No.: 19-6595

Case No.19-10439-H
Dist. Ct. Case No.: 6:17-cv-369-Orl-18KRS

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND TAVELLE HOLMES,
Petitioner-Appellant,

v.

JULIE JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RAYMOND TAVELLE HOLMES
HOLMES CORRECTIONAL INSTITUTION
3142 THOMAS DRIVE
BONIFAY, FLORIDA 32425

QUESTION PRESENTED

(1).Whether this Court should exercise its discretionary certiorari jurisdiction and grant certiorari, vacate the judgment below, and remand the case so that the Court of Appeals can correct the obvious error affecting Mr. Holmes's substantial rights, where the Magistrate Judge failed to file a report and recommendation as required by Title 28 U.S.C.636(b)(1)(C), depriving the Petitioner the opportunity to file a written objection to such proposed findings and recommendations as provided by rules of court. See, Title 28 U.S.C. 636(b) (1) (C); Fed. R. Civ. P. 72(b) (2)?

(2). Whether this Court should exercise its discretionary certiorari jurisdiction and grant certiorari, vacate the judgment below, and remand the case so that the Court of Appeals can correct the obvious error affecting Mr. Holmes's substantial rights, where Petitioner Raymond T. Holmes, was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law pursuant to the United States Supreme Courts holding in *Strickland v. Washington*, 466 U.S. 668,687, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984)? **(A).** Whether the trial court erred in denying Petitioner's claim of ineffective of trial counsel without an evidentiary hearing where trial counsel was ineffective for failing to move to suppress the illegally seized text messages from Petitioner's cell phone that were obtained from his service provider (Metro PCS) without a warrant? **(B).** Whether the warrantless search and Seizure of text messages from a cell phone and it's service provider pursuant to Florida Statute §934.23 and implied consent law, where no exigent circumstances exist, and no alternate source or inevitable discovery in the record, violates the Fourth Amendment of the U.S. Constitution? **(C).** Broward County, Florida after cases had been nolle-prossed shared suppressed text messages from its investigation and failed prosecution with Orange County, Florida for the instant prosecution, the foundation of this evidence being illegally seized without a warrant, was Orange County's State Attorney Office required to inquire into the legality of this evidence before it was used or was it lawful and constitutional to rely on the work

product of a sister court who's case has been dropped, and did this evidence constitutionally fall under the umbrella and connected to the Williams Rule Evidence to be listed as such in the State's intent to use? **(D).** Does the Fourth Amendment protect the property that is held by a third party, to the point that law enforcement must obtain a warrant to take possession of personal correspondence meant only for one person and not posted on a general website for anybody to have access, private social interaction in consideration of Florida Statute 934.23? **(E).** Is it lawful and constitutional for the same text messages to be suppressed in Broward County, Florida (case nolle-prossed) only to be handed over to Orange County, Florida prosecutor's office and used to convict where no exigent circumstances, no alternate source, or no inevitable discovery in the record?

(3). Whether the trial court erred in denying Petitioner's claim of ineffective of trial counsel without an evidentiary hearing where trial counsel was ineffective for failing to timely move to sever counts one and two from counts three through five? **(B).** This case involves two (2) separate alleged victims from two (2) separate crimes/offenses (alleged) that were not severed for trial, though these crimes were the same in nature (sexual), one was alleged consent and the other alleged by force, upon what constitutional legality is the State allowed to deprive a defendant a fair trial(s) as to each crime in consideration of the evidence spilling over into the other clouding elements of each crime vice-versa?

(4). Whether the trial court erred in denying Petitioner's claim of ineffective of trial counsel without an evidentiary hearing where trial counsel was ineffective for failing to object to the admission of Williams Rule/Similar Fact evidence (Counsel failed to object when the State offered the evidence during trial)? **(B).** Similar fact evidence was presented at this unsevered trial of a nolle-prossed case (Broward County, Fl) involving (alleged) victim B.A., the same Orange County, Fl. alleged victim in counts 3-5, counts 1-2 is alleged victim N.P., counts 1-2 alleged force and counts 3-5 consent, nothing similar about these charges existed except the nature of the offenses. B.A was the Broward County (nolle-pros) alleged victim, the unsevered trial crimes and similar fact

evidence introduce is inextricably intertwined; did both used in conjunction with each other violate the petitioner's fair trial rights as the rule of severance and William's rule (similar fact evidence) essentially cancelled each other out in terms of effect and purpose as to B.A. and N.P.?**(C).** Similar fact evidence (Williams Rule) mandates that such evidence not becomes a feature of the trial that instruction on the limited admissibility of the evidence be given to the jury, no such instruction was given for lack of a severance, moreover, the State clearly made similar fact evidence a feature of the trial. at what point did the lack of instruction and making the evidence a feature of the trial infringe upon the fair trial rights of the petitioner in consideration of lack severance?

