tr. 223). Although she was trying not to look at the stranger, she saw him in the dim light from the kitchen, standing about seven feet away. (Tr. 223 ("it was dark but, yes, he was facing me and I could see

[1] Citations to Volumes II, III, and IV of the record are paginated according to the numbering on the trial transcript and designated (Tr. XX).

him")). She gave him the money from her purse (described at trial as "between 22 and

42 dollars" in "maybe a couple fives and a ten or a twenty"). (Tr. 224). Ms. remembered looking at the clock in the master bedroom, which read "4:01." (Tr. 227).

After the stranger left, Ms. went across the street to her son's house, where she called the police. (Tr. 227). A "be on the lookout" ("BOLO") was issued for a Caucasian male "about five-nine with sandy blond hair and a beard." (Tr. 239-40). Ms. knew the exact height of her son (5'11") and of her husband (6'1"), providing her with a frame of reference to accurately describe the height of the suspect. (Tr. 240). She identified his hair as "sandy," and "would not have said that it was grey." (Tr. 235).

B. Mr. is Stopped on his Bicycle for a Traffic Violation and Held for Identification.

At about 4:08 a.m., Corporal Oscar Dominguez stopped Mr. for bicycling without a light. (Tr. 253, 262). Corporal Dominguez broadcasted Mr. McKenzie's description to the dispatcher. (Tr. 254). Corporal Dominguez requested to search Mr. McKenzie because he noticed a bulge in Mr. McKenzie's pocket and a wet spot. (Tr. 254). Mr. McKenzie granted consent to the search, and Corporal Dominguez recovered a cool (not cold) bottle of Heineken beer and an orange lighter. (Tr. 255-57). Corporal

Dominguez also recovered thirty-eight dollars from a white changepurse the right front pocket of Mr. ’s jeans. (Tr. 258). The specific denominations were a twenty-dollar bill, two five-dollar bills, and eight one-dollar bills. (Tr. 259).

Corporal Dominguez’s arrest report listed Mr. ’s height as 6’2”. (Tr. 292). Mr. was wearing jeans and a tan t-shirt when he was arrested. (Tr. 271).

C. Ms. : Identification of Mr. and Missing Bottles of Beer.

Officer Robert Skoglund responded to Ms. ’ call. (Tr. 279). Officer Skoglund had heard Corporal Dominguez describe Mr. moments before. (Tr. 279-80). Officer Skoglund believed that Ms. ’ description of the stranger matched Corporal Dominguez’s description of Mr. . (Tr. 280).

Ms. agreed to ride with the police to attempt to identify Mr. as the stranger who had been in her house. (Tr. 229). Officer Skoglund took Ms. about half a mile away to Mr. ’s location. (Tr. 281-82). On arrival, from the back of the police cruiser she saw a handcuffed man under a light pole. (Tr. 229, 246). Her view was partially obstructed by the mesh or Plexiglas between the front and back seat. (Tr. 229-30, 283; see also Tr. 301 (Mr. was “cuffed, standing in bright light from a police cruiser”)). However, she identified the potential suspect as the stranger who had been in her house

earlier that night. (Tr. 230). She explained at trial that she based her identification on "the build and the beard," as well as clothing (jeans and a tee-shirt). (Tr. 231).

Ms. then returned to her home with Officer Robert Skoglund, who asked her whether any beer had been taken. Ms. discovered that two beers were missing from her refrigerator, green-bottled beers like a Heineken or a Beck's. Two beers were left. She remembered the number of beers because she had moved them from the door of the refrigerator to the back, in order to make room in the pack for drinks her grandchildren had not finished, which might otherwise spill. (Tr. 232-33).

D. Physical Evidence

1. The Beer Bottles and Subsequent Testimony Regarding the "Production Line" Number.

While conducting her investigation of Ms. 's home, Investigator Kelly Hare was called to the 2300 block of Pine Avenue, where she recovered an open, nearly-empty bottle of Heineken. (Tr. 309-11). Forensic Scientist Earl Ritzline later matched DNA recovered from the bottle to Mr. . (Tr. 349-50).

