No._____

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK KNIGHT PETITIONER

VS.

JULIE L. JONES – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DERRICK KNIGHT
APALACHEE C. I. WEST UNIT
52 W. UNIT DR., (F2-155S)
SNEADS, FL. (32460-4162)
Pro Se-Petitioner

QUESTIONS PRESENTED

1) Was Petitioner denied his constitutional right to effective assistance of appellate counsel when his appellate counsel failed to raise an issue of trial court error for failure to grant a motion for judgment of acquittal & motion for new trial?

2) Is the State of Florida bound by the Constitution to seek the truth?

3) Must the State of Florida bring forth evidence that they have in their possession even if it would demonstrate a not guilty verdict?

4) Were Petitioner's convictions obtained by a Brady violation of the State withholding impeachment evidence from the defense?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Pamela Jo Bondi
Attorney General, State of Florida

Beatric Butchko
Circuit Court Judge, Eleventh Judicial Circuit

Douglas J. Glaid
Senior Assistant Attorney General, State of Florida

Milton Hirsch
Circuit Judge, (11th) Judicial Circuit

Julie L. Jones
Secretary, FDOC

Robert Kalter
Asst. PD, Counsel\direct appeal

James L. King
U.S. District Judge, So. Dist of Florida

Derrick J. Knight
Petitioner

Edwin G. Jones
U.S. Magistrate, So. Dist of Florida

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was March 7, 2018.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 24, 2018, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th; 6th and 14th Amendments, U.S. Constitution

STATEMENT OF THE FACTS

Petitioner, was charged by amended information in the 11th Judicial Circuit Court for Dade County, Florida, case #F03-28569, with: (1) second degree murder; (2) aggravated battery with discharge of a firearm causing great bodily harm; (3) shooting a deadly missile; (4) shooting a deadly missile; (5) possession of cocaine; and, (6) possession of drug paraphernalia.

Petitioner entered a not guilty plea and took his case to trial. After a jury trial, on August 3, 2007, the jury found Knight guilty as charged except for Count 1, for which he was convicted of the lesser-included offense of manslaughter by discharging a firearm which resulted in death or great bodily harm, and Count 4, on which the jury was hung. Mr. Knight was sentenced to: (1) Count 1, 15 years; (2) Count 2, a 25 year minimum mandatory sentence, consecutive to Count 1;(3) Count 3, 15 years to run concurrent with the other charges; and, (4) Count 5, no sentence was imposed.

Petitioner pursued a timely direct appeal to the Third District Court of Appeal of Florida. The Third DCA affirmed in a written opinion on August 12, 2009, and denied rehearing on September 1, 2009. Knight v. State, 15 So.3d 936 (Fla. 3rd DCA 2009). The mandate issued on September 18, 2009.

Petitioner filed a Florida Rule of Criminal Procedure 3.800(c) motion to modify sentence in the trial court on September 8, 2009. The court summarily

denied the motion on September 21, 2009. The Third DCA dismissed the appeal. Knight v. State, 2009 WL 4281370 (Fla. 3rd DCA 2009).

On December 7, 2009, Petitioner filed with the trial court a Florida Rule 3.850 motion for post-conviction relief. On March 26, 2010, the trial court denied the 3.850 motion, and denied rehearing on October 22, 2010. The Third DCA *per curiam* affirmed the denial of the 3.850, denied rehearing, and issued its mandate on February 14, 2011. Knight v. State, 53 So.3d 234 (Fla. 3d DCA 2011). The Florida Supreme Court dismissed a petition for discretionary review for lack of jurisdiction on March 22, 2011. Knight v. State, 59 So.3d 108 (Fla. 2011).

On May 14, 2010, Petitioner filed a Florida Rule 3.800 motion to correct sentence. The trial court denied the motion on November 16, 2010. The Third DCA *per curiam* affirmed with a case citation, denied rehearing, and issued its mandate on March 31, 2011. Knight v. State, 54 So.3d 630 (Fla. 3d DCA 2011). The Florida Supreme Court dismissed a petition for discretionary review for lack of jurisdiction on June 17, 2011. Knight v. State, 65 So.3d 516 (Fla. 2011).

Petitioner filed a second Rule 3.850 motion on June 3, 2010, in which he argued that newly discovered evidence revealed that the State committed discovery violations. The trial court denied relief on October 22, 2010. Petitioner filed a State habeas petition seeking belated appeal, which the Third DCA granted on April 28,

2011. The court *per curiam* affirmed and denied rehearing. Knight v. State, 64 So.3d 689 (Fla. 3d DCA 2011). The mandate issued on July 25, 2011.

On December 27, 2010, Petitioner filed a state habeas corpus petition arguing, *inter alia*, that appellate counsel was ineffective for failing to raise the following grounds on direct appeal: (1) there was no substantive evidence to prove the elements of the charged offenses; (2) the trial court abused its discretion by failing to interview a juror who may have been threatened or intimidated; and, (3) vindictive sentencing. The Third DCA denied relief on February 4, 2011. Knight v. State, 2011 WL 781900 (Fla. 3d DCA 2011).

Petitioner filed a second Rule 3.800 motion to correct illegal sentence on April 29, 2011. The trial court denied relief on June 1, 2011. The Third DCA *per curiam* affirmed and denied rehearing. Knight v. State, 75 So.3d 738 (Fla. 3d DCA 2011). The mandate issued on December 29, 2011.

On August 23, 2011, Petitioner filed a third Rule 3.850 motion for post-conviction relief. The trial court denied relief on November 23, 2011, and denied rehearing on January 24, 2012. The Third DCA *per curiam* affirmed and denied rehearing. Knight v. State, 90 So.3d 293 (Fla. 3d DCA 2012). The mandate issued on June 15, 2012.