(5). Whether the trial court erred in denying Petitioner's claim of ineffective of trial counsel without an evidentiary hearing where trial counsel was ineffective for failing to object to the closure of the courtroom during the victim's testimony?

(6). Whether the trial court erred in denying Petitioner's claim of ineffective of trial counsel without an evidentiary hearing where trial counsel was ineffective for failing to call multiple witness to testify?

(7). Whether the trial court erred in denying Petitioner's claim of ineffective of trial counsel without an evidentiary hearing where trial counsel was ineffective for misadvising the petitioner that his testimony was unnecessary and;

(8). Whether the trial court erred in denying Petitioner's claim of ineffective of trial counsel without an evidentiary hearing where trial counsel was ineffective for failing to move for a judgment of acquittal?**(B).** Concerning material variance at J.O.A. once a information has been filed and presented and read to the jury being charged with hearing the facts of the (crime(s) as charged), has the crime(s) been proven if no evidence that the information charged has been presented, the fact or allegation that the "crime" happened being neither here or there, is that ā legal and proper argument for J.O.A. as it doesn't

have anything to do with the elements of the crime(s), but the date alleged in the information? And should the J.O.A. be granted on such a circumstance?

LIST OF PARTIES

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:

Berger, Wendy W., Judge, Fifth District Court of Appeal, State of Florida

Bondi, Pamela, Florida Attorney General

Charles, Aliette-Marie, Esq. Assistant Public Defender

Cohen, Jay P., Fifth District Court of Appeal, State of Florida

Evander, Kerry I., Judge, Fifth District Court of Appeal, State of Florida

Gong, Lisa, Assistant State Attorney, Ninth Judicial Circuit, State of Florida

Holmes, Raymond Tavelle; Petitioner-Appellant

Lamar, Lawson, State Attorney, Ninth Judicial Circuit, State of Florida

Latimore, Alicia L., Judge, Ninth Judicial Circuit Court, State of Florida

McGinnis, Katy, Esq., Assistant Public Defender

Mills, Jonathan, Esq. Assistant State Attorney

Moody, Ashley B., Elected Attorney General, State of Florida

Morris, Allison, Esq., Assistant Attorney General

Orfinger, Richard B., Judge, Fifth District Court of Appeal, State of Florida

Palmer, William D., Former Judge, Fifth District Court of Appeal, State of Florida

Parish, Bonnie Jean; Assistant Attorney General

Purdy, James S., Public Defender, Seventh Judicial Circuit Court, State of Florida

Ross, Leonard R., Esq., Assistant Public Defender

Sharp, Kendall G., Senior Judge, U.S. District Court, State of Florida

Spaulding, Karla R., Magistrate Judge, U.S. District Court of Florida, State of Florida

Torpy Jr., Vincent G., Chief Judge, Fifth District Court of Appeal, State of Florida

Wesley, Robert, Public Defender, Ninth Judicial Circuit Court, State of Florida

Wooten, Wayne C., Judge, Ninth Judicial Circuit Court, State of Florida

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Case No.19-10439-H
Dist. Ct. Case No.: 6:17-cv-369-Orl-18KRS

IN THE
SUPREME COURT OF THE UNITED STATES

Petitioner Raymond Tavelle Holmes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the 11th Circuit, denying Petitioner's application for Certificate of Appealability.

