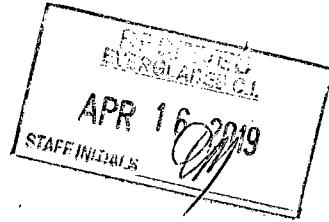


NO: _____



IN THE

SUPREME COURT OF THE UNITED STATES

IN RE "PRO SE" KAZI BOWLES PETITIONER
VS.

FLORIDA DEPT. OF CORRECTION
ATTORNEY GENERAL, STATE OF FLORIDA RESPONDENT(S)
"ET AL."

APPENDIX

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APPENDIX A

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JAN 12 2018 IN THE UNITED STATES COURT OF APPEALS

David J. Smith
Clerk

FOR THE ELEVENTH CIRCUIT

No. 17-12720-G

KAZI BOWLES,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Mr. Kazi Bowles¹ is a Florida prisoner serving a 25-year sentence for attempted murder. He is required to serve a mandatory minimum of ten years of that sentence, before he is eligible for parole. He seeks a certificate of appealability ("COA"), and leave to proceed *in forma pauperis* ("IFP"), to appeal the denial of his Fed. R. Civ. P. 60(b) motion for reconsideration, filed in his successive 28 U.S.C. § 2254 habeas proceedings.

As background, in February 2008, Mr. Bowles filed a federal habeas corpus petition, pursuant to 28 U.S.C. § 2254, raising several claims for relief, including a claim that the trial court imposed a vindictive sentence. In that petition, Mr. Bowles noted that he had been

¹ Mr. Bowles alternatively refers to himself as "Bowleg" and "Bowles." Additionally, court orders vary in how they spell his last name. However, as the district court referred to him as "Bowles," this name will be used for consistency.

resentenced in 2005. It was denied on the merits, and, thereafter, in 2013, Mr. Bowles filed a motion for relief from judgment, under Fed. R. Civ. P. 60(b), which the district court construed as a second § 2254 habeas petition, and dismissed for a lack of jurisdiction because it was second or successive.

In May 2016, Mr. Bowles filed an unauthorized successive § 2254 habeas corpus petition arguing that the 10-year mandatory minimum aspect of his sentence, under the “10-20-life” sentencing scheme, was improperly applied to his case because he did not meet the requirement of being a criminal known to use a firearm. Specifically, Mr. Bowles argued that he did not have a prior history of using firearms to commit violent offenses. Mr. Bowles also asserted that the prosecutor’s representations at his original sentencing hearing resulted in the sentencing court being under the mistaken impression that it was required to sentence him to 20 years’ imprisonment. Mr. Bowles acknowledged that his original sentence was reduced in 2005, after he successfully challenged his mandatory minimum 20-year sentence in state court, but his revised sentence was still improper. In support of his habeas petition, Mr. Bowles provided a copy of the November 2005 order, granting his Fla. R. Crim. P. 3.000 motion and determining that the 20-year mandatory sentence was improper.

A magistrate judge issued a report and recommendation (“R&R”), recommending that Mr. Bowles’s § 2254 petition be dismissed for a lack of jurisdiction. The magistrate judge determined that Mr. Bowles had filed a federal habeas petition in February of 2008, which was denied on the merits, and he had not obtained permission from this Court to file a second or successive habeas petition.

Mr. Bowles objected, asserting that his petition was not successive because he was raising, for the first time, his resentencing claim, and because his petition stemmed from a new

judgment, it could not be successive. In November of 2016, over Mr. Bowles's objections, the district court adopted the R&R and dismissed the petition for a lack of jurisdiction. The district court specifically determined that, although the state court entered an order correcting Mr. Bowles's sentence in July 2010,² that order was not a new judgment because it did not alter the 2002 sentence. Instead, the order merely clarified how Mr. Bowles should receive credit for time-served. Furthermore, Mr. Bowles had filed a habeas petition in 2013, after the new order. Accordingly, it dismissed his petition for a lack of jurisdiction and, in the same order, denied a COA.

Thereafter, in January of 2017, Mr. Bowles filed a motion for reconsideration under Fed. R. Civ. P. 60(b), arguing that it was improper for the district court to rely on the 2010 order, as it was not part of his habeas petition. Rather, his petition relied on the resentencing order from 2005. He appeared to concede that the 2010 order was not a new judgment. Mr. Bowles also argued that his 2013 habeas petition would not render his current filing second or successive because that petition attacked his "old" judgment, and, as it was deemed successive, it would not impact his current petition.