Petitioner filed a third Rule 3.800 motion to correct illegal sentence on February 7, 2012. The trial court denied relief on March 1, 2012. The Third DCA

per curiam affirmed and denied rehearing and rehearing *en banc*. Knight v. State, 90 So.3d 293 (Fla. 3d DCA 2012). The mandate issued on June 15, 2012.

On February 15, 2012, Petitioner filed a fourth Rule 3.850 motion for post-conviction relief. The trial court denied relief on May4, 2012. On May 15, 2013, the Third DCA affirmed the 3.850 denial in a citation affirmance. Knight v. State, 114 So.3d 351 (Fla. 3d DCA 2013). A motion for rehearing was denied on June 17, 2013. The mandate issued on July 3, 2013. The Florida Supreme Court denied a petition for review on April 1, 2014.

On April 17, 2012, Petitioner filed a Title 28 U.S.C. § 2254 petition for writ of habeas corpus with this Honorable Court. Petitioner's § 2254 petition was dismissed without prejudice on February 14, 2013.

On November 12, 2013, Petitioner filed a Rule 3.800 motion to correct illegal sentence. On May 14, 2014, the 3.800 was denied. Petitioner thereafter filed a petition for belated appeal with the Third DCA. On August 26, 2014, Mr. Knight was granted a belated appeal. On March 11, 2015, the Third DCA issued a *per curiam* affirmance of the denial of his 3.800 motion. A mandate was issued on April 22, 2015. Thereafter the mandate was recalled and a new *per curiam* affirmance was issued on May 20, 2015. The Mandate was issued on July 9, 2015. An application for review by the Florida Supreme Court was dismissed for lack of jurisdiction on December 21, 2015.

On October 12, 2015, Petitioner filed a petition for all writs jurisdiction with the Florida Supreme Court. Said petition was dismissed for lack of jurisdiction on December 21, 2015.

STATEMENT OF THE CASE

Pretrial

Prior to the start of Petitioner's trial, the trial Judge initiated plea discussions between the State and Petitioner. The following dialogue occurred:

> THE COURT: Has the State made a plea offer in this case?
>
> MS. WEINTRAUB [prosecutor]: We have and it has been rejected.
>
> THE COURT: What was the State's offer?
>
> MS. WIENTRAUUB: Five years straight time **with no credit for time served.**
>
> MS. PECKINS [defense counsel]: There is a little discrepancy of what was made of a plea offer it does not make that much of a difference at this point because the defendant has rejected it but the State's recollection, my recollection indicated and it's written in my file that I have in my car because I didn't bring it in for the jury selection was that the State offer came down to three years with credit time served or two years with no credit time served.

Thereafter, the trial judge indicated that he wished to discuss the plea offer with Petitioner, and the following dialogue occurred:

> THE COURT: Mr. Knight, it is my understanding from what the State just informed me that at some point there had been an offer of five years in state prison. Do you have any recollection of that being a plea offer that was made?

THE DEFENDANT [Mr. Knight]: Mr. Peckins came to me but it was not five years, it was like three years or something like that.

THE COURT: Now, are you interested in a plea at all in this case?

MR. PECKINS: May I respond in that regard? The defendant would seriously consider a plea offer that did not entail hi returning to prison so, he has been on house arrest for the past three or four years with absolutely no problems. He established and runs a business that he was getting going at the time of this incident, when it occurred. He's been quite successful at it. As a matter of fact, he has a new baby that was born the last few months. His life is headed in a good direction and he would be in extreme, extreme difficult thing for him to do to accept any plea offer that would have him return to prison.

However, if there was some plea offer made that possibly had a limited amount of time in jail whether it was served in the county jail or even if was something in state prison that was somewhat more reasonable, we would certainly be taking it very seriously because of the risk involved in this case and only because of the risk.

THE COURT: Ms. Weintraub, is the five years still on the table?

MS. WEINTRAUB: Yes.

THE COURT: **Would you contemplate a lesser plea offer**?

MS. WEINTRAUB: No.

MR. PECKINS: And I brought this up to Ms. Weintraub and she adamantly against it because he's been on house arrest for this period of time and has been in custody of the department of corrections. It is discretionary with the Court whether to award him credit for time served for that time on any sentence. If the court were amenable to that even though the State is objecting to it, I would seriously talk to him about accepting such an offer.

THE COURT: At this juncture, I will not give him credit for time served for being out and maybe that is something that we can talk about later if there is a conviction in this case I do not know but - -

MR. PECKINS: It will not do any good if he is sentenced to life.

THE COURT: **That is the presumption.** Are you interested in the five year plea offer that the State is making I have to ask here what we're doing this is a technicality that this is your trial this is your time as well as the State of Florida but this is your life you know and now is the time were before trial I get a chance to see how you are doing how your thought process is because I do not know what can happen later. I mean, you can get a not guilty or you can get a conviction and if you do get a conviction you get sentenced to more time I do not want you to come back and say, oh my gosh I would have taken five years and I didn't so, I want you to take a moment I will ask that your lawyer sit next to you one more time and you two have a conversation for one last time about this five years and I want you to tell me what you want to do, okay?(emphasis added).

After telling Petitioner that he needed to further think over the States plea offer, the trial court said that it was not going to involve itself in the plea negotiations and noted that if Petitioner accepted the plea offer, he would get credit for time served in jail. Thereafter, the trial court did further involve itself in the plea negotiations. Defense counsel informed the judge that the prosecutor said she would not agree to credit for time served. The court then stated to petitioner that if he took a plea, "I will give you time served for what you did in jail but not for what you did on house arrest. Do you want a couple of minutes to speak with your lawyer in private?" Petitioner stated that he did not want to speak with his lawyer any further about the plea. The court then asked, "What is your decision? Are you interested in the plea?"