OPINIONS BELOW

The following opinions and orders below are pertinent here, all of which are unpublished: **[A]**. Decision reached on belated appeal by *Holmes v State*, 103 So.3d 261, 2014 Fla. App. LEXIS 21958 (Fla. Dist. Ct. App. 5th Dist., Dec. 21, 2012) [Orange County, Florida]-Case No.: 5D12-4114; **[B].** Decision reached on appeal [judgment and conviction] by *Holmes v. State*, 150 So. 3d 1170, 2014 Fla. App. LEXIS 17344 (Fla. Dist. Ct. App. 5th Dist., Oct. 21, 2014)-Case No.: 5D12-4937; **[C].** Decision reached on appeal [motion for post conviction relief] by *Holmes v. State*, 222 So. 3d 1229, 2017 Fla. App. LEXIS 149 (Fla. Dist. Ct. App. 5th Dist., Jan. 3, 2017)-Case No.: 5D16-2971); **[D]**. Rehearing [motion for post conviction relief]- *Holmes v. State*, 2017 Fla. App. LEXIS 2591 (Fla. Dist. Ct. App. 5th Dist. February 1, 2017)-Case No.: 5D16-2971; **[E].** Order by United States District Court for Middle District of Florida [Hon. G.K. Sharp, Senior, United States District Judge], denying petition for writ of federal habeas corpus and District Court Order Denying Request for Certificate of Appealability January 4, 2019.-

Holmes v. Jones, (M.D. Fla. Jan. 04, 2019)-Case No.: 6:17-cv-00369-Orl-18KRS;**[F].** Eleventh Circuit order denying application for a certificate of appealability May 30, 2019. Case No.: *Holmes v. Florida*, 2019 U.S. App. LEXIS 16208(M.D. Fla. May 30, 2019);**[G].** Eleventh Circuit order denying motion for reconsideration July 23, 2019. Case No.: *Holmes v. Florida*, 2019 U.S. App. LEXIS 16208(M.D. Fla. May 30, 2019);**(See Appendix for copies.)**

STATEMENT OF JURISDICTION

The District Court and the Court of Appeals for 11th denied Petitioner's request for Certificate of Appealability. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court held that, pursuant to 28 USC § 1254(1), the United States Supreme Court has jurisdiction, on certiorari, to review a denial of a request for Certificate of Appealability by a Circuit Judge or panel of Federal Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 USC § 2254. The standard for relief under "AEDPA" is set forth in 28 USC § 2254(d)(1).

STATEMENT OF THE CASE AND PERTINENT FACTS

The underlying criminal case arises out of several alleged incidents during March 2010 where Petitioner (then 29 years old), a track coach at Hollywood Christian Academy who also had established his very own non-profit Youth Track Club [Holmes Express Youth Track Team -ages 5-19] travel team; was accused of being in a consensual boyfriend/girlfriend sexual relationship with his student B.A. (16- 17year old) and also, accused of forcing himself on another student N.P. (15 years old). B.A. incidents allegedly occurred in Broward County and Orange County, Fl.; which resulted in two separate criminal cases -- one in each county. N.P. incident allegedly occurred in Orange County only; which were filed in the same in the amended information as B.A., which ultimately resulted in Orange County Case No. 2011-CF-004326-A-O charging Petitioner with counts 1,2 lewd or lascivious battery against N.P. (15 year old) March 13, 2010, in violation of F.S. 800.04 (4)(a); and counts 3,4,5 unlawful sexual activity against B.A. (16- or 17-year old) March 12, 2010, in violation of F.S. 794.05(1). However, Petitioner's cases against B.A. unlawful sexual activity-F.S. 794.05(1)) in Broward County (Case No.: 10-005071-CF-10-A; 10-010453-CF-10-A) had been nolle-prossed on two (2) different occasion/cases prior to the jury trial in the Orange County, case. Petitioner's habeas petition challenges the Orange County, Fl. case. Still it is necessary to briefly address his Broward County case because the Orange County case is based on the nolle-pros collateral crimes involving the same alleged victim B.A. .

Petitioner in this case was accused of having an alleged consensual sexual incident with B.A. and a forceful sexual incident with N.P. all in a Hotel while at a track and field sporting event in Orlando, Fl. (3/12-13/2010-Orange County). Several chaperons (adult) were also at this event including David Tillman- Assist. Coach who shared a room with Petitioner and his fiancée Ashley Ferrell: numerous other uncalled witnesses were present during the timeline of these alleged offenses and was present and available at trial. It must be noted that N.P.'s mother was also a chaperon during this trip and nothing was mention or reported while in Orlando of any crime taking place.

