

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL RIVERA

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. §2241(a)(1)(3)

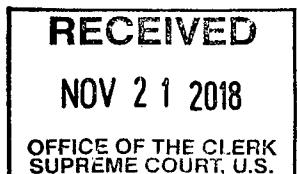
On appeal from the United States Court of Appeals for
the Eleventh Circuit, the Court that last reviewed the
Merits of the Case.

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

PROVIDED TO
SOUTH FLORIDA RECEPTION CENTER
on 11/15/18 FOR MAILING.

BY JS
OFFICER'S INITIALS

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QUESTIONS PRESENTED FOR REVIEW
UNDER S.C. RULE 14.1(a); RULE 20.4(a)

FIRST QUESTION

WHETHER ... RESPECT JUDGMENT OF THE COURT JUDGE'S - - WHOSE MEMBERS TAKE THE SAME OATH AS THE U.S. CONGRESS THAT UPHOLD THE U.S. CONSTITUTION UNDER 28 U.S.C. §453 - - REQUIRES NO LESS WHY THE COURT JUDGE'S MAKE AND USE RULING TO DENY UNCONSTITUTIONAL FUNDAMENTAL ERROR WHEN THE POWER UNDER THE U.S. CONSTITUTION IT FOLLOWS THAT THIS POWER IS NO LIMITED?

SECOND QUESTION

WHETHER ... BETWEEN THE U.S. CONSTITUTIONAL AMENDMENTS VIOLATION, CONSTITUTION STATUTORY PROVISION AND THE FEDERAL RULES OF THE COURT'S JURISDICTION WHICH OF THESE THREE LAWS THE JUSTICE'S AND JUDGE'S MUST OBEY FIRST AND PROTECT THE MOST?

THIRD QUESTION

WHETHER ... BETWEEN THE U.S. CONSTITUTIONAL AMENDMENTS VIOLATION AND THE COURT'S JURISDICTION RULES, WHICH OF THESE TWO LAWS THE JUSTICE'S AND JUDGE'S SHALL FOLLOW OR GO BOUND FIRST TO CORRECT THE U.S. CONSTITUTIONS AMENDMENTS VIOLATION OR THE RULE OF THE COURT'S JURISDICTION?

FOURTH QUESTION

WHETHER ... CONVICTION JUDGMENT OF ACQUITTAL IS UNCONSTITUTIONAL PLAIN ERROR IN VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION. HOW OR WHY SUCCESSIVE MOTION OR ANTI-TERRORISM ACT ~~OF~~ 1996 LAW BAR PETITIONER'S CLAIM FROM THE COURT?

FIFTH QUESTION

WHETHER ... CONVICTION OF CRIME NOT CHARGED IN THE INDICTMENT BY THE GRAND JURY IS UNCONSTITUTIONAL PLAIN ERROR IN VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION, HOW OR WHY SUCCESSIVE MOTION OR ANTI-TERRORISM ACT OF 1996 LAW BAR THE PETITIONER'S CLAIM FROM THE COURT?

SIXTH QUESTION

WHETHER ... CONVICTION FOR A CRIME IN THE INDICTMENT BY THE COURT WITHOUT ANY EXISTING EVIDENCE DURING TRIAL IS UNCONSTITUTIONAL MISCARRIAGE OF JUSTICE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION. HOW OR WHY SUCCESSIVE MOTION OR ANTI-TERRORISM ACT 1996 LAW BAR THE PETITIONER CLAIM FROM THE COURT?

SEVENTH QUESTION

WHETHER ... THE QUESTIONS IN THE FOURTH, FIFTH AND SIXTH QUESTION IS A VOID JUDGMENT IS UNCONSTITUTIONAL VIOLATION OF THE U.S. CONSTITUTION AMENDMENT FIVE AND FOURTEEN(1) AND FLORIDA CONSTITUTION ARTICLE I, §§9; 15(A); AND 16(A); HOW AND WHY THE STATE COURT'S SANCTION AND BAR THE PETITIONER'S CLAIM FROM THE STATE COURTS?

EIGHTH QUESTION

WHETHER ... THE FEDERAL AND STATE COURT'S UNDER THEIR OWN JURISDICTION THAT SHALL NOT HAVE ANY JURISDICTON TO MAKE THEIR OWN LAW OR RULE OR FOLLOW ANY OTHER LAWS TO DENY A UNCONSTITUTIONAL ARTICLE OR AMENDMENT VIOLATION OF THE U.S. CONSTITUTION. HOW OR WHY THE COURT'S TODAY IN THE COUNTRY USING RULE AND LAWS THAT OVERRULE THE U.S. CONSTITUTION BY DENIAL UNCONSTITUTIONAL AMENDMENTS VIOLATION CLAIMS LIKE IN THIS CASE?

The Petitioner's Extraordinary Writ of Habeas Corpus for review by the United States Supreme Court by Justice(s) Sotomayor, Ginsburg, Breyer, Kagan, Thomas, under S.C. Rule 20.4(a); Rule 36; and Title 28 U.S.C. §2241(a)(1)(3). The Petition's questions presented for review justify the granting of a writ of habeas corpus which that show exceptional circumstances the Article and Amendment of the U .S. Constitution warrant the exercise of the Court's discretionary powers and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted. [“The Act of Congress is drawn into question ... The Constitution is written”]. Thus, “[E]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution of the ‘United States’”.