Trial:

On October 17, 2003, Luis Romero, Chris Marson, and Jonathan Ramesar were driving around Dade County, intoxicated on beer and high on Xanax, when they decided to go to Petitioner's house around midnight to try and purchase Xanax. According to Ramesar, Luis Romero parked his car in front of Petitioner's house and started to walk up to the front door. Ramesar said that as Romero approached the front of Petitioner's house, Ramesar lost sight of Romero. According to Ramesar, there were several people, three females and two males, in front of the house. Ramesar said that he did not see Romero speak with Petitioner. At that time, Ramesar said that he did hear Romero start to argue with someone. Several seconds later, Ramesar heard two shots fired, but he did not see who fired the shots.

After the shots were fired, Ramesar testified that Marson exited the car to see what was happening. Marson had his hands up in the air and was saying, "What's up? What's up?" as if he were running into a fight. Several seconds later, Ran east saw Romero and Marson running back to the car. As Romero and Marson were running back to the car, Ramesar said that he heard "a good 40 shot [sic] were fired." Ramesar testified that he did not see who was firing at the car, saying, "I couldn't tell you who was firing the shots to be honest with you." Ramesar further said, "I know [the shots] were coming from Petitioner's house, but I

couldn't see who was shooting." When Romero and Marson got back into the car, they started to drive away. Ramesar heard several more gunshots as they were driving away.

During cross-examination, Rameasr testified that Romero had been arrested on a previous occasion for possessing a firearm at school and that he had been involved in several fights at school. Ramesar also revealed that he had given two statements to the police. In one if the statements, Ramesar told Detective Gallagher that as Romero got back in the car, prior to Romero being shot, Romero had fired four to five shots in the direction of Petitioner's house. Ramesar also told the detective that on a prior occasion, Romero had said that he wanted to rob Petitioner. Ramesar was confronted at trial with said statements to Detective to Gallagher. Ramesar claimed that he did not remember making such statements to the police.

Luis Romero testified at trial that he had complete amnesia concerning any of the events prior to being shot, and that he did not remember firing shots at Petitioner. Romero was able to testify that on the night of the shooting, he was in a car with Ramesar and Marson. He also remembered that they had gotten drunk. Romero was asked, "The night that this happened, did you own a gun?" to which he responded, "Yes." He said that he owned a .357 Glock. Mr. Romero sustained gunshot wounds to his head, leg, and back on the night of the incident.

Christopher Marson was shot in the back during the incident. The medical examiner concluded that Marson cause of death was a gunshot wound to the back.

Patrick Thompson and Loria Lijia were at Petitioner's house on the night of the shooting. Both Lijia and Thompson testified that they were standing outside of Petitioner's house when they saw Luis Romero approach the house with a shirt wrapped around his hand. According to both Lijia and Thompson, when Thompson asked what was hidden in the shirt, Romero pulled out a gun and fired it. Lijia and Thompson immediately fled the area. Thompson testified that he hid by a canal and heard several gunshots fired, but he did not see who fired the shots. Thompson did not see petitioner with a gun with a gun and did not see petitioner fire a gun during the incident.

Loria Lijia testified that when Romero shot the gun, she ran into Petitioner's house. Lijia saw Petitioner come out of a hallway in the house and go outside. Lijia testified that she could not remember if Petitioner had anything in his hands as he exited the house. The State then tried to impeach Ms. Lijia with a statement that she made to police. Defense counsel objected on the basis that use of the police report was improper to impeach her lack of memory. Defense counsel objected to the reading of Lijia's statement to the police in front of the jury. In response, the prosecutor argued that she was impeaching Lijia, stating, "if the party decides to impeach concerning a matter to determine the person doesn't remember what they

testified before is not inconsistent with the statement and there is no requirement to proceed that you have to do it in a particular way. I want to establish that she gave the statement. She actually gave it to him and then she was asked several questions and then he asked her if she can tell us about what she remembers. She says, 'I don't remember,' and doesn't go forward, I will go to the statement." Over defense counsel's objection, the trial court allowed the use of Lijia's statement to police for impeachment.

Lijia testified that she could not remember Petitioner having anything in his hands when he exited his house. In response, the State read a portion of Ms. Lijia's statement in which she supposedly told a detective that Petitioner grabbed an AK 47 and walked outside of his house with it. Ms. Lijia testified that she did not remember petitioner walking outside with a gun. The prosecutor impeached her with a portion of her statement where she supposedly said that Petitioner went outside with the AK47. Lijia testified that she did not remember the detective asking her what Petitioner did after he went outside with the AK47. The prosecutor also impeached portions of Lijia's testimony with a second statement that she gave to the police, in which Ms. Lijia supposedly said she saw Petitioner with a gun in his hands and that Petitioner shot the gun.

At the end of Lijia's testimony, defense counsel moved for a mistrial on the basis that the reading of Ms. Lijia's statement amounted to improper impeachment.

Officer David Riley of the Metro Dade Police Department was on patrol on October 7, 2003. Riley came upon a vehicle on the side of the road. Riley discovered that both Mr. Marson and Mr. Romero had been shot. According to Riley, Marson stated that he had been shot and pointed at Petitioner's house. Riley asked Ramesar what happened, and Ramesar pointed at a house and said "over there, Derrick's house." Riley noticed bullet holes in Romero's car and that the windshield was blown out. Riley then walked to Petitioner's house and saw bullet casings and a bullet hole in Petitioner's fence. While Riley was at Petitioner's house, he saw a detective retrieve a rifle from Petitioner's attic.

Officer Lacala was also riding in the neighborhood when he came upon the shooting scene. Lacala seized a gun that was outside of Romero's car and gave it to a crime scene detective. Thomas Fadal, a firearm examiner, testified that he was given numerous gun casings and projectiles to examiner and that three of the casings were fired from the .357 Glock found near Romero's car.

