18-5705 ORIGINAL

NO 18-

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE EASTERLY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SECOND DISTRICT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

GEORGE EASTERLY
Pro Se
715 Sunset Ave.
Auburndale FL 33823
Phone: (863) 582-5522

QUESTIONS PRESENTED

Question #1: Whether the Florida Court of Appeals unreasonably applied this Court's precedent when it upheld summary denial of a postconviction claim alleging ineffective assistance of counsel because the lawyer failed to properly investigate exculpatory and impeaching evidence of a controlled phone call, in conjunction with an interview, preventing counsel from properly advising Petitioner of the law relative to the facts, rendering his plea involuntary?

Question #2: Whether the Florida Court of Appeals unreasonably applied this Court's precedent when it upheld summary denial of a postconviction claim alleging ineffective assistance of counsel because Petitioner's plea was not knowingly, voluntarily or intelligently entered, due to counsel's multiple alleged acts or omissions?

Question #3: Whether the Florida Court of Appeals unreasonably applied this Court's precedent when it upheld summary denial of a postconviction claim alleging ineffective assistance of counsel because the lawyer failed to challenge the validity of the probable cause affidavit(s) and search warrant used to search the defendant's home and seize his computer, where the affidavit(s) were unsigned; based upon perjury; and/or otherwise deficient per the report of a forensic examiner?

LIST OF PARTIES

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JURISDICTION

The date on which Florida's Second District Court of Appeals decided Petitioner's case was March 16, 2018. A copy of that decision is provided in Appendix A. A timely petition for rehearing, rehearing *en banc*, certification and/or written opinion was denied by Florida's Second District Court of Appeals on May 24, 2018. A copy of that order denying rehearing, etc., is provided in Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "[n]o State shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, s. 1.

The Fifth Amendment provides, in relevant part, no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. 5.

A copy of the Sixth Amendment is provided in Appendix H.

The Due Process Clause of Article I of the Florida Constitution provides: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

STATEMENT OF THE CASE

On January 22, 2009, while returning home from work, Petitioner was stopped on the road and arrested by the Collier County Sheriff's Office ("CCSO"). Thereafter, Petitioner was charged with ten (10) counts of violating Section 827.0751(5)(a), Florida Statutes prohibiting sexual performance by a child, *i.e.*, child pornography. Approximately two (2) months prior, CCSO detectives obtained a warrant to search Petitioner's residence and did so, seizing Petitioner's computer. After Petitioner's arrest, he privately retained Shannon McFee, Esq., as his defense counsel. (App. G at 2). In total, Petitioner was held in jail nine hundred and ninety one days (991)

before he entered a negotiated plea upon the advice of Mr. McFee; this decision was made after Mr. McFee advised Petitioner that Mr. McFee remained unprepared to go to trial.

Specifically, on October 10, 2011, Petitioner pled *nolo contendere* to ten (10) counts of possession of child pornography in violation of Section 827.071(5)(a), Florida Statutes. (App. G at 1). Pre-plea, Petitioner was charged with a total of forty-one (41) counts of possession of child pornography. That same day, Petitioner was sentenced pursuant to plea to a term of 36.4 months Florida Department of Corrections, followed by three (3) years probation consecutive on Count Nine, and four (4) years probation on Count Ten consecutive to the three (3) years probation and the 36.4 months prison. (Id.). There was no initial appeal. Then, on October 20, 2013, Petitioner was found to have violated his probation and was sentenced to five (5) years prison on Counts 9 and 10 respectively, to be served concurrently. (Id.).

On September 30, 2013 and October 7, 2013, Petitioner filed motions for relief under Rule 3.850, Fla.R.Crim.P. On January 24, 2014, Petitioner moved to dismiss his original motion(s) for postconviction relief; and said motion was granted by the Court. On March 20, 2014 and May 14, 2014, Petitioner filed two amended motions for postconviction relief. (App. G. at 2).