After, this track and field event (3/13/2010) all parties traveled back to 'Broward' county at which time on March 22, 2010, B.A.'s mother found text messages on B.A.'s I-pod and confronted her of its contents. On March 23, 2010, B.A.'s mother then alerted school officials and Hollywood Police Department who met with petitioner and his Assist. David Tillman at Hollywood Christian Academy (Broward County) in reference to improper activity between [a] female student 'B.A.'. Police placed handcuffed on petitioner and his Assist. Tillman for "their safety". Police asked if petitioner had a cell phone. Petitioner responded that his phone was in his pocket. Without consent police officer reached into Petitioner pocket and retrieved Petitioner's phone and began looking through petitioner's phone and it's contents/text messages without a warrant. Petitioner's was subsequently taken into custody, incident to arrest as petitioner's text messages were gathered from Metro PCS service provider dating January 2010-March 2010, without a warrant.

During the Broward County investigation of it's own alleged crime, B.A. in 2011, subsequently made known to investigators that were another alleged incident of sexual activity between her an petitioner and petitioner and her cousin N.P. in Orange County, while attending a track and field sporting event March 12-13-2010-Orlando, Fl. . After inquiry into allegation Orange County charged petitioner with five (5) amended counts involving two different students, with two different alleged offenses, two different location and times. Petitioner asserted his right to jury trial and on July 12, 2012, B.A. testified to the Orange County and Broward County alleged incidents occurring on or about March 5-19, 2010[1]. N.P. testified that the Orange County alleged incident occurred on March 13, 2010.

These counts were not severed for trial as requested by counsel, denied, then objected to. Moreover, the State sought to use similar fact evidence of a uncharged crimes of prior alleged crimes with B.A. from Broward County, Florida that had been nolle-prossed on two (2) different occasion/cases as B.A. failed to appeal for trial and 'text' messages suppressed.'

Defense counsel sought a continuance prior to trial based off of new information obtained from Mr. Elliot Lumpkin (Broward County private attorney who handled petitioner's case that resulted in (2) two nolle-pros) concerning a Ms. Jacqueline Henry (best friend of B.A.) vol. 1-TR 2-19) who indicated that all of the allegation against the petitioner were planned and are false. Counsel attempting to investigate and depose as a

[1] B.A.'s testimony as to the alleged sexual encounters occurring in Broward County between her and Petitioner can be found in the transcripts of the pre-Williams hearing and the trial transcripts for Orange County case no.: 2011-CF-004326-A-O-TR (330-511).

payoff from a lawsuit because an issue that had been learned about. This witness (Ms. J. Henry) is alleged to have made these statements to a listed defense witness, the Assist. Coach David Tillman who was present at trial and gave a proffer concerning these false allegations, verbalizing exculpatory evidence, in that B.A was paid to lie about the petitioner. (vol. 1 TR 22-29). Ultimately, the trial court denied a continuance to pursue this evidence.

Also, prior to trial, in limine, the petitioner had learned that the trial court had been a prosecutor with the State Attorney office while the petitioner's case was pending directly before the "court" became a judge for these case(s), counsel moved for recusal, the court denied the motion as insufficient, then during trial, stopped trial and gave defense counsel the opportunity to file a written motion of recusal and ruled on it immediately, 'denied.' The case went to trial, the State calling several witness, the defense called one character witness who could not challenge the State's case and the petitioner did not testify under misadvise of counsel. Further, defense counsel failed to move for a judgment of acquittal (J.O.A.), which the court stated that "had J.O.A. been made it would've been denied, "material variance at issue as to date/time in the information. The jury found petitioner on guilty July 13, 2010 on all five counts and on August 27, 2010, the court sentenced petitioner. Petitioner timely appealed his conviction on September 27, 2012. On October 21, 2014, the appellate court affirmed Petitioner's conviction, *per curiam* and without written opinion. *Holmes v. State*, 150 So. 3d 1170 (Fla. 5th DCA, 2014).

Petitioner timely filed his habeas petition pursuant to Section 2254; the State filed its operative Response along with exhibits. Petitioner filed a traverse on January 29, 2018.

Without the Honorable Karla R. Spaulding, United States Magistrate Judge filing her Report and Recommendation, the Honorable G. Kendall Sharp, Senior United States District Judge, issued an order on January 4, 2019 denying and dismissing with prejudice Petitioner's Petition for Writ of Habeas Corpus. Said order also "Denied" the Petitioner a Certificate of Appealability. (Doc. 20). The Honorable G. Kendall Sharp, Senior United States District Judge, abused his authority by wrongfully depriving Petitioner the right to object to the Appointed Magistrate Judge finding of fact and recommendation and the right to an adequate

de novo review.