Detective Martinez was a crime scene investigator who was assigned to process both the scene at Romero's car and Petitioner's house. Martinez seized a .357 Glock from Romero's car and numerous bullets that were found in Petitioner's front yard. Sergeant McCully found casings outside Petitioner's house that appeared to be casings fired from an assault weapon. A consensual search of Petitioner's house revealed a rifle that was hidden in the attic. Fadal testified that

casings found on Petitioner's lawn were from the rifle that was found in Petitioner's attic.

At the conclusion of the State's case, Defense counsel moved for a judgment of acquittal on the basis that the State failed to present a prima facia case of guilty. Said motion for judgment of acquittal was denied without explanation or elaboration. Trial counsel once again raised the issue relating to the lack of sufficient evidence to carry the verdicts in a motion for new trial. Once again, the trial court denied the claim relating lack of sufficient evidence without elaboration or explanation.

REASON FOR GRANTING THE PETITION

ISSUE ONE

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE AN ISSUE OF TRIAL COURT ERROR FOR FAILURE TO GRANT A MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL

At trial, there was no substantive evidence presented that Petitioner handled or fired the gun that was linked to the shootings. The State relied on four eyewitnesses to prove their case: Luis Romero, Jonathan Ramesar, Patrick Thompson, and Lijia Loria. Not one of the witnesses presented testimony that Petitioner handled the AK47, nor did any of the witnesses testify to seeing Petitioner firing a gun on the night in question.

Luis Romero had no memory of the night of the incident, from the time before he showed up at Petitioner's house and up and through the time that he woke up in the hospital. Romero provided no eyewitness testimony as to how the shooting occurred or who was responsible for it.

Jonathan Ramesar admitted that he did not witness who fired shots at Romero and Romero's car. Ramesar stated: "I couldn't tell you who was firing the shots to be honest with you." Ramesar further said, "I know [the shots] were coming from Petitioner's house, but I couldn't see who was shooting." Never once

did Ramesar testify that he saw Petitioner possess a rifle or fire a rifle in the direction of Romero or Romero's car.

Patrick Thompson fled the scene when Luis Romero appeared and began firing his gun. Thompson hid buy a canal and heard several gunshots fired, but he did not see who fired the shots. Never once did Thompson testify that he saw Petitioner possess a rifle or fire a rifle in the direction of Romero or Romero's car.

Loria Lijia testified that when Romero shot the gun, she ran into Petitioner's house. Lijia saw Petitioner come out of a hallway in the house and go outside. Lijia testified that she could not remember if Petitioner had anything in his hand when he exited the house. Lijia testified that she did not remember seeing Petitioner handling or firing a gun on the night in question. Not once did Lijia testify that she saw Petitioner possess a rifle or fire a rifle in the direction of Romero or Romero's car. (See Appendix-E Loria statement) (See also Rule 801.)

It is true that the State was able to try to impeach Ms. Lijia's lack of memory with her statements to the police, and that such statements were read before the jury. But, a statement given under oath during a police investigation is not a statement given at an "other proceeding" and consequently is not admissible as substantive evidence in Florida under Florida Statutes § 90.801(2)(a). State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986); Pearce v. State, 880 So.2d 561, 569 (Fla. 2004). Instead, the introduction of a prior statement that is inconsistent with a

witness's present testimony is one of the main ways to impeach, i.e., attack the credibility of a witness. *See* § 90.608(1) Fla. Stat. (2001); Pearce v. State, 880 So.2d 561, 569 (Fla. 2004). But, impeachment of a witness with a prior inconsistent statement is relevant only to the witness's credibility and is not evidence of the defendant's guilt. Neal v. State, 854 So.2d 666, 669 (Fla. 2d DCA 2003).

Further, The Florida Supreme Court has found the type of conduct engaged in by the prosecutor, regarding Lijia's statements to the police, to be erroneous as a matter of law. Oliver v. State, 239 So.2d 637, 640-41 (Fla. 1st DCA 1970) *decision quashed on other grounds*, 250 So.2d 888 (Fla. 1971). In Oliver, the trial court permitted the State to impeach a court witness, one Martha Peterson, by prior inconsistent statements before the witness had given any testimony adverse to the prosecution or in favor of the codefendant Colbert. At one point in the trial the prosecutor called Martha Peterson as a witness. The prosecutor established that Peterson was acquainted with the appellants Colbert and Billy Ray Oliver. Although the prosecutor asked questions of Peterson seeking to incriminate appellant Colbert as a participant in the crime, Peterson refused to give such testimony. Id. When Peterson insisted she knew nothing about appellant Colbert's participation in the alleged offense, the prosecutor announced he wished to try to refresh Peterson's memory by reading to her questions propounded and sworn

answers given by her prior to the trial. Id. at 640-41. Objection to this procedure was made by Oliver's counsel on the ground that the State was attempting to introduce in the record substantive evidence against Oliver under the guise of seeking to impeach the witness' testimony prior to the time the witness had made any statements adverse to the prosecution or in favor of Oliver. This objection was overruled and the prosecutor was permitted to read to Peterson a series of questions asked her at an interview long prior to the trial, and the answers which she purportedly gave at that time. Such answers given in the prior interview incriminated Oliver as a participant in the crime and were damaging to his defense. The Oliver court found this to be erroneous, writing, "It is our view that the procedure followed by the prosecution in this case was erroneous as a matter of law and the objection to that procedure should have been sustained by the court." Id. Furthermore, on appeal of the Florida Supreme Court specifically approved the lower court's opinion regarding the improper impeachment of Peterson, writing, "we agree with the District Court below that the procedure used by the prosecution regarding the impeachment of Martha Peterson, a witness, was erroneous as a matter of law." Oliver v. State, 250 So.2d 888 (Fla. 1971).