Then, on August 28, 2014, Petitioner filed an Addendum to the Petitioner's "3.850" Motion for Post-Conviction Relief (the "Addendum"). The Addendum focused on Grounds 3 and 4 of Petitioner's 3.850 Motion. In it, Petitioner raised a

claim of newly discovered evidence with respect to the defense expert, Dr. Arlen Rosenbloom, relying on correspondence from the doctor stating: "'my suggesting a plea deal is at best a misunderstanding and at worst a complete fabrication...'" Dr. Rosenbloom had advised Petitioner he would have testified that: "NONE of the pictures the State intended to present as evidence of child pornography were of children under the age of 18." Petitioner also noted the favorable testimony of defense expert, Tami Loehr, who would have testified, *inter alia*, that: "I didn't find anything that showed ... any conscious efforts to knowingly possess child pornography ... Forensics allows us to go in and find all that spray. If someone is looking for child pornography, I guarantee you, we're going to find that spray somewhere on that hard drive. I didn't find anything anywhere ... If that activity was occurring, I would find something." Petitioner maintained that armed with this information, "had defense counsel been truthful about Dr. Rosenbloom's knowledge and what he intended to testify to..." Petitioner would not have pled but insisted on a trial wherein "the State could not have proven their case."

Then, on September 11, 2014, the Circuit Court issued an Order Striking Defendant's Addendum to Petitioner's "3.850" Motion for Post Conviction Relief as a Nullity. Thereafter, on December 15, 2014, the judge also issued an Order Striking Ground 6 of Defendant's 3.850 Motion with Leave to Amend within Thirty Days. On December 24, 2014, Petitioner filed a Motion to Amend Ground Six of Defendant's 3.850 Motion filed on March 20, 2014 and May 14, 2014. Thereafter,

on March 19, 2015, the Hon. Frederick R. Hardt issued an Order Directing that an Evidentiary Hearing Be Held As To Grounds 1, 2, 3 and 6 of Defendant's 3.850 Motion. (App. G at 2).

On October 19, 2015, Judge Hardt rendered a further Order on Defendant's Motion for Clarification setting some claims but not others for an evidentiary hearing. (App. F at 1). On November 23, 2015, an evidentiary hearing was held before Judge Hardt on Petitioner's Grounds 1, 2, 3, and Amended Ground 6. (App. E at 1; App. G at 2). At the hearing, the defense called the following three witnesses: Petitioner, Dr. Rosenbloom, and Ms. Loehrs. (Id.). At the conclusion of the hearing, the parties submitted closing argument to the court in writing. On September 27, 2016, a final order issued denying Petitioner's post-conviction motion in its entirety. (App. G at 1). A timely appeal followed.

On March 16, 2018, Florida's Second District Court of Appeal issued a *per curiam* affirmed opinion, denying appellate relief in this case. (App. A at 1). Thereafter, the appellate court issued on May 24, 2018, an opinion denying rehearing, rehearing en banc, certification and/or written opinion. (App. B at 1).

REASONS FOR GRANTING THE PETITION

This Court has repeatedly held that the criminal accused has the right to effective assistance of counsel under the Sixth Amendment of the U.S. Constitution, as applied to the states by the Fourteenth Amendment of the U.S. Constitution. U.S. Const. Amend. 5, 14. As a general rule, successfully demonstrating ineffective

assistance of counsel has two steps: a claimant must prove that his counsel performed deficiently resulting in actual prejudice. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner submits that the Florida appellate court's decision to uphold the summary denial of his claims was inconsistent with both Federal and Florida precedent.

To uphold a Circuit Court's summary denial of claims raised in a motion filed pursuant to Rule 3.850, Fla.R.Crim.P., the reviewing court must be able to find that the claims are facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held by the Circuit Court, the reviewing court must accept the movant's factual allegations as true to the extent they are not refuted by the record. *See* Goforth v. State, 15 So.3d 786, 788 (Fla. 5th DCA 2009); McLin v. State, 827 So.2d 948, 954 (Fla. 2002); Foster v. State, 810 So.2d 910, 914 (Fla. 2002). "Documents prepared to refute claims in a post-conviction motion are not substitutes for an evidentiary hearing, whether they be affidavits, *Morris v. State*, 624 So.2d 864 (Fla. 2d DCA 1993), a written statement by a defense attorney responding to accusations of ineffectiveness, *Bryant v. State*, 661 So.2d 73 (Fla. 2d DCA 1995), or, as here, a court ordered response." Flores v. State, 662 So.2d 1350, 1351-1352 (Fla. 2d DCA 1995). Nor should a postconviction motion be denied without an evidentiary hearing based on information obtained after the filing of the motion and from sources outside the record. *See* Vencil v. State, 715 So.2d 334, 335-336 (Fla. 1st DCA 1998). *See also* Dessin v. State, 868 So.2d 613 (Fla. 2d DCA 2004) (neither

the State nor the Court may go outside the record to refute allegations). Unless the record shows conclusively that the movant is entitled to no relief, the Circuit Court's order summarily denying the motion must be reversed and the case remanded for evidentiary hearing. *See* Rule 9.141(b)(2)(D); Moore v. State, 870 So 2d 74, 75 (Fla. 2nd DCA 2003).