The district court denied Mr. Bowles's motion in an endorsed order, determining that his state court judgment was entered before he filed his previous habeas petitions. The district court denied IFP status and a COA on appeal.

² Mr. Bowles did not rely on a July 2010 sentencing order in the instant petition. Rather, the district court appears to have gone outside the district court record to find this order. Regardless, a review of the district court record, and an independent review of the state court record, shows that a state court altered Mr. Bowles's sentence in July of 2010, and this alteration was separate and distinct from the 2005 amendment. Further, a review of the state court docket shows that, in July of 2010, Mr. Bowles's judgment was corrected, to clarify how he would receive credit for time-served. This order did not otherwise alter his sentence.

Mr. Bowles now seeks and COA and IFP status on appeal. In his motion for a COA, Mr. Bowles reasserts his argument that his 2005 resentencing allowed him to file another habeas petition. He contends that the district court erred by going outside of the record to determine that it lacked jurisdiction. Mr. Bowles also moves to expand his claim to include claims for (1) fraud on the court, as the prosecutor persuaded the judge to improperly sentence him to a 20-year mandatory minimum in his original sentencing hearing; and (2) vindictive sentencing because he insisted on going to trial and rejected a plea agreement with a substantially lower sentence. Mr. Bowles asserts that the court could always consider a claim for fraud on the court.

DISCUSSION:

As an initial matter, this Court only has jurisdiction to consider the appeal of Mr. Bowles's motion for reconsideration, as it was filed in January of 2017, more than 30 days after the district court dismissed his § 2254 petition. Accordingly, it did not qualify as a tolling motion. *Cf. Fed. R. App. P. 4(a)(4)* (explaining that a Rule 60 motion must be filed within 28 days of the judgment to qualify as a tolling motion).

Mr. Bowles does not require a COA to proceed on appeal. Generally, a COA is required to appeal a final order in a proceeding under § 2254. *See* 28 U.S.C. § 2253(c)(1)(A). Furthermore, an appeal from the denial of a Rule 60(b) motion generally requires a COA. *See Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1264 (11th Cir. 2004) (*en banc*), *aff'd on other grounds sub nom. Gonzalez v. Crosby*, 545 U.S. 524 (2005) (requiring a COA to appeal from the denial of a Rule 60(b) motion).

However, this Court has held that the dismissal of a successive habeas petition for lack of subject-matter jurisdiction does not constitute a “final order in a habeas corpus proceeding” for purposes of § 2253(c). *Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004). Instead,

this Court may review that dismissal under 28 U.S.C. § 1291. *See Hubbard*, 379 F.3d at 1247. Based on the reasoning outlined in *Hubbard*, Mr. Bowles does not require a COA to proceed.

While Mr. Bowles is not required to obtain a COA, because he seeks leave to proceed IFP on appeal, the appeal from the judgment is subject to a frivolity determination.³ *See* 28 U.S.C. § 1915(e)(2)(B); *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983). An action is frivolous if it is without arguable merit either in law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

Before a prisoner may file a second or successive habeas petition, he first must obtain an order from the court of appeals authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A). Without authorization, the district court lacks jurisdiction to consider a second or successive motion to vacate. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). This Court has recognized that “the phrase ‘second or successive’ is not self-defining and does not refer to all habeas applications filed second or successively in time.” *Stewart v. United States*, 646 F.3d 856, 859 (11th Cir. 2011) (citing *Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007)). This Court has determined that a small subset of claims, which do not ripen until after the conclusion of an initial habeas proceeding, “must not be categorized as successive.” *Id.* at 862-63.

This Court reviews the denial of a Rule 60(b) motion for an abuse of discretion. *See Cano v. Baker*, 435 F.3d 1337, 1341 (11th Cir. 2006). In order to show that the district court abused its discretion in denying a Rule 60(b) motion, the appellant “must demonstrate a justification so compelling that the district court was required to vacate its order.” *Id.* at 1342 (quotation and alteration omitted).

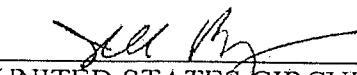
³ A review of Mr. Bowles’s motion for IFP status shows that he is indigent.