SAMUEL RIVERA v. STATE OF FLORIDA

The Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida
Case No.: 85-25037

LIST OF PARTIES

S.C. Rule 12.2(A); Rule 6; Rule 29.2; and Rule 39.1

- [] All parties that appear in this cover page be served on every party to the proceeding with respect to which relief sought. All persons served are deemed Respondent's for all purposes in the proceeding in this court.
- [] All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in the court after the case is placed on the docket, and that time will not be extended Counsel for such Respondent shall ensure that Counsel of record for all parties receive notice of its intention to file a brief in support within 30 days after the case is placed on the docket.

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INTRODUCTION
S.C. Rule 24.5 (2017)

In this writ of habeas corpus the Defendant is the Petitioner below and the State Attorney was the Respondent. The parties will be referred to as they appear before this Court. All emphasis has been supplied unless otherwise indicated.

The symbol “Ex” will be referred to the Exhibit Record

The symbol “Tr” will be referred to as the Trial court transcript record.

The symbol “Lns” will be referred to as the trial court transcript page line number.

The symbol “Letter from “A” through “G” will be used to refer to the Court Writ of Habeas Corpus and Exhibit Trial Court record by the Judge and Jury verdict.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a Writ of Habeas Corpus issue to review the judgment below.

OPINIONS BELOW

For case from Federal Court:

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix E to the Petition and is;

Has been designated for publication but is not yet reported, or;

For cases from State Court's;

The opinion of the highest State Court of the Florida Supreme Court to review the merits appears at Appendix "C – D" to the Petitioner and is'

has been designated for publication but is not yet reported;

The opinion of the Third District Court of appeal of Florida appears at Appendix "B" to the Petitioner and is;

Reported at _____

The opinion of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida @ Appendix "A"

The Petitioner's case is from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida Case No.: 85-25037

The Third District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175 addressed the merits of the case by committing unconstitutional fundamental error in violation of the U.S. Constitutional Amendments 5, 8, and 14(1). Case No.: 3D16-1007.

The Supreme Court of the State of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, Case No.: SC17-1961. The Court denied discretionary review in violation of the U.S. Constitutional Amendments 5, 8, and 14(1).

The United States Court of Appeals, for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, Case No.: 18-11705-H. This court decided Petitioner's case and denied the Petitioner case by committing unconstitutional plain error in violation of the U.S. Constitutional Amendments 5, 8, and 14(1).

Samuel Rivera, DC#180695, South Florida Reception Center, South Unit, 13910 N.W. 41st Street, Doral, Florida 33178-3014, *pro se*.

JURISDICTION
Under Rule 17.1

[] For case from Federal Court of Appeals for the Eleventh Circuit, Case No. 18-11705-H

The date on which the United States Court of Appeals for Eleventh Circuit decided the case was March 28, 2018;

[] Yet Petition for Rehearing was timely filed in the case; Yes

[] A timely Petition for Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on the following dated: August 10, 2018, and a copy of the order denying rehearing appears at Appendix "E";

[] For case from State Court, the Circuit court for the Eleventh Judicial Circuit for Miami-Dade County, Florida, Case No.: 85-25037F

The date on which the highest State Supreme Court of Florida decided the case was May 5, 2018 a copy of that decision appears at Appendix "C";

[] The Florida Supreme court did not allow the Petitioner to file a Motion for Rehearing and copy of the order appears at Appendix "D";

The jurisdiction of this court is invoked for the Petitioner for Writ of Habeas Corpus in this court under Article III, Section 2 of the Constitution of the United States. See: 28 U.S.C. §1251(a), U.S. Constitutional Amendment 11. A Petition for an extraordinary writ in aid of the Court's appellate jurisdiction as provided in S.C. Rule 20.1, 2. A, Petition seeking a writ of habeas corpus authorized by 28 U.S.C. §2241d(a)(1)(3); and S.C. Rule 29.1, 4(b)(c). The Constitutionality of Act of Congress was drawn into question. See: Rule 14.1(e)(v)(f).

("When ... Plain error in relation to the federal question of the Constitution that creeps into the record we have the responsibility to review the proceeding of the Federal and State courts in violation of the United States Constitution." *Supra*. In *Hawk v. Olson*, 66 S.Ct. 116, 119, 326 U.S. 271-272-276, 90 L.Ed.2d 61 (1945); See e.g., *Rasul v. Bush*, 124 S.Ct. 2586, at 2692-2694 (2004); [a] Congress has granted Federal Courts within their respective jurisdiction the authority to hear application for habeas corpus by any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States in Title 28 U.S.C. §2241(a)(1)(3) (2017). See *Id* at 2695-2696. *Supra*.