Since Lijia's statement to police could not be used as evidence of Petitioner's guilt, there was absolutely no substantive evidence presented to the jury that Petitioner handled or shot the AK47 rifle. Where the State has failed to

present *prima facie* evidence of all elements of the offense charged, a judgment of acquittal should be granted. In Florida, a motion for judgment of acquittal is designed to challenge the legal sufficiency of the evidence. State v. Williams, 742 So.2d 509, 510 (Fla. 1st DCA 1999). If the State presents competent evidence to establish each element of the crime, a motion for judgment of acquittal should be denied. Id. at 510. A trial court should not grant a motion for judgment on acquittal unless the evidence, when viewed in a light most favorable to the State, fails to establish a *prima facie* case of guilt. Id.; State v. Odom, 826 So.2d 56, 59 (Fla. 2d DCA 2003).

In the instant case, the evidence presented by the State failed to establish a *prima facie* case of guilt of Counts 1 through 3. As to Count 1, manslaughter, it had to be shown that the death of Mr. Marson was caused by the act, procurement, or culpable negligence of Petitioner in relation to the charged offenses. The only matters that were submitted to the jury regarding act, procurement, or culpable negligence, were the State's reading of Lijia's statements to the police. As established above, such matters were impeachment of Lijia with prior inconsistent statement is relevant only to the witness's credibility and is not evidence of the defendant's guilt. Neal v. State, 854 So.2d 666, 669 (Fla. 2d DCA 2003).

As to Count 2, aggravated battery, it had to be shown that Petitioner intentionally or knowingly caused great bodily harm, permanent disability, or

permanent disfigurement, **or** used a deadly weapon. § 784.045, Fla. Stat. (2003). Once again, the only evidence presented at trial that showed any intentional act of Petitioner that caused bodily harm was the impeachment testimony of Ms. Lijia. The same is true for evidence that showed that Petitioner used a deadly weapon. No substantive evidence was presented to show a *prima facie* case of aggravated battery.

As to Count 3, shooting or throwing a deadly missile, it had to be shown that Petitioner shot a gun into a building. § 790.19, Fla. Stat. (2003). Once again, there was no such substantive evidence presented at trial that Petitioner shot a gun.

Petitioner's attorney moved for a judgment of acquittal at the close of the State's case. Defense counsel argued that there was no substantive evidence presented to show a *prima facie* case against Petitioner. In response to the motion for judgment of acquittal, the trial judge merely stated, "Your motion is denied," and gave no further elaboration on the reason for the denial. Trial counsel once again raised the insufficiency of the evidence in a motion for new trial, which was also denied without elaboration or explanation.

It is absolutely clear that the trial court erred in allowing the State to impeach Ms. Lijia with her statements to police when she testified that she did not remember the events. *See* Oliver v. State, 239 So.2d 637, 640-41 (Fla. 1st DCA 1970). Oliver specifically found such impeachment to be erroneous as a matter of

law. As such, the trial court was in error in allowing the Lijia's statements to the police to be read to the jury. Further, even though said statements were read to the jury, they clearly were not substantive evidence of guilt. There absolutely was no substantive evidence presented to demonstrate all of the elements of the offenses in Counts 1 through 3. Ms. Lijia's statements to the police were used either to refresh her memory or to impeach her. Either way, the statements to the police were not substantive evidence of Petitioner's guilt. Neal v. State, 854 So. 2d 666; 669 (Fla. 2d DCA 2003). In light of the above, Petitioner counsel had a strong appellate argument, which was preserved at trial with proper objections and motions, that the lower court was in error in denying Petitioner's motion for judgment of acquittal and motion for new trial. The motions for judgment of acquittal and new trial properly asserted that the State did not present a *prima facie* case of guilt on Counts 1 through 3. In the absence of Lijia's statements to police, there was no evidence that Petitioner possessed or fired a gun. There was no evidence that Petitioner took any actions to harm any of the victims. Any reasonable attorney would have raised the issue of the judgment of acquittal/motion for new trial on appeal. The failure to do so is inconceivable as a matter of strategy. Petitioner could not have had a stronger issue on appeal. Certainly the issue of the judgment of acquittal is far weightier than the issues actually submitted in Petitioner's appeal. Furthermore, the prejudice to Petitioner is obvious.

Had appellate counsel raised the improper denial of the motion for judgment of acquittal, there is a substantial likelihood that the appellate court would have granted a judgment of acquittal and vacated the convictions on Counts 1 through 3. There simply was no substantial and competent evidence presented by the State to support the convictions on Counts 1 through 3. Had the instant issue been raised on appeal, the appellate court would have recognized that the submission of Lijia's statements were erroneous as a matter of law. Further, the court would have found that necessary elements of Counts 1 through 3 were not proven, thus leading to the conclusion that, even in the light most favorable to the State, *prima facie* showing was not made in Counts 1 through 3. As such, the only possible outcome would have been for the appellate court to grant Petitioner a judgment of acquittal on Counts 1 through 3. As such Petitioner has demonstrated both ineffective assistance of appellate counsel, and resulting prejudice, as is required by Strickland.

The State Court's denial of the Instant Claim Amounts to an Unreasonable Application of Clearly Established Federal Law and an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State Court Proceedings

It is respectfully submitted that the claim submitted in Issue 1of Petitioners petition did demonstrate that the state courts' denial of relief on said claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United

States. There can be no conclusion but that appellate counsel was ineffective in failing to raise an issue of lack of competent evidence to support the conviction. As is clear from the authorities above, the procedure used to elicit Ms. Lijia's statements to the police was erroneous as a matter law. Had the issue been raised, the appellate court would have found that the introduction of Lijia's statements to the police was absolutely improper. Further, the appellate court would have ruled, in accordance with the clearly established legal authorities, that Lijia's statements were not substantive evidence of guilt, In the absence of Lijia's statements to police, there was absolutely no evidence, testimonial or physical, that showed that Petitioner handled the gun that was shot at Mr. Romero's car. In such an absence, a conviction cannot stand in Florida. When the State fails to present a *prima facie* case of guilt, the charges must be dropped. Had appellate counsel raised such an issue on appeal, it is almost certain that Counts 1 through 3 would have been vacated on appeal as the appellate court would have granted a judgment of acquittal. Counsel was clearly ineffective in failing to raise such a strong issue and Petitioner was severely prejudiced by said ineffectiveness. Any finding to the contrary must be an unreasonable application of Strickland.