The district court did not abuse its discretion in denying Mr. Bowles's Rule 60(b) motion. Mr. Bowles's Rule 60(b) motion argued that the court erred in relying on a 2010 order, to determine that his petition was successive. Mr. Bowles further argued that his petition was not successive because he was resentenced in 2005, and it was the first time that he was raising a claim related to his resentencing.

// However, Mr. Bowles's original habeas petition was filed after he was resentenced in 2005, and, therefore, it was based on his 2005 judgment. Furthermore, his current claims were available in 2008, when he originally filed his federal habeas petition. Accordingly, he has not shown that his petition falls into the small subset of claims that must not be categorized as successive. Moreover, although Mr. Bowles argues on appeal that the court erred by looking outside of the record to determine that it lacked jurisdiction, the court was permitted to take judicial notice of court records. *See United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987). Thus, as Mr. Bowles has not obtained authorization from this Court to file a second or successive habeas petition, the district court correctly dismissed his § 2254 petition as successive and did not abuse its discretion in denying his Rule 60(b) motion.

Finally, to the extent that Mr. Bowles attempts to raise new arguments—including his arguments that the state committed fraud and that his sentence was vindictive—on appeal, this Court will not consider those arguments as they were not clearly presented to the district court as grounds for relief. *See Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994) (stating that an argument “not raised in the district court and raised for the first time in an appeal will not be considered by this court” (quotation omitted)).

Accordingly, his motion for a COA is DENIED AS UNNECESSARY and his motion for IFP status is DENIED, as any appeal would be frivolous.



UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-21697-CIV-LENARD/WHITE

**KAZI BOWLES,
A.K.A. KAZI BOWLEG**

Petitioner,

v.

JULIE L. JONES,

Respondent.

**ORDER ADOPTING REPORT OF MAGISTRATE JUDGE (D.E. 6),
DISMISSING BOWLES' § 2254 PETITION (D.E. 1), DENYING CERTIFICATE
OF APPEALABILITY AND CLOSING CASE**

THIS CAUSE is before the Court on the Report and Recommendation of Magistrate Judge Patrick White (the "Report"), issued on May 19, 2016. (D.E. 6.) Judge White recommends that the Court dismiss Kazi Bowles' ("Bowles") § 2254 Petition for lack of jurisdiction. Id.

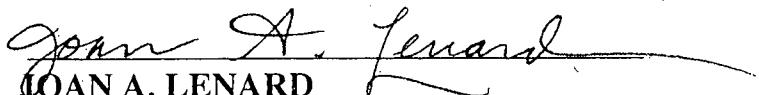
In his Report, Judge White found that: (1) Bowles was convicted of attempted first-degree murder and sentenced to twenty-five years imprisonment on March 15, 2001; (2) Bowles was resentenced to twenty-five years imprisonment on June 3, 2002; (3) Bowles filed his first § 2254 petition in federal court on February 25, 2008, see 08-cv-20528-HUCK; (4) Judge Huck denied Bowles' first petition on December 9, 2008; (5) Bowles filed a second § 2254 petition on October 30, 2013, see 13-cv-23946-GRAHAM; and (6) Judge Graham dismissed Bowles' second petition on December 6, 2013. (D.E.

filed a § 2254 petition in 2013, seeking vacatur of his conviction and sentence. Accordingly, his current Petition would still be second or successive.

Therefore, having conducted a de novo review of the Report, record and Petitioner's objections, it is hereby **ORDERED AND ADJUDGED** that:

1. The Report and Recommendation of the Magistrate Judge (D.E. 6) issued on May 19, 2016, is **ADOPTED** as modified by this Order;
2. Kazi Bowles' objections (D.E. 10) are **OVERRULED**;
3. Kazi Bowles' § 2254 Petition (D.E. 1), filed on May 13, 2016, is **DISMISSED** as second or successive;
4. A certificate of appealability **SHALL NOT ISSUE**; and
5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 14th day of November, 2016.


JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21697-LENARD
MAGISTRATE JUDGE P.A. WHITE

KAZI BOWLES,¹ :
Petitioner, :
v. : REPORT OF
JULIE L. JONES, : MAGISTRATE JUDGE
Respondent. :

I. Introduction

Kazi Bowles, who is presently confined at the Everglades Correctional Institution in Miami, Florida, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking his conviction and sentence in case number F00-2011 entered in the Eleventh Judicial Circuit Court for Miami-Dade County.²

This cause has been referred to the undersigned for consideration and report pursuant to Administrative Order 2003-19.