For these reasons, this Court should grant review:

I. The Decision Below Is Wrong

A. Question #1 should be answered in the affirmative.

Petitioner maintains that in Ground 4 of his Motion to Vacate Sentence filed on March 20, 2014, he stated a claim that he was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution because his counsel failed to properly investigate exculpatory and impeaching evidence of a controlled phone call, in conjunction with an interview of "Jr." wherein "Jr." admitted to Rapisarda. Specifically, this was the controlled phone call which took place between Petitioner and his son, "Jr.," digitally recorded by law enforcement, which became the lynch-pin of the State's case. Petitioner alleged in his March 20, 2014 Motion that he had informed his counsel about the true contents of the controlled phone call, and had asked his counsel to get a tape and/or transcript of it, because the report furnished to the defense in discovery appeared to have been edited in numerous ways. Also, in Ground 4 of his March 20, 2014 Motion, Petitioner alleged that he had advised his counsel that "Jr." had a motive to lie and

fabricate; that Petitioner had never informed "Jr." that he was allegedly looking at, much less downloading, images of child pornography on his computer or any other computer; and that the controlled phone call, if heard in its entirety, would have demonstrated that "Jr."'s information was clearly unreliable and an insufficient basis for either a probable cause affidavit or a search warrant; and that therefore, under the totality of the circumstances, the prosecution of Petitioner was based upon a fabrication and false arrest. Id.

Additionally, Petitioner alleged in his March 20, 2014 Motion that his counsel never requested a true and correct copy of the controlled phone call; and that his counsel's acts or omissions were clearly unreasonable and deficient performance--in violation of the Sixth Amendment of the U.S. Constitution--under Rule 3.850. *See e.g.,* Trevino v. State, 980 So.2d 517, 519 (Fla. 2d DCA 2007) (evidentiary hearing required on Trevino's post-conviction claim that his counsel had failed to secure documentary evidence capable of bolstering his defense); Chavers v. State, 876 So.2d 715 (Fla. 4th DCA 2004) (evidentiary hearing required on Chavers' 3.850 claim that his counsel failed to secure videotapes which would have exonerated him). Moreover, in his March 20, 2014 Motion, Petitioner also pointed out that a simple investigation could have, and indeed would have, provided his counsel with a plethora of impeachment evidence against "Jr.," the prosecution's key witness. It is well-settled in Florida that "a defendant has a strong interest in discrediting a crucial state witness by showing bias, an interest in the outcome, or a possible ulterior

motive for his ... testimony." Parcell v. State, 735 So.2d 579, 580 (Fla. 4th DCA 1999. Yet, as duly pled in Petitioner's Motion, no such vital investigation took place. Finally, Petitioner alleged in his March 20, 2014 Motion that had he been aware of his counsel's deficiencies, he would not have pled, but insisted on a trial.

Thereafter, Petitioner restyled Ground 4 of his March 20, 2014 Motion as Ground 5 of his May 9, 2014 Motion. In that further pleading, Petitioner reasserted his prior claim(s) (*i.e.*, from Ground 4, concerning his counsel's failure to properly investigate exculpatory and impaching evidence related to the controlled phone call) in their entirety. However, Petitioner added that the deficient performance prevented counsel from properly advising Petitioner of the law in relation to the facts, thereby rendering his plea involuntary, McMann v. Richardson, 397 U.S. 759 (1970), thus presenting a *prima facie* case of ineffective assistance. Anderson v. State, 665 So.2d 281, 283 (Fla. 5th DCA 1995). This claim should not have been summarily denied by the Circuit Court on the basis that a movant cannot raise issues in a Rule 3.850 motion known to him at the time of the plea. *See* Gidney v. State, 925 So.2d 1076 (Fla. 4th DCA 2006). To do otherwise ignores this Court's binding precedent in McMann, *supra*.