Ms. Hare also testified regarding what she assumed were identifying numbers printed on the labels of the four bottles:

A. While I was examining both bottles that I had in

> my possession, I noted that there was a number on both of them. And so I returned to the residence to see if the two remaining bottles in the refrigerator had a matching number that corresponded with those two bottles.
> . . . .
> Q Okay. Have you received any police training as far as the significance of numbers of beer bottles?
> A At that point, no, I had not.
> Q Okay. But obviously you were curious about them?
> A Yes.
> Q Okay. Okay. Again, I'm showing you State's 9, the empty bottle. And again, what if anything did you notice about the numbers on the two bottles?
> A They were the same number on both bottles.
> Q Okay. Were you able to somewhat determine what these numbers were, the significance of these numbers?
> A Yes, I was.
> Q And what is your understanding of what these numbers are, signify?
> A I called the number listed on the bottle for questions and was informed by a corporate representative that they referred, they were called a production line –
> MR. SMITH: Objection, your Honor. Hearsay.
> THE COURT: Sustained.

(Tr. 312-14). Nevertheless, the State returned to the same line of questioning, and Ms. Hare was allowed to give testimony which appeared to link the bottles recovered outside the home to the other two bottles from Ms. ’s refrigerator:

> Q So you were aware even, you said immediately

some significance to the numbers on these bottles?
A That's correct.
Q And the reason you went back to the crime scene was what again?
A While I was at the crime scene initially I had noted that there was two remaining Heineken bottles in the refrigerator and I responded back to the scene to see if the numbers on those bottles were the same as the bottles that I, had been turned into evidence already.
. . . .
Q And what was your determination upon inspecting them?

A I determined that the number on the label of both of these bottles was the same number on the labels of both the bottles that had been collected as evidence.
Q I'm showing you State's 1. And again, you're referring to this, which number are you referring to again?
A The number printed in black in the white rectangle on the bottom of each label.
Q Okay. And obviously there's other similarities on the label between the bottles; correct?
A Correct.
Q What was it particular about this number that stood out to you as something that warranted further investigation?
A It appeared to me to be some sort of identification number, a product number of some sort that wasn't just a brand name or a description of the product. It appeared to be an individualizing we call it number.

(Tr. 314-17).

2. The Baseball Hat

Additionally, a baseball hat was recovered near the broken window in Ms. 's garage. (Tr. 208-09). The hat was adjustable with a Velcro band. (Tr. 319). No scientific tests were performed on the hat (Tr. 295-96); however, Officer Skoglund described the process by which the hat was "matched" to Mr. :

> A [I]t appeared that he was at one time wearing a hat because, I guess you can call that, he had a hat head where his, his hair near his ears was kind of, you know, waved out and --
> Q All right. And then at some point, were you present when this hat was placed on his head?
> A Yes.
> Q Okay. What happened?
> A It appeared to fit, it fit, just fit his head and his hair, kind of flowed how it was with the hat.
> Q Was it adjusted at any point before --
> A No.
> Q Okay. It was left as found when it was placed on his head?
> A Yes.
> Q Okay. And you observed that it fit well as far as round wise?
> A Yes, it did.
> Q And as far as top to bottom, the bottom of the hat matched where the hair flipped up?
> A Correct.

(Tr. 289). No other evidence tended to link Mr. to the baseball hat.

3. The Shoeprint and the Bicycle Track in the Gravel

Officer Skoglund reported that a garage window was broken, with

glass on the inside and outside of the garage, and that there were shoeprints in the dirt underneath the window. (Tr. 285-86). Kelly Hare, crime scene investigator and latent print investigator, recovered from the scene a shoeprint that appeared to come from a worn shoe because it was "basically void of [tread] details." (Tr. 305). She described the shoes Mr. was wearing during his arrest as " very worn, particularly in the toe area and were lacking in the tread detail." (Tr. 305). However, she could not definitively say that the prints came from Mr. 's shoes. (Tr. 305-06). She also reported a trail in the gravel near the house consistent with a bicycle. (Tr. 331).