¹ The Petitioner's name appears as Kazi Bowles as well as Kazi Bowleg in this Court's and the Florida courts' records.

² A petitioner cannot proceed with a petition for a writ of habeas corpus in this Court unless he has either paid the \$5.00 filing fee or qualified to proceed *in forma pauperis* ("IFP"). See Rule 3(a), Rules Governing Section 2254 Cases. The Petitioner has filed a motion to proceed IFP but has not provided the six-month account statement from his institution. The Court would ordinarily provide petitioner with the opportunity to satisfy the filing fee requirement. However, because the instant petition is being dismissed *sua sponte* for the reasons discussed in this Report, this Court determines that in the interest of judicial economy petitioner will not be afforded additional time to comply with the filing fee requirements. See Dionne v. Suffolk County Sheriff Dep't., 2012 WL 3492018 (D.Mass 2012).

The Court has before it the for consideration the petition for writ of habeas corpus and supporting memorandum (DE# 1, 4), this Court's file in case number 08-CV-20528-HUCK, and the electronic docket sheets from the Miami-Dade County Circuit Court, the Third District Court of Appeal, and the Florida Supreme Court.³ No order to show cause has been issued because, on the face of the petition, it is evident that the petitioner is entitled to no relief. See Rule 4(b), Rules Governing Section 2254 Proceedings ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.").

II. Procedural History⁴

A jury found the Petitioner guilty of attempted first-degree murder and he was sentenced to twenty-five years' imprisonment with a twenty-five year minimum mandatory in Florida case number F00-2011. (App. A at 14-15); see (08-20528 DE# 25 at 2-3). The Third District Court of Appeal affirmed his conviction but remanded for resentencing because the sentence did not comport with the trial court's oral pronouncement. Bowleg v. State, 813 So. 2d 291 (Fla. 3d DCA 2002) (3D01-1036); (App. B). The trial court reimposed a twenty-five year sentence but reduced the minimum mandatory to twenty years. (App. A at 13); see (08-20528 DE# 25 at 3).

The Petitioner instituted unsuccessful post-conviction proceedings in the Florida courts. See (App. A at 11-12); (App. D);

³ The Florida courts' relevant records have been made part of the record by separate order and will be referred to in this Report as "App." A through R.

⁴ A more exhaustive procedural history along with citations to the relevant Florida court records may be located in the Report entered in case number 08-CV-20528-HUCK, docket entry 25.

Bowles v. State, 901 So. 2d 129 (Fla. 3d DCA 2005) (3D04-2495); see also (App. C, E).

He then filed a Rule 3.800 motion to correct an illegal sentence that the trial court granted in part, and his minimum mandatory sentence was reduced to ten years on February 21, 2006. (App. A at 9); see (08-20528 DE# 25 at 5). The Third District Court of Appeal *per curiam* affirmed on March 14, 2007. Bowles v. State, 951 So. 2d 846 (Fla. 3d DCA 2007) (3D06-739); (App. F).

On February 21, 2008, the Petitioner filed his first Section 2254 petition for writ of habeas corpus, case number 08-CV-290528-HUCK. It was denied on the merits on December 9, 2008, and the Eleventh Circuit denied the Petitioner's motion for a certificate of appealability on May 20, 2009, case number 09-10295.

The Petitioner filed a second Section 2254 motion to vacate on October 24, 2014, case number 13-CV-23926-GRAHAM. It was dismissed as successive on December 6, 2013.

Meanwhile, the Petitioner's collateral attacks on his conviction and sentence in the Florida courts continued. See (App. A at 2-8); (App. H-Q). The trial court finally prohibited him from filing further *pro se* collateral attacks on his conviction and sentence on June 22, 2015. (App. A at 2). The Third District *per curiam* affirmed. Bowles v. State, 2015 WL 7007798 (Fla. 3d DCA Nov. 12, 2015) (3D15-1426); (App. R).

The Petitioner filed the instant Section 2254 habeas petition, his third, on May 9, 2016.

III. Discussion

The Antiterrorism and Effective Death Penalty Act ("AEDPA") requires that:

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(b)(3)(A).