Further, the state courts' denial of relief regarding said issue resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The facts and authorities

argued above clearly demonstrate that the decision denying Petitioner relief on such a claim was contrary to, and an unreasonable application of, federal law, and, further was an unreasonable determination of the facts in light of the evidence presented in the state court Proceedings. Petitioner relies on the argument asserted above. As a result Petitioner's Judgment and Sentence should be vacated and he should be released from his unconstitutional incarceration.

ISSUE TWO

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE AND ISSUE OF JUROR TAMPERING ON APPEAL

In Florida, in considering claims on juror misconduct, a court must initially determine whether the facts alleged are matters that inhere in the verdict and are subjective in nature, or are extrinsic to the verdict and objective. *See* Devoney v. State,717 So.2d 501, 502 (Fla. 1998). See also Mattox v. U.S. [36 L ed 917]. A juror is not competent to testify about matters inhering in the verdict, such as jurors' emotions, mental processes, or mistaken beliefs. *See* Baptist Hosp. V. Maler, 579 So.2d 97, 99 (Fla. 1991); State v. Hamilton, 574 So.2d 124, 128 (Fla. 1991); *see also* § 90.607(2)(b), Fla. Stat. (2003). However, jurors may testify as to "overt acts which might have prejudicially affected the jury in reaching their own verdict." Hamilton, 574 So.2d at128; *see also* Powell v. Allstate Ins. Co., 652 So.2d 354, 356 (Fla. 1995) [holding that racial statements alleged to have been

made during deliberations by some members of an all-white jury about black people plaintiffs constituted sufficient overt acts which might have prejudicially affected jury in reaching its verdict]; Marshall v. State, 854 So.2d 1235, 1240 (Fla. 2003). Under Florida law, a trial court has wide discretion in deciding whether or not to grant a new trial. First National Bank v. Bliss, 56 So.2d 922, 924 (Fla. 1952). An abuse of the discretion to grant a new trial is subject to reversal on appeal. State v. Hamilton, 574 So.2d 124, 126 (Fla. 1991).

In the instant case, trial counsel filed a motion for new trial on August 8, 2007, explaining that there was jury misconduct. Trial counsel received an email from juror Carmen Flores, explaining that "she felt coerced in the vote that she had taken," and further explained that she "felt under some physical danger based upon what some of the other jurors were doing or saying." In response to the motion for new trial, the court refused to hold a hearing to interview Flores, and instead denied the motion, station "[The jurors] were polled and they stated this was their feeling and I never received a communication from this jury and you know, [Flores] certainly could have communicated me via e-mail. My e-mail is available to anybody in the public, and I think they all had my bailiff's phone number in case there was an emergency."

The trial court was made aware of matters of improper external influence over Flores. Specifically, the trial court was told that Ms. Flores felt coerced in the

vote that she had taken, and further that she felt under some physical danger based upon what some of the other jurors were doing or saying. The trial judge denied the motion for new trial without ever interviewing Flores to determine the threats that were made against her and whether the external coercion was the reason that she voted to find petitioner guilty. Clearly the trial court abused its discretion in summarily denying the motion for new trial without ever even inquiring into the threats and coercion that Ms. Flores communicated to trial counsel. This issue was preserved for appeal through trial counsel's motion for new trial.

Appellate counsel presumably reviewed all of the relevant transcripts. If appellate counsel did so, he should have recognized the trial court's clear abuse of discretion in failing to even inquire into the very troubling accusations of juror tampering. The trial court's failure must be viewed in light of the fact that jury deliberations are an especially sensitive portion of a trial. State v. Hamilton, 574 So. 2d 124, 126 (Fla. 1991). In Powell v. Allstate Ins. Co., 652 So. 2d 354, 358 (Fla. 1995), the Florida Supreme Court remanded with instructions for the trial court to conduct an appropriate hearing to ascertain whether overt racial statements were made by jurors and whether said statements affected the jury's verdict. The same would have been proper in the instant case had the issue been raised on appeal. As such, appellate counsel was ineffective in failing to raise the clear issue of overt, external juror coercion on appeal. The lower court abused its discretion in

failing to further inquire into the juror misconduct, and it was objectively unreasonable for trial counsel to omit such an issue on appeal, especially given the fact that jury deliberations are an especially sensitive portion of a trial. Furthermore, petitioner's right to fair appellate review was prejudiced by counsel's failure in this regard.

Had appellate counsel raised the issue of juror misconduct on appeal, there is a substantial likelihood that the outcome of the appeal would have been different. Given the trial court's error in failing to inquire further into the juror coercion, it is likely that the appellate court would have remanded the case to the trial court for juror interviews to determine whether there was external and overt coercion that influenced the jury's verdict. As such, petitioner has demonstrated ineffective assistance of appellate counsel with regard to the instant issue. Consequently, petitioner should be granted a belated appeal, at which he can address the claim of juror tampering.