Pursuant to Title 28 U.S.C. 636(b)(1)(C) once a magistrate judge is appointed the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Here, the Honorable Karla R. Spaulding, the United States Magistrate Judge did not file her proposed findings and recommendations in accordance with Title 28 U.S.C. 636(b)(1)(C), therefore, depriving the Petitioner the opportunity to file a written objection to such proposed findings and recommendations as provided by rules of court. See, Title 28 U.S.C. 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2).

On March 15, 2019, the Petitioner filed his initial application for Certificate of Appealability with the Eleventh Circuit Court of Appeals. On April 10, 2019, the

Petitioner requests leave to file an Amended Application for Certificate of Appealability with the Eleventh Circuit Court of Appeals in good faith. On May 30, 2019, the Eleventh Circuit Court of Appeals issued an Order denying the petitioner's amended application for certificate of appealability, also denying petitioner's motion for leave to proceed on appeal in forma pauperis as moot. Petitioner on June 19, 2019, filed a motion to reconsider, vacate, or modify with the Eleventh Circuit Court of Appeals which issued an order denying the petitioner's motion for reconsideration.

As a result, the question presented becomes the following:

REASONS FOR GRANTING THE WRIT

ARGUMENT

The following factors were all present in this case:

In claim 1: The Magistrate Judge failed to file a report and recommendation as required by Title 28 U.S.C.636(b)(1)(C), depriving the Petitioner the opportunity to file a written objection to such proposed findings and recommendations as provided by rules of court. See, Title 28 U.S.C. 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2).

The Petitioner filed a federal writ of habeas corpus on February 28, 2017, (Doc. 1). On or about March 3, 2017, United States District Court; Middle District of Florida, [Orlando Division] filed a Related Case Order and Track One Notice appointing Honorable Karla R. Spaulding, United States Magistrate Judge and Honorable G. Kendall Sharp Senior, U.S. District Judge.(Doc. 2) On May 31, 2017, the Honorable Karla R. Spaulding ordered Respondents to file a response.(Doc. 6)

The Respondent filed their response on November 13, 2017(Doc. 14). Petitioner filed a Reply on January 29, 2018, to the Response (Doc. 18).

Without the Honorable Karla R. Spaulding, United States Magistrate Judge filing her Report and Recommendation, the Honorable G. Kendall Sharp, Senior United States District Judge, issued an order on January 4, 2019 denying and dismissing with prejudice Petitioner's Petition for Writ of Habeas Corpus. Said order also "Denied" the Petitioner a Certificate of Appealability. (Doc. 20).

The Honorable G. Kendall Sharp, Senior United States District Judge, abused his authority by wrongfully depriving Petitioner the right to object to the Appointed

Magistrate Judge finding of fact and recommendation and the right to an adequate de novo review.

Pursuant to Title 28 U.S.C. 636(b)(1)(C),Fed. R. Civ. P. 72 (b)(2), Once a magistrate judge is appointed, "the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties." *Id.*

Here, had Petitioner been afforded the opportunity to file objections, there is a reasonable likelihood that the District Court Judge would have found merit in the grounds alleged or in the least award an evidentiary hearing to allow Petitioner to further expand and develop the grounds/claims.

In this procedural context, Petitioner is unable to foresee or predict what the Magistrate would have proposed in (her) findings and recommendations. Considering the possibility the Magistrate would have proposed an adverse ruling. Petitioner was entitled to file his objections/traverse in order to further illustrate the merits of his claims. As such, Petitioner's procedural/substantive due process rights as guaranteed by the Fourteenth Amendment of the U.S. Constitution were violated.

Assuming arguendo, that the Honorable Karla R. Spaulding, the United States Magistrate Judge did file her report and recommendation as required by Title 28 USC 636(b)(1)(C);Fed. R. Civ. P. 72(b) (2). The Petitioner was never served a copy of the Magistrate Judge's report and recommendation, as required by rules of court. Once more, depriving the Petitioner the opportunity to file a written objections to the proposed findings of fact and conclusions of law contained in that report, within fourteen (14) days

of being served with a copy of that report, bars that party [the petitioner] from: (1) entitlement to *de novo* review by the United States District Judge of the findings of fact and conclusions of law, See, *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of any such findings of fact and conclusions of law accepted by the United States District Judge, See, *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, at 1428-29 (5th Cir. 1996) (en banc).