A three-judge panel of the court of appeals may authorize a second or successive application only if it presents a claim not previously raised that either: (a) relies on a new retroactive rule of constitutional law that was previously unavailable; or (b) for which the factual predicate could not have been previously discovered through the use of due diligence and the facts underlying the claim would establish by clear and convincing evidence that no reasonable fact finder would have found the petitioner guilty but for the constitutional error. 28 U.S.C. § 2244(b)(2)(A), (B)(I)-(ii); 2244(b)(3)(B). If a petitioner files a second or successive habeas petition without first seeking permission from the appellate court, however, the District Court is "without jurisdiction to entertain it." Burton v. Stewart, 549 U.S. 147, 153 (2007).

Because the Petitioner has previously filed a Section 2254 petition that was denied on the merits and he has not obtained permission from the Eleventh Circuit pursuant to Section 2244(b), this Court is without jurisdiction to consider the instant successive Section 2254 petition.

If the Petitioner intends to pursue this case, he should forthwith apply to the United States Eleventh Circuit Court of Appeals for the authorization required by Section 2244(b)(3)(A). The petitioner will be provided with a form to apply for such authorization with this report. Under the circumstances of this case it does not appear that either a direct transfer of the case to the Court of Appeals pursuant to Section 1631 or a stay of the present case would be appropriate. See generally Guenther v. Holt, 173 F.3d 1328 (11th Cir. 1999).

IV. Certificate of Appealability

A State prisoner must obtain a certificate of appealability before appealing the denial of his federal habeas petition. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability may issue only when the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition, should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Further, as noted by the United States Supreme Court:

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, ... a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jimenez v. Quarterman, 555 U.S. 113, 118 n. 3 (2009).

The Petitioner has filed the instant successive federal habeas petition without first obtaining permission from the Eleventh Circuit Court of Appeals. Therefore, a certificate of appealability is not warranted. If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the District Judge in objections to this report.

V. Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be dismissed, a certificate of appealability not be issued, and this case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 19th day of May, 2016.



UNITED STATES MAGISTRATE JUDGE

(ENCLOSURE)

cc: Kazi Bowles
M23610
Everglades Correctional Institution
Inmate Mail/Parcels
1599 SW 187th Avenue
Miami, FL 33194
PRO SE

Office of the Attorney General
Miami, FL

APPENDIX D

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 05 2018

David J. Smith
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12720-G

KAZI BOWLES,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Kazi Bowles has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's January 12, 2018, order, denying his motion for a certificate of appealability as unnecessary, and denying leave to proceed *in forma pauperis*, from the denial of his Fed. R. Civ. P. 60(b) motion. Bowles has also moved to supplement the record. Upon review, Bowles's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief. His motion to supplement the record is DENIED AS UNNECESSARY because the records he asks this Court to consider have already been considered.

APPENDIX E

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: **DENIED**

(8) Date of result (if you know): **SEPTEMBER 14TH 2007**

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion? **YES**

(1) First petition: Yes No

(2) Second petition: Yes No

(3) Third petition: Yes No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

I APPEALED ALL POST-CONVICTION

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: THE STATE COURTS VIOLATED DEFENDANT'S 5TH, 6TH AND 14TH AMENDMENT RIGHTS TO A FAIR JURY TRIAL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

THE STATE COURTS VIOLATED THE DEFENDANT'S 5TH, 6TH AND 14TH AMENDMENT RIGHTS TO A FAIR JURY TRIAL BY NOT HAVING THE WORDS ACTUAL POSSESSION IN DEFENDANT'S INFORMATION AND NOT ALLOWING THE JURY TO MAKE A SPECIAL FINDING THAT DEFENDANT ACTUALLY POSSESSED A FIREARM AS REQUIRED.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

THIS ISSUE WAS PRESENTED ON A 3.800(A) MOTION AND
WAS APPEALED TO THE D.C.A.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 3.800(A)

Name and location of the court where the motion or petition was filed:

11TH JUDICIAL CIRCUIT COURT

Docket or case number (if you know): FOO-2011

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

3RD. DISTRICT COURT OF APPEAL

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

P.C.A.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, FAILURE TO RELATE PLEA IN VIOLATION OF DEFENDANT'S 6TH AND 14TH AMENDMENT

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

THE DEFENDANT'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN SHE FAILED TO RELATE A FAVORABLE 5 YEAR PLEA OFFER FOR THE ATTEMPTED MURDER CASE IN VIOLATION OF DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENTS

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

BECAUSE THIS ISSUE WAS NOT OBJECTED AND PRESERVED FOR APPELLATE REVIEW

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 3.850 POST CONVICTION MOTION