4. Evidence Recovered from Mr. 's Clothes

Ms. Hare also examined Mr. 's jeans and shirt for signs of entry through the broken window. She found no glass or blood on the pants (Tr. 307), although there was a reddish stain she determined was not blood. (Tr. 331-32). Using magnification, she was able to find "three small slivers of what appeared to be consistent with glass on the front of the tee-shirt." (Tr. 308). The slivers of glass were too small to determine their source. (Tr. 328).

II. Conviction and Sentencing

On September 1, 2010, sentencing hearings were delayed for a time because the State wanted to "quadruple check" Mr. 's eligibility for a

sentencing enhancement by "checking with the DOC." (Tr. 413). When proceedings re-convened later that day, the State explained that it would not seek any enhancement because "there was an early term of probation that took him outside" the requirements for the enhancement. (Tr. 416).

At sentencing, Mr. 's mother testified about his history of drug abuse and the positive adjustments he had made when bad influences were not present in his life. (Tr. 417-19). Mr. described his successful drug treatment and the long period between his prior convictions. (Tr. 422). He did not ask for a specific sentence, but requested an arrangement that would allow him to serve his sentence outside of confinement in a DOC institution, such as house arrest or a furlough. (Tr. 422-23). Defense counsel highlighted the nonviolent nature of the incident and the fact that Mr. was suffering a relapse of his addiction at the time. (Tr. 424).

The State requested a 30-year sentence. (Tr. 426). The Court declined to impose the maximum sentence, explaining that Mr. deserved "credit for not injuring Mrs. or hurting her in any way." (Tr. 426-27). Instead, the Court imposed a sentence of 20 years of imprisonment.

III. Rule 3.850 proceedings.

A. Motion and order granting evidentiary hearing

In his Rule 3.850 motion, Mr. argued that counsel rendered ineffective assistance by:

1) failing to discover and advise Mr. before the first plea agreement expired that the identification codes from the Heineken were overwhelming evidence that Mr. had taken bottles of beer from the victim's house (R. 534);

2) failing to correctly advise Mr. of his maximum exposure during plea negotiations, leading to a fundamental breakdown in the process (R. 535-36);

3) failing to suppress or exclude the victim's identification (R. 536); and,

4) failing to object to comments during closing argument. (R. 540).

In its response, the State argued in relevant part that "because [the identifying number] evidence was never admitted during trial it had no impact on the verdict," and that any claim that the state would have offered a more favorable plea offer was merely speculative. (R. 551).

On January 6, 2015, the court entered an order granting an evidentiary hearing on the first two claims and summarily denying the last two claims. (R. 710-867).

B. Evidentiary hearing

Mr. 's ex-wife, Maria Pranikoff-, testified that Mr. called and wrote her and his daughter, Abigail, frequently, and they all enjoyed a friendly and loving relationship. (HT 7-10).[2] Mr. explained that he kept in contact as much as he could with them through the telephone. (HT 15). His mother Regina also testified that he maintained contact with Marra and Abigail. (R. 31).

Mr. testified that he had been released from probation ahead of schedule to good behavior. (HT 14). He married in 2001. (HT 15). Abigail was less than two years old in 2010 when he was arrested. (HT 16). He had completed all of his obligations and successfully broken his lifelong battle with drug addiction. (HT 16-17). However, Hurricanes Frances, Jeanne, and Wilma had destroyed the business for which he worked. (HT 18). Under additional pressure due to Marra's pregnancy, his two attempts at rehabilitation did not work, and Marra had moved away to Daytona with her parents when he was released the second time. (HT 18).

[2] Citations to volume VII of the record on appeal, the transcript of the evidentiary hearing, are designated (HT ___).