This Court has repeatedly held that it is incumbent on defense counsel to properly advise a client prior to plea. *See* U.S. Const. Amend. 5, 6, 14; Fla. Const. Art. I, Sec. 9. That did not happen here. Thus, on Ground 4 of his March 20, 2014 Motion and Ground 5 of his May 9, 2014 Motion, Petitioner stated a claim. Nor

should this claim have been summarily denied by the Circuit Court to the extent that Petitioner did not detail what portions of the conversation were redacted and how that would exculpate him or impeach "Jr." Even assuming *arguendo* that any aspect of this claim was not adequately pled, Petitioner should have been permitted to re-plead it once as a matter of right consistent with Federal and State constitutional due process, principles of fair play, and substantial justice. *See* U.S. Const. Amend. 5, Fla. Const. Art. I, Sec. 9; Spera v. State, 971 So.2d 754 (Fla. 2007). Hence, it is readily apparent that Petitioner stated a claim for relief here. Because the record attached to the Circuit Court's order did not conclusively refute this claim, the Florida Court of Appeal's decision upholding the summary denial was contrary to this Court's precedent and should be reversed.

B. Question #2 should be answered in the affirmative.

Furthermore, Petitioner stated a claim in Ground 7 of his Motion to Vacate Sentence filed on March 20, 2014, that his plea was not knowingly, voluntarily or intelligently entered as a direct result of counsel's acts or omissions. Petitioner duly noted that "[t]he long standing test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among alternative courses open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). And that one cannot voluntarily waive a defense or right if one is not told about its availability in the case. *See e.g.* Boykin v. Alabama, 395 U.S. 238, 243 n. 5 (1969); Ethridge v. State, 766 So.2d 413 (Fla. 4th DCA 2000). This principle holds true regardless of whether

counsel failed to advise of a viable defense, Seigel v. State, 586 So.2d 1341 (Fla. 5th DCA 1991), failed to investigate the facts of the case, Thompson v. State, 732 So.2d 1122 (Fla. 4th DCA 1999), failed to explain the elements/charges, Henderson v. Morgan, 426 U.S. 637, 645, 647 n. 8 (1976), or failed to investigate possible impeaching or exulpatory evidence, Anderson v. Johnson, 338 F.3d 382 (5th Cir. 2003). *See also.*, pages 35-37, *infra* (re: the unsigned and/or perjured probable cause affidavit(s) underlying the illegal search warrant to investigate/remove evidence from Mr. Easterly's home). Nor, Petitioner asserted, was there any need to allege prejudice, Panchu v. State, 1 So.3d 1243 (Fla. 4th DCA 2009), though if allegations of prejudice were necessary, it would be that counsel's errors adversely affected Petitioner's decision whether to accept the plea. *See* Clark v. State, 855 So.2d 691 (Fla. 2d DCA 2003); Aebi v. State, 842 So.2d 888 (Fla. 2d DCA 2003).

Here, Petitioner maintained that his sworn allegations, both individually and cumulatively, established that he was unable to enter a knowing and voluntary plea, thus rendering his plea void. *See* McCarthy v. United States, 394 U.S. 459, 465-67 (1967). ***For example, Petitioner alleged that after waiting almost three (3) years in the county jail, counsel simply implied that Petitioner either accept the State's plea offer or be prepared to remain in jail indefinitely because counsel could not say when he would have time to work on Petitioner's case.*** Fearing that counsel would be unprepared for trial then or in the forseeable future, Petitioner was persuaded to plea when counsel falsely represented that Dr. Rosenbloom had said it

was in his best interest to accept the State's offer—a false statement Dr. Rosenbloom never made to counsel. Petitioner alleged further that counsel's failure to investigate the facts and law of the case; to prepare a defense; to explain the necessary elements of the offenses; or to consult with Petitioner re: the viable defense(s) stemming from the expert(s)' deposition(s), placed Petitioner in fear that counsel was unprepared to proceed and thus rendered the plea void. *See* Thompson, *supra*; Lanier, *supra*; Siegel, *supra*; *and* Henderson, *supra*. Since it could not be assumed that counsel had properly informed Petitioner, Labady v. State, 783 So.2d 275 (Fla. 3d DCA 2000), and Petitioner's claims re: personal communications with counsel could not be refuted by the record, the Circuit Court should have set this ground (reasserted in Petitioner's May 9, 2014 Motion to Vacate Sentence as Ground 8) for evidentiary hearing. Rodriguez v. State, 777 So.2d 1143 (Fla. 3d DCA 2001). Instead, the Circuit Court delayed ruling on this ground until after the evidentiary hearing and then summarily denied Petitioner's claim. Because the record attached to the order(s) did not conclusively refute this ground, the Florida Court of Appeal's decision upholding the summary denial was contrary to this Court's precedent and should be reversed.