The State Court's Denial of the Instant Claim Amounts to an Unreasonable Application of Clearly Established Federal Law and an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State Court Proceedings

It is respectfully submitted that the claim submitted in Issue 2 of petitioner's petition for writ of habeas corpus did demonstrate that the state court's denial of relief on said claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the

Supreme Court of the United States. Further, the state courts' denial of relief regarding said issue resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The facts and authorities argued above clearly demonstrate that the decision denying petitioner relief on such a claim was contrary to, and an unreasonable application of, federal law, and, further was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Petitioner relies on the argument asserted above.

ISSUE THREE

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELATE COUNSEL WHEN HIS APPELLATE COUNSEL FAILED TO RAISE AN ISSUE OF VINDICTIVE SENTENCING ON APPEAL.

In Florida, if a court inserts itself into plea negotiations, and if a harsher than offered sentence is meted out after the rejection of the bargain, a determination must be made regarding whether there is a reasonable likelihood that the harsher sentence was vindictive. *See* Wilson v. State, 845 So.2d 142 (Fla.2003), In such a situation, a totality of the circumstances analysis is to be conducted to determine if the sentence is vindictive. *See* Vondervor v. State, 847 So.2d 610 (Fla. 5th DCA 2003). If the totality of the circumstances indicates vindictive sentencing, then the burden shifts to the State to dispel the presumption. Evans v. State, 979 So.2d 383 Fla. 5th DCA 2008). See also Meachum v. Longval, 460 U.S. 1098 (April 1983).

In Wilson v. State, 845 So.2d 142 (Fla.2003), the Florida Supreme Court set forth a number of factors that can be considered, with regard to vindictive sentencing, in the totality of circumstances calculus, including: (1) whether the trial judge initiated the plea discussion without being requested to do so by either party; (2) whether the trial judge, through her comments on the record, appears to have departed from the required role as an impartial arbiter either by urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as whether the defendant exercises his or her right to go to trial; (3) whether there is a disparity between the plea offer and the ultimate sentence imposed and the quantum of that disparity; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his right to a trial or hearing.

In the instant case, the trial judge initiated plea discussions, in the absence of a request from and of the parties, just prior to trial when she asked if there was a plea offer made. The judge then further involved herself in plea discussions, after being told that Petitioner rejected the five year plea offer, by specifically discussing the plea offer with Petitioner and asking if he was interested in the States' plea offer. After being told that Petitioner was rejecting the State's plea offer, the judge continued to urge a plea, asking the prosecutor if she would consider an offer less than five years imprisonment. Further, the court indicated the

presumption was that petitioner to once again discuss the plea offer with his attorney. After telling Petitioner that he needed to further think over the State's plea offer, the trial court said that it was not going to involve itself in the plea negotiations and noted that if Petitioner accepted the plea offer, he would get credit for time served in jail. Thereafter, the trial court did further involve itself in the plea negotiations. Defense counsel informed the judge that the prosecutor said she would not agree to credit for time served. The court the offered a better plea than the State was willing to offer, telling Petitioner that if he took a plea, "I will give you time served for what you did in jail but not for what you did on house arrest. Do you want a couple minutes to speak with your lawyer in private?" Petitioner stated that he did not want to speak with his lawyer any further about the plea. The court then asked, "What is your decision? Are you interested in the plea?"

The trial court very clearly inserted itself into the plea process, encouraged a plea, and even offered a better plea deal than the State was willing to agree to (five years imprisonment with credit for time served). Ultimately, after going to trial and being acquitted on one count and found guilty of the lesser included offense of manslaughter on the primary charge, Petitioner received an overall sentence of 40 years, resulting in a thirty-five year disparity in the sentence imposed and the sentence that the trial court initially indicated it would be willing to impose in exchange for a plea to all of the charges. There is no explanation in the record as to

the disparity the judge's willingness to impose a 5 year sentence (with credit for time served) and the 40 year sentence that said judge ultimately imposed, thus leading to the conclusion that the additional thirty-five years was imposed as punishment for Petitioner's decision to reject the plea offer. Further relevant in the regard is the fact that petitioner was found not guilty on one of the counts (shooting a deadly missile) and guilty of the lesser included offense of manslaughter (as opposed to second degree murder). That fact that Petitioner was found guilty of a lesser included offense on the most serious charge should have been reason for a sentence of even less than what the court was originally willing to consider when petitioner was asked to plead guilty to all of the charges (including second degree murder). Despite being found guilty of fewer of the counts than charged, and guilty of a lesser included offense for the primary charge, the trial court still far surpassed the sentence that was originally willing to impose in exchange for a guilty of a plea to all charges. Such a result is a clear indication of vindictive sentencing. Thus, the totality of circumstances demonstrates that the trial judge went beyond her role as a neutral arbiter in the instant case and did punish Petitioner with a vindictive sentence of forty years due to Petitioners rejection of the plea offer.

The imposition of a vindictive sentence constitutes fundamental error in Florida, and is cognizable on appeal, even if not raised at the trial court level. *See*, Rosado v. State, 129 So. 3d 1104, 1109 (Fla. 5th DCA 2013). Thus, said issue was

viable for Petitioner's direct appeal. Further, said issue would have presented a strong claim that the totality of the circumstances indicated that the forty year sentence was vindictively imposed and punishment for rejecting the plea offer that the trial court was urging. Appellate counsel instead neglected to realize the availability of a vindictive sentencing claim. The failure to recognize and raise such a claim is objectively unreasonable. Furthermore, Petitioner's right to an appeal was severely prejudiced as a result of said ineffectiveness.

There is a substantial likelihood that the outcome of Petitioners appeal would have been different had counsel raised the vindictive sentencing claim on appeal. Had such a claim been made, the appellate court would likely have recognized that the totality of the circumstances indicated that the trial judge initiated plea discussions and encouraged Petitioner to accept the plea, even going to far as to include credit for time served that the State was not willing to otherwise allow. Further, there is an enormous discrepancy of 35 years in the sentence offered by the court and the sentence imposed after trial. Under such circumstances, there is a high probability that the appellate court would have found that the sentencing was vindictive and remanded the case for resentencing before a different judge. As a result, Petitioner's sentences should be vacated and a new sentencing hearing should be held, at which Petitioner can present all relevant mitigating factors to the court.