However, the Eleventh (11th) Circuit Court of Appeals overlooked the above facts and record and failed to issue an order reversing and remanding the Petitioner's Petition for writ of habeas corpus back to the Honorable Karla R. Spaulding, the United States Magistrate Judge directing the Magistrate to file her report and recommendation and serve a copy of said report to the Petitioner with a notice that the petitioner has fourteen (14) days to file a written objection to the Magistrate's report as required by Title 28 U.S.C. 636(b)(1)(C);Fed. R. Civ. P. 72(b)(2).

In claim 2: The petitioner was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law where the trial court erred in denying Petitioner an evidentiary hearing, where trial counsel failed to move to suppress the illegally seized text messages from Petitioner's cell phone that were obtained from his service provider (Metro PCS) without a warrant.

Under the holding in *Kimmelmann v Morrison*, 477 U.S. 365 (1986) counsel's failure to challenge Fourth Amendment violation via Motion to Suppress illegally seized evidence satisfied deficient performance prong of *Strickland v. Washington*, 466 U.S. 668,687, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

Under the facts and circumstances of this case, Counsel should have moved to suppress all evidence that was based off of the foundation of the warrantless search and seizure of the petitioner's phone incident to arrest, in Broward County, Florida. See, *Arizona v. Gant*, 129 S. Ct. 1710, 173 L.Ed. 2d 485, 566 U.S. 332 (2009) which clearly established that once the arrestee is separated from any possible weapons or evidence, the search incident –to-arrest warrant exception no longer exist. (556 U.S. at 335). The arresting officer actually searched the contents of Petitioner's phone in his presence without consent. The Fourth Amendment of the United States Constitution and thru the 14th Amendment clearly forbids such a search without a warrant or permission; officer having neither. Moreover, the line of evidence and his train of thought based off of that search became and are fruit of the poisonous tree doctrine. See... *U.S. v. Olivapes-Rangel,* 458 F.3d 1104, 1117 (10th Cir. 2006); F.S. 934.23.

Broward County Police officer search through the phone w/o warrant, and the State Attorney's office obtained the contents (text messages) from the Metro PCS Service Provider without a warrant. The Broward County case(s) were nolle prossed due to suppression of the illegally search and seizure of petitioner's phone and text messages and B.A. failed to show for trial. Broward County then provided Orange County with all of the illegally obtained and suppressed evidence and at no time did Orange County State Attorney or Orange County Sheriff's office take any legal measures (i.e. warrant) to obtain petitioner's phone record, nor did they ascertain the legality of the seizure of the text messages given. This evidence 'phone record'/ 'text messages are constitutionally protected as Petitioner did not voluntarily convey these messages to 'anyone' who

wanted to look at them but one person. Officers search of petitioner cell phone text message without a warrant or any exception rule or exigent circumstances on the record, violated petitioner's expectation of privacy which is guaranteed under the Fourth Amendment. *Riley v. California,* 134 S.Ct. 2473 (2014).

In *Riley v. California*, supra., the Supreme Court held that when a person is arrested and has a cell phone in his possession, the police may not search the contents of the cell phone without a search warrant. The justifications for a search incident to arrest (Officer safety and preservation of evidence) do not support the warrantless search of a cell phone.

Here, the Petitioner contends that the records is clear, the search of petitioner's phone was not a search of the person incident to an arrest, but a warrantless search of highly advances technology that contained extensive personal information (text messages). As technology has enhanced the government's capacity to encroach upon areas normally guarded from inquisitives eyes, the United States Supreme Court has sought to assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted, so before compelling a wireless carrier to turn over a subscriber's contents (text messages) information, the government obligation is a familiar one and get a warrant. See, *Carpenter v. United States,* 138 S.Ct. 2206, 2213, 201 L. Ed. 2d 507 (2018) n.4.

Once the cell phone was in custody, the State can take preventative steps to ensure that data found on the phone are neither lost nor erased, but because Petitioner has an expectation of privacy to the contents of his cell phone, law enforcement officer was

required under the Fourth Amendment to obtain a warrant before intruding into the phone's contents. Intrusion into Petitioner possessory interest in his cell phone is at least as high as if not higher. A smart phone, as the Supreme Court recently emphasized, is unique in both the breadth and depth of personal information it stores, including; "photographs, pictures messages, text messages, internet browsing history, a calendar, and phone book entry"- information that, all told, "reveal(s) much more in combination than any isolated record" causing petitioner expectation of privacy or effect under the 4th Amendment to be violated. *Riley v. California*, *supra.*; *U.S. v Babcock*, 27 Fla. L. Weekly Fed. C2024 (2019).