This Honorable United States Supreme Court Justices have the authority by the U.S. Constitution and Jurisdiction to proceed in this Writ of Habeas corpus to transfer this case to the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, under Case No. 85-25037-F to proceed in this case to correct the unlawful plain error the trial court committed in violation of the U.S. Constitutional Amendments 5, 8, and 14(1) by convicting and sentencing the Petitioner judgment of acquittal, crime not charged in the indictment by the Grand Jury and the conviction without no evidence at trial. The court shall reverse this writ with the instruction by the comment by the U.S. Constitution.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED UNDER
S.C. RULE 20.1.2.a; Rule 29.1.4.(b)(c); and Rule 14.1(e)(v)(f)(2017)**

The Petitioner for Writ of Habeas Corpus is extraordinary writ in question that will aid of the Court's appellate jurisdiction, and will adequate relief cannot be obtained in any other form or from any other court when it comes to the Anti-terrorism Act of (1996) law (AEDPA) (110 Stat 1214); Title 28 U.S.C. §2254(a); and 28 U.S.C. 2244(b)(3)(A)(2017).

The U.S. District Courts, the U.S. Court of Appeals and the State Courts in the United States overlooked and misapprehended the power and the authority of the United States Constitution, when it comes to the laws of the land. The power of congress is limited powers. Congress has no power except those specified in the Constitution. See: *Marbury v. Madison*, 5 U.S. 137, 1 Cranch, 137, 176 2. L.Ed.

60 (1803) (Marshall C.J.) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten. The Constitution is written”). Thus, “[E]very law enacted by congress must be based on one or more of its powers enumerated in the Constitution.” *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658d (2000).

The Constitution has outlined (and perhaps others) all follow the fact that no matter what congress may call under Title 28 U.S.C. §2254(a); 28 U.S.C. §2244(b), the Constitution identifies the original meaning of the Constitution. The allocation of powers in the Constitution is absolute. The enumerated powers under the Constitution resolution of claims against the Petitioner’s conviction judgment of acquittal; conviction of crime not charged in the indictment by the Grand Jury; and a conviction of a crime in the indictment without any existing evidence at trial that can prove the Petitioner committed the crime.

The Congress or the United States Supreme Court never address how the Anti-terrorism Act of 1996 laws or successive motions or court’s sanction or procedurally barred apply to Constitutional claims under the U.S. Constitutional Amendment’s 5, 8, and 14(1) violation. How this rule that Act of Congress bar the Petitioner from access to the court’s when the limited to adopting measures to enforce the guarantees of the Constitutional Amendment grant congress no power to restrict, abrogate, or dilute these guarantees that duty is to enforce the

Constitution as written and not to overrule the Construction's authority ...

Constitutional question (18c) Constitutional law. A legal issue resolvable by the interpretation of a Constitution and Constitutional provisions restricts powers of the court. See: *Alazar v. Buono*, 130 S.Ct. 1803 at 1817 note [12](2010). The court holding: Congress, the Executive and the Judiciary all have a duty to support and defend the Articles and Amendments and the United States Constitution. See (Appendix "E").

Under Title 18 U.S.C. §242, the Petitioner's constitutional claims are secured and protected by the Constitution or law of the United States under color of law. According to Title 28 U.S.C. §2241(a)(1)(3); The Petitioner being held in custody in violation of the United States Constitution for which the Petitioner is entitled to his discharge by this writ of habeas corpus, under S.C. Rule 36.

1. The Petitioner must be discharged. Judgment of acquittal in the firearm charge granted by the trial court on Count III in the indictment;
2. The Petitioner must be discharged in a wrongful conviction as a principal, aider, abettor for a crime not charged in the indictment by the Grand Jury;
3. The Petitioner must be discharged in a wrongful conviction in the indictment without any existing evidence at trial that can prove the Petitioner committed the capital crime.

According to *U.S. v. Windson*, 133 S.Ct. 2675, 2695 (2013) the court holding

that: note [27]: The power the Constitution grant is also restrain and though Congress has great authority to design law to fit its own conception of sound national policy, it cannot deny due process clause of the Fifth Amendment.

Note [28]: The Fifth Amendment itself withdraw from Government the power to degrade or demean in the way this law does the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved. See: *Id.* At 133 S.Ct. 2675 page 2695. *Supra*.

The court has jurisdiction to consider the merits of this case. This case clearly presented a concrete disagreement between that opposing of the the State and Federal Court laws and the unconstitutional as a deprivation of the equal liberty of persons that are protected by the Fifth And Fourteenth Amendment of the United States Constitution.

The court's shall not ignore that (every law made by the Congress has no power to act unless the Constitution authorizes it to do so).

This unconstitutional provision may by the act of congress is drawn into question in this case under S.C. Rule 29.4(b)(c) in questions (1)(2)(3) and (4).

STATEMENT OF THE CASE
S.C. Rule 24.1(g)

1. Petitioner was found guilty on the 26th day of February 1987. The trial court findings by the jury occurred in Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Case No.: 85-25037.

Verdict by the jury finding the Petitioner as to first degree murder as charged in the indictment, Count I. Guilty.

Verdict by the jury finding the Petitioner as to Robbery, as charged in the indictment, Count II, with a firearm. Guilty (See: Exhibit "D", Tr. Pg. 154, Lns 1-14)

The Petitioner Samuel Rivera has been found not guilty by the trial court sitting without a jury of the offense of Use of a Firearm in the Commission of a Felony as set forth in Count three of the indictment on the 26th day of February, 1987. (See: Judgment of Acquittal @ Exhibit "C").