The State Court's Denial of the Instant Claim Amounts to an Unreasonable Application of Clearly Established Federal Law and an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State Court Proceedings

It is respectfully submitted that the claim submitted in Issue 3 of Petitioner's petition for writ of habeas corpus did demonstrate that the state courts' denial of relief on said claim resulted in a decision that was contrary to, and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Further, the state courts' denial of relief regarding said issue resulted in a decision that was based on an unreasonable determination of the facts in light of evidence presented in the state court proceedings. The facts and authorities argues above clearly demonstrate that the decision denying Petitioner relief on such a claim was contrary to, and an unreasonable application of, federal law, and, further was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Petitioner relies on the argument asserted above.

ISSUE FOUR

PETITIONER'S CONVICTIONS WERE OBTAINED BY A *BRADY* VIOLATION OF THE STATE WITHHOLDING IMPEACHMENT EVIDENCE FROM THE DEFENSE.

Brady v. Maryland, 373 U.S. 83 (1963), requires the State to disclose material information within the State's possession or control that tends to negate the guilt of the defendant. Errors involving the suppression of evidence in violation

of *Brady* present issues of constitutional magnitude. *See* Cardona v. State, 826 So.2d 968, 973 (Fla. 2002). As expressed in *Brady*, the rule is premised on the principle that reversal is warranted when the State fails to disclose to the defense exculpatory or impeaching evidence that prejudices the defendant, thereby undermining confidence that he received a fair trial. Brady, 373 U.S. at 87-88.

To establish a *Brady* violation, a defendant must demonstrate: (1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced. Strickler v. Greene, 527 U.S. 263, 281-82, (1999); *see also*, Banks v. Dretke, 540, U.S. 668 (2004).

In the instant case, the State possessed evidence favorable to Petitioner that could have been used to impeach Luis Romero. The State Attorney's Office, either intentionally or inadvertently, withheld impeachment evidence that demonstrated that Luis Romero did not own the .357 Glock handgun that he was in possession of, and fired multiple times, during the incident in question. Further, it is suggested that there is a substantial likelihood that the outcome of the trial would have been different had such impeachment evidence been available to Petitioner.

Although it was not disclosed to Petitioner before or at trial, it is now known that the .357 Glock that Luis Romero possessed and fired on the night of the incident, was a stolen gun. Despite having knowledge that the gun was actually

owned by Mr. Jeffery Winkle, the prosecutor asked Mr. Romero if he did "own" the gun. Such a leading question, and the resulting answer, was misleading to the jury and suggested that Mr. Romero was in legal possession of said handgun. In reality, the gun was a stolen gun and was actually the property of Mr. Jeffery Winkle. Had such information been available, the State would not have been able to mislead the jury in the manner that it did. Further, Petitioner could have impeached Romero's testimony regarding ownership of the gun by demonstrating that the gun was actually stolen property that, in reality, was *owned* by Jeffery Winkle. As a result, the jury would have known that the gun possessed by Romero was stolen property. This could have had a significant effect on the jury because they had already heard about Ramesar's statement to the police that Romero previously said he wanted to rob Petitioner. Further, the jury was aware that Romero showed up uninvited at Petitioner's residence, brandishing and firing a gun without provocation. Had the jury also been aware that Mr. Romero was lying about his ownership of the gun and the fact that the gun was stolen property, it further would have demonstrated that Petitioner was not at fault, and that even if he did fire a gun at Romero, it was in self-defense. At the very least, the true state of the evidence would have cast Romero in an extremely unfavorable light and called his testimony into question. Unfortunately, since the State deprived Petitioner and his counsel of information regarding the true ownership of the handgun, Petitioner

was deprived of information that would have benefited the defense. Therefore, the intentional or inadvertent suppression of evidence relating to the true ownership of the .357 Glock gun amounts to a *Brady* violation that deprived Petitioner of valuable impeachment material. Consequently, Petitioner's judgment and sentence should be vacated and a new trial should be granted.

The State Court's Denial of the Instant Claim Amounts to an Unreasonable Application of Clearly Established Federal Law and an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State Court Proceedings

It is respectfully submitted that the claim submitted in Issue 4 if Petitioner's petition for writ of habeas corpus did demonstrate that the state courts' denial of relief on said claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Further, the state courts' denial of relief regarding said issue resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The facts and authorities argued above clearly demonstrate that the decision denying Petitioner relief on such a claim was contrary to, and an unreasonable application of, federal law, and, further was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Petitioner relies on the argument asserted above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Based upon the foregoung arguments and citations of autoority, it is apparent that Pttitioner was denied his constitutional rights to due process and effective assistance of counsel and that said constitutional deprivations severely prejudiced Petitioner's right to a fair trial, sentencing, and appeal.

WHEREFORE, Petitioner requests that this Honorable Court grant all relief to which he may be entitled in this proceeding, including but not limited to:

1. Grant this petition and issue a writ of Certiorari to have Petitioner brought before this Court to the end that Petitioner may be discharged from his unconstitional confinement and restraint; or in the alternative,

2. Grant this petition, vacate the judgment and sentence as entered, and remand this cause to the state court for *de novo* jury trial; or, in the alternative,

3. Order a full and fair evidentiary hearing, with Petitioner present, with counsel, in order for Petitioner to sustain, if necessary, his burden of production and persuasion; or, in the alternative,

4. Grant any other or further relief as this Court deems necessaryin the interest of justice.

Respectfully submitted,

/s/ Daniel Knight Date: 8-17-18