Name and location of the court where the motion or petition was filed:

11TH JUDICIAL CIRCUIT COURT (MIAMI)

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

3RD DISTRICT COURT OF APPEAL

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

P. C. A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two

GROUND THREE: TRIAL COURT IMPOSED A PRESUMPTION OF VINDICTIVE SENTENCE

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

TRIAL COURT IMPOSED A PRESUMPTION OF VINDICTIVE SENTENCE IN VIOLATION OF DEFENDANT'S 8TH AND 14TH AMENDMENT RIGHTS AND FURTHER DENIED HIM ALL RIGHTS UNDER THE DUE PROCESS CLAUSE

(b) If you did not exhaust your state remedies on Ground Three, explain why?

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

THIS ISSUE WAS NOT RAISED ON DIRECT APPEAL IT WAS
RAISED ON A 3.850 POST-CONVICTION MOTION

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 3.850

Name and location of the court where the motion or petition was filed:

~~11TH CIRCUIT COURT~~ 11TH JUDICIAL CIRCUIT COURT (MIAMI)

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

DENIED / WITH ALL ISSUES IN THE MOTION BEING ADDRESSED

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

3RD DISTRICT COURT OF APPEAL

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

P.C.A.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: FUNDAMENTAL ERROR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DIRECTING VERDICT FOR THE STATE IN VIOLATION OF THE CONSTITUTION

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO OBJECT AND PRESERVE FOR APPELLATE REVIEW, TRIAL COURTS REMARK DIRECTING VERDICT FOR THE STATE IN VIOLATION OF 6TH AND 14TH AMENDMENT OF U.S. CONSTITUTION

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

THIS ISSUE WAS RAISED ON MY 3.850 POST CONVICTION MOTION

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 3.850

Name and location of the court where the motion or petition was filed:

11TH JUDICIAL CIRCUIT COURT (MIAMI)

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

DENIED

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

3RD DISTRICT COURT OF APPEAL

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

P.C.A.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

GROUND 5

THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO INFORM DEFENDANT OF THE APPLICABILITY OF 85% PERCENT GAIN-TIME CONSEQUENCES IN VIOLATION OF DEFENDANT'S SIX AND 14TH AMENDMENTS OF U.S. CONSTITUTION

THIS GROUND WAS RAISED ON PLAINTIFF 3.850 MOTION FOR POST-CONVICTION RELIEF IN THE 11TH JUDICIAL CIRCUIT COURT AND APPEALED TO THE 3RD D.C.A.

THIS ISSUE WAS DENIED ON THE MERITS AND P.C.A. IN THE 3RD D.C.A.

GROUND 6

THE TRIAL COURT ERRORED IN FAILING TO ALLOW THE DEFENSE TO IMPEACH THE VICTIM WITH THE TYPE OF PRIOR CONVICTION HE HAD SINCE THE VICTIM'S DENIAL HAD BEARING ON PLAINTIFF'S DEFENSE IN VIOLATION OF PLAINTIFF'S 5TH AND 14TH AMENDMENT OF U.S. CONSTITUTION

THIS GROUND WAS OBJECTED TO IN THE TRIAL COURT AND RAISED ON PLAINTIFF'S DIRECT APPEAL, AND IT WAS DENIED IN THE 3RD. D.C.A.

GROUND 7

TRIAL COURT COMMITTED FUNDAMENTAL ERROR
BY FAILING TO GIVE REQUIRED JURY INSTRUCTIONS
ON DEFINITION OF EXCUSABLE AND JUSTIFIABLE ATTEMPTED
HOMICIDE IN VIOLATION OF PLAINTIFFS 14TH AMENDMENTS
DUE PROCESS RIGHTS

THIS GROUND WAS RAISED ON PLAINTIFF'S 3.850
MOTION FOR POST CONVICTION RELIEF IN THE ELEVENTH
JUDICIAL CIRCUIT COURT AND APPEALED TO THE 3RD
DISTRICT COURT OF APPEAL. THIS ISSUE WAS DENIED ON
THE MERITS IN THE TRIAL COURT AND P.C.A. IN THE
3RD DISTRICT COURT OF APPEAL.