2. Petitioner was initially charged through an indictment by a Grand Jury on October 15, 1985, for First-Degree Murder a Capital Offense on Count I; Armed Robbery on Count II: and Use of a Firearm in the Commission of a Felony on Count III. (See Exhibit "B"); Petitioner's indictment.

The Petitioner filed two motions for a judgment of acquittal and which there is no objection by the State Attorney.

No evidence being submitted before the court and the jury as to Count I and

II in the indictment. There has not been any corroboration evidence brought before this court or jury as to Count I and II; no corroboration as to robbery. There has been no confirmation to robbery there is no way they can prove premeditated first degree murder, a capital offense theory without any evidence that can prove the Petitioner committed the murder there is nothing to substantiate any of the facts as to Count I and II in the indictment. Count III the firearm charge has already been dismissed by the Court. (See: Exhibit "D" Tr. Pg. 59-60; Tr. Pg. 149, Lns 7; Tr. Pg. 167, Lns 3-7) and (See: Appendix Exhibit "F", Tr. Pg. 150, Lns 1-25).

The firearm charge on Count III indictment is no longer a part of the indictment. The Court: "I know that." See: Exhibit "C" and Exhibit "D", Tr. Pg. 66, Lns 5-21; Tr. Pg. 190 Lns. 13-24).

"The Petitioner being acquitted of the firearm charge in the indictment and convicted sentenced with the same firearm for the first degree murder. (See, Exhibit "G", Judgment and Sentenced).

The Petitioner being convicted by the jury of armed robbery with a firearm and sentenced by the court for armed robbery with a firearm. The Third District Court of Appeal, State of Florida reversed the Petitioner's case for resentencing for robbery without a firearm because the Petitioner was acquitted of the firearm charge.

The court never corrected the conviction and sentence for the first degree

murder with a firearm when the Petitioner had been acquitted of the firearm charge in the indictment in the firearm conviction and sentence is a void judgment.

3. Petitioner has been convicted in a void judgment in a non-existing crime in the indictment or charge in the indictment by the Grand Jury or the Chief State Attorney as a Principal, Aider and Abettor. The Petitioner's indictment shows that there is no other name or person charged with the murder of John Burgos. How can the Petitioner become or charged as a principal, theory when the Petitioner is the only one indicted with the 'First-degree Murder, Armed robbery and Use of a Firearm during the Commission of a Felony,' alone.

During trial there was no co-defendant or witnesses that can testify that the Petitioner committed any crime with any person or any other person. Otherwise the Petitioner that cannot be convicted for infamous crime as a principal aider, abettor unless another person is charged in the indictment by the Grand Jury or the State Attorney.

The Petitioner's conviction under Florida Statutes §777.011 as a Principal, Aider, Abettor, is a fraudulent charge by the State Attorney and the trial Court Judge because there is no co-defendant charged in the indictment or at trial. This void judgment conviction represents malicious prosecution by the trial court because there is no probable cause for the Petitioner to be convicted for a crime not charged in the indictment. The Petitioner's claim is secure by the U.S. Const.

Amend. 4 and 5. The trial court record proves the Petition is being detained on a fraudulent charge. (See: Exhibit "B"; App. Ex. "D", Tr. Pg. 109, Lns, 4-25; Tr. Pg. 149, Lns. 7; Tr. Pg. 190, Lns 5-8; and Exhibit "F", Tr. Pg. 133, Lns 4-7).

The jury never convicted or found the Petitioner guilty as a Principal, aider or abettor. (See: Exhibit "F", Tr. Pg. 154, Lns 1-14).

The trial court judge with the States Attorney malicious prosecution that was the only one that found the Petitioner guilty as a principal, aider, abettor for a crime not charged in the indictment without the jury verdict. (See: Exhibit "G") Judgment and Sentence under Florida Statutes §777.011.

The trial court entered adjudication judgment of acquittal in the firearm charge: Crime no charged in the indictment by the Grand Jury as a Principal, aider, abettor and a conviction without any existing evidence that can prove the Petitioner committed the crime.

This case manifest injustice and "cruel and unusual punishment" by the court's judge because the Petitioner is detained under unlawful conviction and sentence in violation of the U.S. Constitutional Amendments 4, 5, 8, and 14(1); under Title 28 U.S.C. §2241(a)(1)(3).

The Petitioner's writ of habeas corpus shall be reviewed under Title 18 U.S.C. §242. The color of law in this case, that contains the facts material to the consideration of the question(s) presented: The summary of this case and the

proceedings that took place in the lower courts. (See: Appendix "A" and "B").

The State Attorney during jury trial incorrectly instructed the court and the jury about a case not charged in the indictment by the Grand Jury. The Petitioner that can be charged as a principal, aider, abettor and not existing crime because there is no other person indicted in the murder of John Burgo and there is no witness to the crime and no co-defendant charged with the crime under Fla. Sta. §777.011(1985).

When you see the indictment there shows that no other person's name or charge with this crime and no other person at trial that can testify that they committed any crime with the Petitioner.

How or why the Petitioner was convicted with no existing evidence in violation of the U.S. Constitutions Amend. 5 and 14(1) and Florida Const. Art. I, Sec. 15(a). The court record and trial court transcripts prove that this conviction is a fraudulent charge. The Petitioner's that cannot be convicted or sentenced according to the laws in the Title 28 U.S.C. §242 (See: Exhibit "B"; "D" Tr. Pg. 149, Lns 7; Tr. Pg. 190, Lns 5-8) See: Exhibit "F", Tr. Pg. 133, Lns 4-7).