C. Question #3 should be answered in the affirmative.

Furthermore, Petitioner stated a claim in Ground 7 of his Motion to Vacate Sentence filed on May 9, 2014, that he was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution when

Mr. McFee rendered ineffective assistance of counsel by failing to move to dismiss and challenge the validity of the probable cause affidavit and search warrant used to search his home and seize his computer based on the October 6, 2009 deposition of investigator Scott Rapisarda and Ms. Loehrs' report of forensic examination. Petitioner's claim therein detailed numerous bases for a lack of evidence, discrepancies, and deficiencies of Rapisarda's so-called investigation. *See e.g.*, pages 35-37, *infra* (re: the unsigned and/or perjured probable cause affidavit(s) underlying the illegal search warrant to investigate/remove evidence from Mr. Easterly's home).

Furthermore, the forensic examination report of Ms. Loehrs demonstrated that there insufficient evidence to support probable cause, much less a search warrant, despite the standard of great deference which applies to that determination. *See* U.S. Const. Amend. 4; Fla.Stat. s. 933.02(3). Here there was no probable cause, period. Two elements had to be proven with the probable cause affidavit. As for the first, the commission element (*i.e.*, that a particular person committed a crime), this could not be established because it could not be presumed that Petitioner's son, "Jr.," was not the person who had accessed the images because they were in unallocated spaces, indicating the files had all been deleted. None of the files would have been accessible to Petitioner without the use of specialized forensic tools, which he did not have the skills to use, whereas Petitioner's son, "Jr.," did. As Ms. Loehrs' report reflects, "Jr." was an information security enthusiast in computer science, and a member of an underground "crew" who found exploits in software applications, used

them to intrude on other devices and then report them--and "Jr." had lived with Petitioner for about six months to a year. As for the second element, the nexus element (*i.e.*, that the evidence relevant to the probable criminality was likely to be located at the place searched) this too was deficient here. In particular, "Jr." swore that while scanning Petitioner's computer for viruses, he came across pictures in the My Documents folder on the computer with such names as 12 yo, Lolita and Raygold, which he associated with child pornography. However, none of those names were found on Petitioner's computer hard drive. Under these facts and circumstances, there was insufficient evidence for probable cause for a warrant without a prima facie showing of criminal activity, and counsel was ineffective for failure to challenge the validity of the warrant or move for dismissal--as well as to suppress the evidence seized from Petitioner's home.

Since this ground could not be conclusively refuted by the record, the Circuit Court should have set it for an evidentiary hearing. But this did not happen. Rather, the lower court delayed its ruling on this ground until after the evidentiary hearing and then went on to summarily deny Appellant's claim. Because the record attached to the order(s) did not conclusively refute the claim, the Florida Court of Appeal's decision upholding the summary denial was contrary to this Court's precedent and should be reversed.

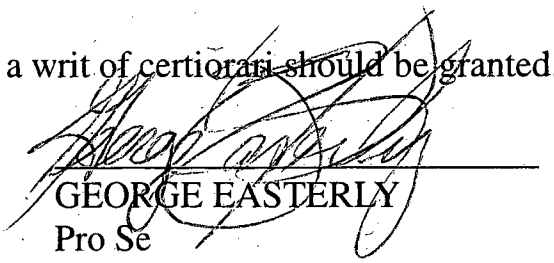
II. THIS CASE IS AN EXCELLENT VEHICLE

As noted above, this case would allow the Court to provide guidance on the

Sixth Amendment's safeguards against involuntary pleas and ineffective assistance of counsel, to state and federal courts applying its precedent in the first instance, and to habeas courts.

CONCLUSION

Therefore, this petition for a writ of certiorari should be granted.



GEORGE EASTERLY
Pro Se
715 Sunset Ave.
Auburndale FL 33823
Phone: (863) 582-5522