He remembered the fifteen-year plea offer, but refused it because his lawyer was confident he could prevail at trial because the state "didn't have any evidence." (HT 19). He outlined the weak physical evidence (the hat, the tire track, the relatively poor description). (HT 19-20). He did not learn about the matching serial numbers until he was "rearrested" after being charged with home invasion robbery. (HT 20-21). He would not have insisted on going to trial if the evidence had been overwhelmingly against him, he would have accepted the 15-year agreement or asked his attorney to negotiate a more favorable deal. (HT 22-23). With gain time, he would have been released when Abigail was in her mid-teens and when he was fifty-five or fifty-six years old. (HT 23-24).

On cross-examination, he testified that he met with trial counsel Blake Smith four times during the year he was incarcerated in the county jail. (HT 25). He agreed that he was released from probation three years early in 2004. (Id.). He agreed that after his release, he was arrested several times, disputing an arrest in Collier County. (HT 25-26). HE agreed that he had been convicted of around ten felonies. (HT 29).

Blake Smith testified that he remembered that prosecutor Victoria Winfield's position at the time the first plea was offered was that Mr. was a habitual offender, subject to a thirty-year maximum sentence. (HT 35).

Mr. Smith did not discover that Mr. was not a habitual offender until September 21, 2010, after she filed a notice of intent to seek enhancement. (HT 35). However, he also testified that before the offer was revoked, he interpreted the plea as an offer to plead to the maximum fifteen-year sentence. (HT 37). In his experience, these offers occurred when a defendant had prior felonies of the same nature. (HT 38)

Before the plea agreement was revoked, Mr. Smith considered the evidence against Mr. to be mostly circumstantial, with only weak direct evidence in the form of a poor identification by the victim. (HT 40-41). He did not know the meaning of the serial numbers until a week or so after the investigator's report on November 9th, 2010. (HT 45).

On cross-examination, Mr. Smith testified that Ms. Winfield was replaced by Patrick O'Bryan, who actually tried the case. (HT 49-50). He testified that he was not aware that Mr. was not HFO eligible on September 15, 2010.[3] (HT 51). He testified that the prosecutor "must have" orally threatened to seek an HFO enhancement, and again stated that he would have learned on September 21, 2010 that Mr. was not HFO eligible. (HT 53). They speculated that Mr. O'Bryan might have decided to re-assert

[3] This statement appears to be the basis for the trial court's conclusion that Mr. Smith was aware on September 15 that Mr. was not HFO eligible, and the exact phrasing should be reviewed for ambiguity by the Court.

HFO status after seeing the prior notices filed on July 21, 2010 and (HT 53). The Court remarked that it was "confusing to me that he finds out [that MR. was not HFO eligible], then a year later, they file the same HFO, but nothing's changed in the case. It's not like we found something new." (HT 54).

On May 21st, 2010, he received the report from Kelly Hare, which disclosed that the Heineken bottles all had the same lot number. (HT 58). He realized at that point that the lot numbers would be a problem for the defense. (HT 59).[4]

According to Mr. Smith, Mr. at first admitted his guilt, but after the second meeting and a review of the weak evidence he began to argue that he was innocent. (HT 62). He had rejected the 15-year plea deal because he had a daughter, and wanted to go to her "high school graduation or something, fifteenth birthday, something. He kept saying I've got to be there for this and I feel like it was a six- to eight-year plea offer that he would have taken and that's what he had communicated to me very clearly." (HT 69). Mr. insisted on trial after that. (HT 69). Mr. Smith

[4] Ms. Hare's report indicates that she called 1-888-Heiniken and learned that "the [12-digit] number identifies the production line that manufactured the item," and that "the containers in all packages (6 packs, 12-packs, etc) manufactured on that line would each contain the same production number." (State's ex. At 7).

thought the investigation into the bottles would help, yielding maybe "a million bottles" that might have the same number, instead of around 2,400. (HT 71). Mr. nevertheless did not ask Mr. Smith to try to get the fifteen-year plea back, although he did ask for a new plea offer at every visit. (HT 72-73). Mr. Smith did not advise Mr. that the evidence could also convict him of home invasion robbery. (HT 80). It was after the new charges were filed and Mr. Smith realized Mr. 's liability was "off the charts" that Mr. Smith filed the investigation request. (HT 81). The Judge observed that in his experience "any plea offer I've seen to the max, usually it says it's to the max, but we're not going to seek HFO or they're conceding something to get you to plead." (HT 81).