APPENDIX F

STATEMENT OF THE FACTS

On February 28, 2001 the appellant after being found guilty of the offense of Attempted first degree murder appeared for sentencing before the trial court. The state's position was to have a sentence of (30) years with (20) minimum mandatory imposed. Trial counsel Ms. Ribeiro-Ayala argued that the court take certain mitigation circumstances into consideration and impose a sentence of (10) years. The court while contemplating mitigating from the 10-20 life was interrupted by the state. The court then politely admonished the state not to try to tell the court what to do. The state then misrepresented the law on the minimum mandatory sentencing by stating more or less the jury found the appellant guilty and from the information It says he shot the victim and he thinks the law requires various (20) years minimum mandatory. This misrepresentation induced the trial court to abandon any mitigation circumstances below the (20) years minimum mandatory by determining such sentence must be imposed and upon such judgement impose an overall sentence of (25) years imprisonment with a (20) year minimum mandatory.

Mr. Fikru an attorney well informed of Florida law on minimum mandatory sentencing knew that the jury's finding contained on the verdict form not the allegations in the information determine the punishment to be imposed. The misrepresentation was material as to how less the court could impose sentence. Mr. Fikru only made the misrepresentation with the intent that the court impose sentencing no less than the twenty (20) years minimum mandatory.

The petitioner with no significant prior record was injured as a result of the court relying on the misrepresentation due to the court abandoning any mitigation circumstances.

Several years later in 2005 the petitioner filed a rule 3.800 (a) motion which was granted and the reviewing substitution judge whom subsequently reduced the petitioner's (20) year minimum mandatory to (10) year minimum mandatory consistent with the jury's verdict form fully supports the fact of Mr. Fikru's fraudulent practice on the court and should not be relied upon to protect the overall imposition of twenty-five (25) years which should be vacated and the petitioner should be remanded back to the lower court for a new sentencing hearing with full mitigation discretion as was originally contemplated by the trial court.

Incomplete motions sent to show exhaustion

The petitioner states that in his exhibits the motions that are attached are incomplete, the petitioner states that only the first page of the motion were sent to this federal court to show the court that this claim was exhausted in the lower court, to view the initial motion please see or contact the clerk of courts, send the whole motions would excuse petitioner's motion for relief to consist to over (100) pages.

ARGUMENT

That the petitioner is presently incarcerated in violation of the 5th and 14th amendment of the constitution secures through article I section IX of the Florida constitution by serving a sentence that was induced by fraud upon the court in violation of his due process rights to a fair sentencing proceeding.

In the instant case the petitioner asserts that his constitutional rights in his sentencing state court hearing was held unconstitutionally because the prosecutor Mr. David Fikro intentionally committed fraud upon the court to get the trial court to give the petitioner an increased upward sentence.

The dialogue that occurred between the trial court the prosecutor and defense counsel at the start of the sentencing hearing shows the state's opening argument explaining the circumstances of the petitioner's case. The state prosecutor in arguing for his particular sentence that he would like imposed intentionally committed fraud upon the court by persuading the judge to sentence the petitioner to a minimum mandatory (20) year sentence. In arguing for this (20) year minimum mandatory, the state used false information that was not applicable to the petitioner's sentencing hearing for the purpose of intentionally causing the court to abandon mitigation and impose a harsher sentence. the petitioner's due process rights to a fair sentencing hearing has been violated because of the fraud

committed upon the court. The petitioner would like the court to see the unreliable information that was said by the prosecutor to intentionally persuade the court.

See exhibit of sentencing transcripts page 5 line 19-25 and page 6 line 1-3

state prosecutor

"In addition your honor the defendant qualifies under the ten-twenty life statute. He did fire a weapon and the weapon did strike and cause injury to the individual in this case, Lionel Scott. Based on that he does qualify and the state will highly recommend to the court at a minimum he should get the (20) year's minimum mandatory that is required by the legislature. I don't believe there is any mitigation circumstances that would cause the court to deviate from it."

The petitioner states that this statement made by the prosecutor is incorrect as to it's applicability to the petitioner's sentencing hearing. Why? I'll tell you why. In the petitioner's case a verdict form was drafted up by the prosecutor and the petitioner was found guilty of attempted murder with a firearm which only calls for a minimum mandatory (10) year sentence based on the 10-20 life law for possession of a firearm. The petitioner state that this statement made by the prosecutor against the petitioner was false as it was incorrectly applied to the petitioner's sentencing hearing, unreliable, improper, erroneous and violated petitioner's due process rights.