The Grand Jury never charged or indicted the Petitioner as a principal and the jury never found the Petitioner guilty under the principal theory. (See: Exhibit "F", Tr. Pg. 154, Lns 1-14) and See: Exhibit "G"). Judgment and Sentence under Fla. Stat. §777.011 is a void judgment that must be corrected according to the U.S.

Constitution and Florida Constitution.

“The trial court’s failure to classify a criminal offense correctly results in a illegal imposition of a conviction and sentence of the first degree murder with a firearm, judgment of acquittal granted by the trial court. That it is beyond and/or disproportionate of the statutory maximum for the offense charged when correctly classified.” The imposition of that sentence and judgment or acquittal in the firearm charge will constitute an illegal sentence that is subject for review and release granting the motion according to the U.S. Const. Amend. 5 and Fla. Const. Art. I, Sec. 9.”

In the instant case at bar, that Petitioner’s judgment for Use of a Firearm in the Commission of a Felony is improper in the first degree murder with a firearm. The Petitioner was granted judgment of acquittal on Count III in the indictment for which there is no firearm to support the charge in Count I, First degree Murder with a firearm or count II, Robbery with a firearm. Prior to jury instructions and verdict, yet, the Petitioner was sentenced under Fla. Stat. §775.087(2) to a three (3) year minimum. This is a *prima facie* on the court record and illegally imposed. (See: Exhibit “C”) (Exhibit “D”, tr. Pg. 66, Lns 5-21; Tr. Pg. 190 Lns. 13-24) (See: Exhibit “F”, Tr. Pg. 154, Lns 1-14)(See: Exhibit “G”) Sentence Order.

“Claim preserved when that claim is pertinent may be addressed though Fed.R.Crim.P., Rule 52(b), plain error provides for a judgment of acquittal for the

Use of a Firearm in Commission of a Felony for the insufficiency of evidence utilized, provides for a new trial if the jury verdict is “contrary to law or the weight of the evidence.” The court’s error in this matter presented, ahs absolved authority and jurisdictional power to correct fundamental unconstitutional plain errors, even if they were not preserved for the Petition’s review under Fed.R.Crim.P., Rule 52(b); and Title 28 U.S.C. §2241(a)(1)(3)(2017). Also prejudicial unconstitutional plain error occurs in violation of the U.S. Constitution Amendment 5 and 14(1), when the trial court took the Petitioner’s case to trial without any existing evidence in the indictment or the statute that can proves the Petitioner did not committed the crime. (See: Exhibit “D”, Tr. Pg. 9, Lns 3-7; Tr. Pg. 59-60, Lns 1-5; Tr. Pg. 149, Ln 7; Tr. Pg. 167, Lns 1-7). “Petitioner presents in the trial court evidence so strong that Petitioner is actually innocent and that court’s cannot have confidence in the outcome of the trial if the State Attorney during trial never where present malicious prosecution, abuse of process of law and power for introducing indictment against the Petitioner without any existing evidence and no probable cause the Petitioner committed the crime.

The Petitioner’s detention is violation of the U.S. Constitutions Amendments IV and Title 28 U.S.C. §2680(h). See: *U.S. v. Gainey*, 85 S.Ct. 754, 758, 380 U.S. 63, 13 L.Ed.2d 658 (1965), *Supra*. Thus permitting the Petitioner to file a Writ of Habeas Corpus in the United States Supreme Court, trial court or other a

cognizable for reversal in Title 28 U.S.C. §2241(a)(1)(3)(2017).

REASONS FOR GRANTING THE PETITION
FOR WRIT OF HABEAS CORPUS

The purpose of this section of the Petition's Extraordinary Writ of Habeas Corpus is to explain to the court why it should grant this writ under questions "Four", "Five" "Six" and "Seven" because this is important of having the United States Supreme Court decide the question involved in this unconstitutional fundamental error violation by the courts that cause conflict with the decision of another appellate court when the court's do not put in defense and protect the United States Constitution and the State Constitution first before any statute or rule of the court, federal or state. The importance of this case not only is good for the Petitioner but for others similarly situated; and the ways the decision of the lower court in this case was erroneous but an the decision of others. This is important for this court to address the Petitioner's claims on the merits under Title 28 U.S.C. §2241(a)(1)(3)and Title 18 U.S.C.A. §242.

GROUND ONE

PETITIONER IS BEING ILLEGALLY DETAINED BASED ON A JUDGMENT OF ACQUITTAL GRANTED BY THE TRIAL COURT JUDGE IN THE FIREARM CHARGE IN THE INDICTMENT COUNT III, WHERE THE CONVICTION AND SENTENCE WITH THE SAME FIREARM IS IN VIOLATION OF AMENDMENT 5 OF THE U.S. CONSTITUTION AND ART. I, §9 OF THE FLORIDA CONSTITUTION.