On redirect, Mr. Smith stated that his notes read "State cannot HO on 9/21," the same day the new plea offer came int (HT 83). He again stated that September 21, 2010 was the date he realized that Mr. was not HFO-eligible. (HT 84). He confirmed that he did not understand that the identification numbers identified the exact minute that the beers were bottled until November 2010. (HT 87-88). He saw that the investigator had called the 1-888-Heniken number, but he did not call it himself. (HT 88). Acknowledging that Heineken representative Mr. Fabre would have told the jury the true meaning of the lot numbers, Mr. Smith said that the failure of

Mr. Fabre to testify helped Mr. 's case only "a little bit." (HT 89). Mr. Smith "hoped" that the state would not discover the true meaning of the numbers, and conceded that Mr. Fabre's failure to appear was not a tactical decision. (HT 89).

On recross, Mr. Smith testified that he was concerned that Mr. could have faced a charge of burglary of a dwelling with a battery if he did not accept the plea agreement. (HT 93-94). He claimed he discussed that possibility with Mr. , who rejected the 15-year offer nevertheless. (HT 94).

C. Order denying relief

On July 9, 2015, the court denied Mr. 's Rule 3.850 motion. (R. 899). The court denied Mr. 's claim regarding the Heineken identification numbers because "no evidence of the numbers on any beer bottle were admitted at the trial," and therefore Mr. "was not prejudiced in any way by the numbers on the beer bottles." (R. 890). As for the habitualization issue, the judge ruled that Mr. was "made aware of the plea offer and rejected it outright." (R. 891). The judge found that trial counsel was aware that Mr. could not be habitualized on September 15, 2010. (R. 891). He concluded that trial counsel could not have predicted that the information would be amended to charge home invasion robbery. (R. 891). He found that counsel's testimony was "truthful, compelling and accurate. He clearly had

that defendant's best interest as a priority and did an excellent job of investigating all possible defenses and giving excellent representation, both before and during the trial. The defendant is simply not happy with the result." (R. 891). The court concluded that Mr. had "failed to meet his burden to show entitlement to any relief" without reference to either prong of the Strickland test. (R. 892).

Mr. appeals.

SUMMARY OF ARGUMENT

Mr. 's case suffered from a fundamental breakdown during the plea negotiation stages. The evidentiary hearing clearly shows that the State proceeded as though Mr. were a habitual felony offender ("HFO") subject to a 30-year sentence on the original charges. The 15-year offer demonstrated the State's willingness to negotiate. Trial counsel clearly did not realize that Mr. was not an HFO until it was too late to negotiate any agreement on that basis.

Additionally, trial counsel rendered ineffective assistance by failing to discover the meaning of the lot numbers on the bottles of Heineken in time to advise Mr. whether a plea was in his interests. Trial counsel unreasonably delayed investigation until after the plea Mr. had been charged with a felony punishable by life. Although the jury did not hear the exact meaning of the numbers, they may have concluded that the only Heineken bottles in the world to share the numbers were the ones in the six-pack at the victim's house. Trial counsel should have determined earlier that he could not present evidence to ameliorate the impact of the identification numbers.

Finally, by focusing on the absence of a Heineken representative at trial, the trial court failed to engage with the relevant legal question:

whether it was reasonably likely that Mr. would have accepted a plea offer if he had been advised that the lot numbers on the bottles were the functional equivalent of fingerprints found at the scene. Counsel's subsequent performance at trial, while perhaps not constitutionally deficient, is not relevant to whether Mr. would have accepted a plea offer if he had been adequately advised.