Unconstitutional plain error illegal in lawful detention occur in the Petitioner's conviction and sentence judgment of acquittal in violation of the Fifth Amendment of the United States Constitution, when the trial court judge acquitted the Petitioner of the firearm charge in the indictment on Count III. The jury found the Petitioner guilty with the same forearm charge the Petitioner had been acquitted because the court never instructed the jury the Petitioner had been acquitted of the firearm charge. (See: Exhibit "C"); (See: Exhibit "D" Tr. Pg. 59-60; Tr. Pg. 66, Lns 5-21; Tr. Pg. 190, Lns 13-24) and Exhibit "G"). The Petitioner detention judgment of acquittal is cruel and unusual punishment for charge the Petitioner being found not guilty in violation of the U.S. Const. Amend. 5, 8, and 14(1), (See Exhibit "G") The firearm charge conviction and sentence is a void judgment. Also this conviction is inconsistent and unconstitutional in violation of the Fourteenth Amendment of the United States Constitution because the victim John Burgos that was killed with a firearm and the Petitioner Samuel Rivera was acquitted of the firearm charge and the State Attorney never proved how the

Petitioner committed the murder, because there is no other person indicted in the indictment by the Grand Jury or at trial.

This plain error in this unlawful unconstitutional detention that manifest injustice must be corrected under Rule 52(b), Fed.R.Crim.P., and Title 28 U.S.C. §242 under color of law of the U.S. Constitution, Title 28 U.S.C. §453, and the Florida Constitution Art. II, Sec. 5(b). “The Oath”.

In general, retroactive or prospective operation [1] decision that Fifth Amendment guarantee against double jeopardy is enforceable against the State through the Fourteenth Amendment is retroactive of the court’s decision. *Ashe v. Swenson*, 90 S.Ct. 1189-1191, 397 U.S. 436, L.Ed.2d 469 (1970).

Further, Article I, Section 9 of the Florida Constitution provides in relevant part: “No person shall ... be twice put in jeopardy for the same offense.” Art. I, §9, Fla. Const. Additionally, the Fifth Amendment to the United States Constitution provides that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. This guarantee is applicable to the State through the Fourteenth Amendment. See: *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 707 (1969); *In re, Nielsen*, 131 U.S. 176, 183, 95 S.Ct. 672, 33 L.Ed. 118 (1889); *Evans v. Michigan*, 133 S.Ct. 1069-1083, 185 L.Ed.2d 124 (2012). “The scope of the double jeopardy clause is the same in both Federal and Florida Constitutions. *Trotter v. State*, 825 So.2d 362 (Fla. 2002);

(emphasis added). The Court: “It is difficult to see why a conviction and punishment under an unconstitutional law is mere violation of a person’s constitutional rights than an unconstitutional conviction judgment of acquittal and punishment under a valid law.” The Petitioner is entitled to be discharged on habeas corpus.

GROUND TWO

PETITIONER IS ILLEGALLY DETAINED AND CONVICTED FOR A CRIMINAL OFFENSE NOT CHARGED IN THE INDICTMENT AS A PRINCIPAL BY THE GRAND JURY OR THE STATE ATTORNEY IN VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

Unconstitutional illegal detention and conviction occur when the trial court judge acquitted the Petitioner of the firearm charge in the indictment on count III. The State Attorney during the intercourse of the Motion to Suppress tried to tell the court the Petitioner that can be treated as a principal adest and adest for offense not charged in the indictment by the grand jury. (See: Exhibit “B”) The constitutional protection which requires that indictment the lack of specificity in this particular count of the indictment in failing to name which defendant allegedly committed the offense that murder and armed robbery with the Petitioner this is clearly renders this count subject to dismissal as it was filed in violation of the U.S. Constitution Amend. 5 and Florida Const. Art. I, Sec. 15(a). See: Exhibit “D” Tr. Pg. 109, Lns 12-25)(Exhibit “D” Tr. Pg. 190, Lns 1-23).

The trial court judge committed unlawful unconstitutional plain error by instructing the jury with no existing charge in the indictment under Fla. Stat. §777.011, that Petitioner committed the crime with another person when there is no other person charged in the indictment at trial or arrested for this crime. (See: Exhibit "F" Tr. Pg. 133, Lns 4-7) during jury deliberation the jury never convicted the Petitioner as a principal adest. adest. See: Exhibit "F", Tr. Pg. 154, Lns. 1-14).

The trial court judge under no existing laws adjudicated the Petitioner as a principal without any co-defendant and the crime and no other person indicted or arrested for the crime under Fla. Stat. §777.011 and no existing crime. (See: Exhibit "G").

However, this unlawful charge in conviction as a principal the trial court judge fails to allege specifically what criminal offense the Petitioner committed with another person to become abest and abest, when no other person being indicted for the murder or armed robbery of John Burgos. (See: Exhibit "B")

Now since there is no crime committed by the Petitioner in this unlawful detention and conviction, the United States Supreme Court shall enter an order under the United States Constitution to serve justice in this unlawful and illegal detention in violation of Title 28 U.S.C. §2241(a)(1)(3)and Title 18 U.S.C.A. §242. [The U.S. Constitution and Florida Constitution emphasized] a void judgment of

conviction.

Further, Article I, Section 15(a) of the Florida Constitution provides in relevant part: “No person shall … be tried for a Capital Crime without presentment of an indictment by a Grand Jury under oath foiled by the prosecuting office and the court. Art. I, §15(a), Fla. Const. Additionally the Fifth Amendment of the United States Constitution provides that “No person shall be held to answer for a Capital or otherwise infamous crime, unless on a presentment or indictment of a Grand jury. U.S. Const. Amend. V. This guarantee is applicable to the State through the Fourteenth Amendment. See: *Ex Parte Bain*, 121 U.S. 1, 11-13, 7 S.Ct. 781, 30 L.Ed. 849 (1887). The scope upon indictment charge without resubmission of case to the Grand Jury otherwise infamous crime. The court cannot proceed any further. There is nothing in the language of the Constitution which the “person can be held to answer” a trial on such indictment is void.” The Petitioner then cannot be detained for a crime that he did not commit and the Grand Jury never charged. The Petitioner for the offense not charged in the indictment, infamous crime under the Fifth Amendment prisoner entitled to discharge. There is no authority to hold the Prisoner under the judgment or sentence. A person’s sentence to imprisonment for an infamous crime, without having been presented or indicted by a Grand Jury as required by the Fifth Amendment of the United States Constitution is entitled to be discharged on

habeas corpus. In *Stirone v. U.S.*, 363 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960); Court cannot permit a defendant to be tried on charges that are not made in the indictment against him U.S.C.A. Const. Amend. 5. Id at 273. See: *U.S. v. Cotton*, 535 U.S. 625, 152 L.Ed.2d 860, 122 S.Ct. 1781-1784 (2002); Clause in the same in both the Federal and Florida Constitutions. *Carbajal v. State*, 75 So.3d 258 (Fla. 2011). The Florida Supreme Court held that: [3-5]. The Florida high court stated and explained that jurisdiction to try an accusation does not exist in the indictment under Art. I, §15(a), Fla. Const.

GROUND THREE

PETITIONER JURY INSTRUCTION AND JURY VERDICT IN THE INDICTMENT ALONE “MUST DO MORE THAN SIMPLY REPEAT THE LANGUAGE OF THE CRIMINAL STATUTE” THE INDICTMENT IS NOT EVIDENCE IT AS ANY PROOF THE PETITIONER’S GUILTY OF THE CRIME. THE VERDICT IS A NULLITY.

Unconstitutional fundamental error occurred in violation of the Fifth and Fourteenth Amendment of the U.S. Constitution for depriving the Petitioner of his life, liberty, without due process of law before trial and during trial by jury for taking the Petitioner’s case to trial without any firearm, no witnesses, no fingerprint and no corroboration to prove the Petitioner committed the murder or armed robbery.

The Petitioner’s jury trial is unconstitutional fundamental miscarriage of justice by the trial court judge for which the Petitioner is detained in violation of

Title 28 U.S.C. §2241(a)(1)(3) and this plain error must be corrected under the color of the U.S. Constitution Rule 52(b), Fed.R.Crim.P., and Title 18 U.S.C.A. §242. In *U.S. v. Gainey*, 85 S.Ct. 754, 758, 380 U.S. 63, 13 L.Ed.2d 658 (1965), the United States Supreme Court held that: [8-10] where the only evidence is of presence the statutes in the indictment does not require the judge to submit the case to the jury or pronounce any judgment or sentence and the Defendant's case must grant the judgment of acquittal on all charges. *Id* @ 758, *Supra*. [Emphasis added]. (See: Exhibit "B" and Exhibit "D", Tr. Pg. 9, Ln. 3-7)

The State Attorney stated to the jury during opening statement that we have today that case of the State of Florida versus Samuel Rivera. Mr. Rivera is charged in the indictment with first degree murder, armed robbery and the use of a firearm in the commission of a felony. (See: Tr. Pg. 59-60, Lns 1-5);

COURT: Okay, Motion?

MR. BAER: Judge, I have two motions to make in regard to Mr. Rivera. On behalf of Mr. Rivera, defense having rested. No evidence being submitted before the court and jury as to Count I and II, the defense would respectfully move for judgment of acquittal. I don't believe there has been any corroborating evidence brought before this court or jury as to Count I and II in the indictment; no corroboration as to murder. There has been no confirmation to robbery. There is no way they can prove a felony murder theory. There is nothing to substantiate any of the facts as to Courts I and II. Count III has the firearm charge already been dismissed by the court. Respectfully I would move for judgment of acquittal to both counts. The State Attorney never objected to the motion to the judgment of acquittal but the court denied the motion without any opinion. (See: Exhibit "D", Tr. Pg. 71, Lns 22-25; Tr. Pg. 72, Lns 1-6).

The State Attorney Mr. Vaughn stated in open court during the trial that Mr. Baer, the Defense Attorney, in his opening said there was no physical evidence and for the most part that is correct. We've never suggested at anytime that he was in the house. He never went inside that house. So obviously there would be no physical evidence. He never went into the house, so there is no need for that.

"But the State Attorney never proved who committed the murder of John Burgo since the Petitioner is not the person who committed the murder. Because there is no other person arrested or indicted in the Petitioner's indictment by the Grand Jury or the Chief Assistant State Attorneys, Katherine F. Rundle. (See: Exhibit "B"). (See: Exhibit "D" Tr. Pg. 149, Lns 7).