ARGUMENT

I. Standard of review.

In Rule 3.850 proceedings, this Court reviews factual findings made following an evidentiary hearing for competent substantial evidence. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). This standard also applies to findings of fact supporting a trial court's conclusion that a defendant has failed to satisfy his burden of proof in postconviction proceedings. Johnson v. State, 921 So. 2d 490, 501 (Fla. 2005). "Testimony that is not impeached, discredited, or controverted, nor is self-contradicting or physically impossible, must be accepted by the trial court." State v. Williams, 119 So. 3d 544, 545 (Fla. 1st DCA 2013) (citing State v. Daniel, 665 So. 2d 1040, 1044 n.2 (Fla. 1995); State v. G.H., 549 So. 2d 1148, 1149 (Fla. 3d DCA 1989)). Adverse credibility determinations must be supported by competent, substantial evidence as well. Bell v. State, 965 So. 2d 48, 63 (Fla. 2007).

However, the elements of an ineffectiveness claim are mixed questions of law and fact. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). Issues of application of law to fact are reviewed *de novo*.

II. The lower court erred by not finding counsel's performance constitutionally deficient.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Ferrell v. State, 29 So. 3d 959, 969 (Fla. 2010) (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted)). That is, the movant must demonstrate that counsel's deficient performance was such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Hoskins v. State, 75 So. 3d 250, 254 (Fla. 2011) (quoting Strickland, 466 U.S. at 694). A defendant need not show "'that counsel's deficient conduct more likely than not altered the outcome,'" only that there exists "'a probability sufficient to undermine confidence in [that]

outcome.'" Porter v. McCollum, 558 U.S. 30, 44 (2009) (quoting Strickland, 466 U.S. at 693-94); see generally Simmons v. State, 105 So. 3d 475 (Fla. 2012).

The plea negotiation process is "a critical stage in criminal adjudication, which warrants the same constitutional guarantee of effective assistance as trial proceedings." Cottle v. State, 733 So. 2d 963, 965 (Fla. 1999). "Because 'an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney,' counsel have a duty to supply criminal defendants with necessary and accurate information." Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986) (quoting Brady v. United States, 397 U.S. 742, 748 n.6 (1970)).

When a defendant rejects a favorable plea bargain, relief is appropriate when counsel's misadvice is the reason the defendant chose to stand trial. Morgan v. State, 991 So. 2d 835, 839-840 (Fla. 2008); overruled in part by Alcorn v. State, 121 So. 3d 419 (Fla. 2013). Such a defendant "must show that that, but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court [and] that the court would have accepted its terms," as well as a more serious conviction or sentence after trial. Lafler v. Cooper, 132 S. Ct. 1376, 1375 (2012). As the Florida Supreme Court

recently explained, prejudice exists when "the defendant has shown a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Alcorn, 121 So. 3d at 432.

Where, as here, a defendant is convicted of more serious charges after a trial, the proper remedy is to order the State to re-offer the plea agreement. Id. at 429.

A. Counsel unreasonably failed to discover that Mr. was not a habitual felony offender until the initial plea offer expired.

"[C]riminal justice today is for the most part a system of pleas, not a system of trials," and the Sixth Amendment must be interpreted to "tak[e] account of the central role plea bargaining plays in securing convictions and determining sentences." Lafler, 132 S. Ct. at 1388. "Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). Here, trial counsel's "unreasonably inaccurate" failure to advise Mr. that he was not a habitual offender was constitutionally deficient. Goudie v. United States, 323 F. Supp. 2d 1320, 1330 (S.D. Fla. 2004). The two notices of intent to habitualize filed on July 21 and August 5, 2010 triggered a duty to determine whether Mr. could be habitualized.