There is no witness at the scene of the crime that can testify the Petitioner committed the crime. (See: Exhibit "D" Tr. Pg. 167, Lns. 1-7) There is no fingerprints of the Petitioner at the scene of the crime. (See: Exhibit "D" Tr. Pg. 190, Lns 13-23).

The Petitioner moved for a judgment of acquittal on counts 1, 2, and 3 of the indictment. The court granted judgment of acquittal on count 3. The Petitioner didn't have a firearm. The Petitioner that cannot be a principal in the murder of John Burgo without any co-defendant indicted by the Grand Jury in the indictment according to the U.S. Constitution, Amendment 5. (See: Exhibit F, Tr. Pg. 150, Lns 1-25) The Petitioner did not take the stand during trial.

The Court stated: The constitution requires the State to prove its accusations against the Petitioner. It is not necessary for the Petitioner to disprove anything, it's up to the State to prove the Petitioner's guilt by the evidence and there is no evidence that can prove the Petitioner committed the crime. (See: Exhibit "F", Tr. Pg. 154, Lns 1-14)

The jury verdict Samuel Rivera, also known as "Tony." We the jury at

Miami-Dade county, Florida, this 26th day of February A.D. 1987, find the Defendant Samuel Rivera, also known as Tony, as to First-degree murder as charged in the indictment, Count I, guilty; Count II, robbery with a firearm, Guilty with the same firearm, guilty with the same firearm the Petitioner being acquitted before the jury verdict by the trial judge. (See: Exhibit "G").

The Petitioner's judgment and sentence is a void judgment. Count I in the indictment that the charging document simply repeats the language of the criminal statute is not evidence and that the jury or the court is not to consider it as any proof of guilt under Fla. Stat. §782.04; the firearm charge in the indictment on Count III, is not a crime because the trial court judge acquitted the Petitioner of the most important element to commit the murder because the victim was killed with a firearm and the Petitioner without any firearm and no other person charged or indicted in the crime. The Petitioner cannot commit the crime, under Fla. Stat. §782.087; The conviction under principal theory by the trial court judge and the State Attorney is a fraud unconstitutional violation of the U.S. Constitutions Amendment 5 because no other person is charged or arrested or indicted by the Grand Jury or the State Attorney for the Petitioner to become as a principal or being a principal in the murder of John Burgo, under Fla. Stat. §777.011; and the Armed Robbery charge in the indictment the Petitioner was resentenced by the trial court to Robbery without as firearm because the Petitioner was acquitted of the

firearm. But sentence for murder with a firearm in violation of the U.S. Constitutions Amendment 5. Judgment of acquittal and the firearm charge, the 22 year sentence and the robbery the sentence is moot. [emphasis added].

In citing *United States v. Simmons*, 96 U.S. 360, 362, 24 L.Ed. 819 (1878), the U.S. Supreme court held that: Under the circumstances of this case, the indictment “must do more than simply repeat the language of the criminal statute” including generic terms it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the specifics, it must descend to particulars.” *U.S. v. Cruikshank*, 92 U.S. 542, 558, 12 L.Ed. 588, 593, 1875, WL 17550 (1875). An indictment not framed to apprise the Defendant “with reasonable certainty of the nature of the accusation against him ... is defective, although it may follow the language of the statute.” *United States v. Simmons*, 96 U.S. 360, 362, 24 L.Ed. 819, 820, 1877 WL 18517 (1877). “In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. In *Dougan v. State*, 470 So.2d 697, 701 (Fla. 1985) the Florida Supreme Court held that: [10-11] An indictment or information is not evidence against an accused, but rather is nothing more or less than the vehicle by which the State charges that a crime has been committed. The standard jury

instruction points this out in the pretrial instruction by stating that the charging document is not evidence and that the jury is not to consider it as any proof of guilt.

In *Napue v. People of the State of Illinois*, 79 S.Ct. 1173, 1178-1179 (1959), the United States Supreme Court held that: [6-8] The duty of this court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the constitution inviolate. *Id* @ 1178. *Supra*.

CONCLUSION

The Petition for Writ of Habeas Corpus should be granted, in *U.S v. Smith*, 67 S.Ct. 1330, 1333, 331 U.S. 469, 91 L.Ed.2d 1610 (1947), the Supreme Court held that: [6] Habeas corpus provides a remedy for jurisdiction and constitutional error at trial without limit of time. The government was entitled to the relief sought, and the demands of the constitution, federal and state courts to acknowledge that due process requires corrective judicial process in the nature of the writ be available to expunge a void judgment when all other avenues of judicial relief are unavailable by any other courts.

The Petitioner is in custody under a conviction and sentence of the trial court established unconstitutional and which the Petitioner has the right to be released upon ground that the conviction and sentence was imposed in violation of the

constitution and laws of the United States Title 28 U.S.C. §2241(a)(1)(3). The court which imposed the conviction and sentence does not have any authority to hold the Petitioner in prison under invalidated conviction and sentence. The Petitioner's writ shall be granted with the order to vacate the unconstitutional unlawful and cruel and unusual punishment that inflicted the Petitioner's conviction and sentence in this matter of unconstitutional violation by the trial court. The Petitioner is entitled to immediate resolution and release from custody.

Respectfully submitted,



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