The lower court's conclusion that trial counsel learned Mr. was not HFO-eligible on September 15, 2011 (R. 891) runs contrary to trial counsel's repeated representations that his notation on the file indicated that he learned on September 21, 2010. (HT 35, 52, 85). Trial counsel does not appear to state that he knew on September 15 that Mr. was not HFO eligible. (HT 56; but see HT 82-83). But regardless of which date this Court accepts, by the time trial counsel learned that the offer was a plea to the maximum sentence, it was too late to negotiate based on the initial charge. The lower court's conclusion that no one could have predicted that more serious charges would be filed (R. 891) is belied by the fact that trial counsel testified to his concern that Mr. might be charged with burglary with a battery. (HT 93-94). This cannot be considered constitutionally effective performance.

B. Counsel unreasonably failed to investigate the single most important piece of evidence until the amended indictment charged Mr. with a life-eligible crime.

"Counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary." Terrell v. State, 9 So. 3d 1284, 1290 (Fla. 4th DCA 2009) (citing Strickland, 466 U.S. at 691). In addition to misadvice about his sentencing exposure, trial counsel rendered deficient performance by failing to

investigate the identification numbers and apprise Mr. of the strength of the State's case. Mr. was accused of a serious crime for which the maximum appeared to be thirty years. Nevertheless, trial counsel waited until Mr. was charged with a felony punishable by life to start his investigation. (HT 81).

The lower court's finding that "no evidence of the numbers on any beer bottle were admitted at trial" (R. 890) is clearly erroneous, because the jury heard that the numbers matched and that the investigator felt they were significant. (Tr. 314-15). Because counsel's unfounded "hope[] that there would be thousands upon thousands of beers with that same lot number" (HT 87) did not materialize, he was not able to present any evidence that would let the jury conclude that the numbers were not strong evidence. In fact, there was no particular reason for the jury to conclude that any other six-packs of Heineken in the world would have the same numbers. Counsel should have understood the need to determine quickly whether he could produce evidence that diluted the strength of the identification numbers, because otherwise Mr. 's case was virtually unwinnable.

III. The Lower Court erred in finding that counsel's deficient performance did not prejudice Mr. .

The lower court considered Mr. "adamant" about having a trial, and found that he was made aware of the plea offer and rejected it. (R. 890-91). However, the relevant question is whether there is a reasonable probability

that Mr. would have accepted the plea offer if he had been adequately advised. As Judge LaRose explained in a concurring opinion outlining the proper inquiry:

> the postconviction court need not plumb the ether to determine whether the defendant would have accepted the plea had trial counsel advised him of all pertinent matters. The postconviction court need not find even that the defendant more likely than not would have accepted the plea. Rather, the probability that the defendant would have taken the plea need be only sufficient to undermine confidence that he would have rejected the plea regardless.

Odegaard v. State, 137 So. 3d 505, 512 (Fla. 2d DCA 2014).

Here, where the evidence of guilt was actually overwhelming, there is certainly an "objectively reasonable probability" that Mr. would not have gone to trial. Capalbo v. State, 73 So. 3d 838, 842 (Fla. 4th DCA 2011). The likelihood that Mr. would have negotiated a more favorable sentence if the parties had understood that he was not HFO eligible ought to be factored into this prejudice inquiry as well.

CONCLUSION

When it appeared that Mr. faced a thirty-year sentence for the charge of burglary, the State determined that fifteen years was enough. Mr. lost an opportunity to negotiate based on his actual sentencing exposure of fifteen years. He lost an opportunity to plead to a lesser charge when he learned

too late the damning evidence against him. After losing at trial, the judge sentenced him to 20 years, less than the 25 years the state demanded in the second offer. Mr. deserves a chance to go through the plea process with his eyes open. Accordingly, he asks this Court to reverse his conviction and order the State to re-offer the initial plea: fifteen years for burglary.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2015, a true and correct copy of the foregoing has been furnished by email to the Attorney General's Office, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, via email to: crimappwpb@myfloridalegal.com

/s/ Gray Proctor

CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that this Initial Brief of Appellant complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

/s/ Gray Proctor