A cell phone is almost like a "feature of Human Anatomy" and the different services it provides (text message) are such a pervasive and insistent part of daily life" that must be protected. *Id.* Each prisoner has the right to be secure against unreasonable searches.... In his own person, houses, papers,-and effects. *Minnesota v. Carter,* 525 U.S. 83, 92, 119 S.Ct. 467, 142 L.Ed 2d 373 (1998) (Scolia, J., concurring). Particularly, this was a requirement as the State Court finding presented no evidence that the petitioner could use the devise as a weapon or could have destroyed any evidence that may have existed on the phone. Accordingly, neither the officer protection nor the evidence preservation justification for the warrant exception applied. However, absent either a warrant or probable cause plus an exception, police may not seize private property. See *Kentucky v. King*, 563 U.S.452, 459 (2011).

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. "The basic purpose of this Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States,* supra. n. 1.

Under the Fourth Amendment, a search occurs when "the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). A seizure occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook City.*, 506 U.S. 56, 61, 113 S.Ct. 538, 121 L. Ed. 2d 450 (1992)(quoting *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L. Ed. 2d 85 (1984)). The "ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California,* supra. Also, the Fourth Amendment protects people, not places, and the United States Supreme Court has expanded its conception of the Amendment to protect certain exception of privacy as well. When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize, official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. (Roberts, Ch. J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) *Carpenter v. United States,* supra. n.2

The State court stated that "even if the text messages were suppressed, they still would come in through alternate source so no harm done."

Petitioner contends that the text messages from his service provider Metro PCS, or cell phone, were not made available to the State through alternate sources as stated by the State postconviction court. The State failed to demonstrate or produce documents to establish its alternative source in which they can not speculate or hypothesize. Furthermore, trial counsel never filed a motion to suppress based on the illegal search and seizure of Petitioner's phone, and its text messages, or that §934.23 F.S. which requires a warrant to secure contents stored less than one hundred and eighty days. Either basis required the text messages to be suppressed, violating his Fourth Amendment Constitutional Rights.

Inevitably under this rule involves no speculative elements. Thus, the rule first requires a reasonable probability that the evidence would have been discovered despite the improper police procedure. *United States v. Brookins*, 614 F.2d 1037, 1042 (5th Cir. 1980). Second, the state can not argue that some later or future investigation would have inevitably led to the discovery of the evidence rather, the investigation must be ongoing and the State must demonstrate that the facts known by the police at the moment of the unconstitutional procedure would have led to the evidence notwithstanding the police misconduct.

Here, there was no record of any affidavit, or warrant, nor was there any record sustaining or indicating any attempt or legal measures by the State or law enforcement that the text message were available through any other means, or sources and there was no means to obtain messages within B.A.'s I-Pod Wi Fi device in 2010, because again, B.A.'s I-Pod in year 2010 had no service provider that could reproduce the contents (text

messages). Petitioner service provider was the only way to obtain text messages between B.A. and Petitioner as it was done without a warrant violating Petitioner's Fourth Amendment Constitutional Right.

Section 934.23(4)(b), Florida Statute (2010), provides that information pertaining to a subscriber, not including the contents of an electronic communication, must be obtained by warrant, court order, or consent of the subscriber. There's nothing in the entire record that indicate that the officer search of petitioner's phone was conducted in objectively reasonable reliance on binding judicial precedent. The United States Court of Appeal of the Eleventh Circuit has explained that an affidavit should establish a connection between the defendant and the property to be searched and a link between the property and any criminal activity. No affidavit in the record in support of a search warrant or an attempt to seek one.

Counsel's failure to move for suppression of illegally seized text messages that were obtained from his service provider (Metro PCS) after Petitioner was taken into custody can't be viewed as a harmless error especially in light of the fact that a year prior, a different judge suppressed the same text messages in a pending case against Petitioner with similar facts in Broward County pertaining to B.A. . Therefore, had it not been for Counsel's deficient performance there was a reasonable probability that the outcome of Petitioner's trial would have been different, because the State's theory was that Petitioner and B.A. were in a boyfriend/girlfriend relationship, and the messages were introduced to confirm the relationship. Absent the text messages, B.A's testimony could not be

corroborated, as some of the allegation she made were so inherently incredible concerning the alleged relationship, the jury would have rejected her entire testimony.

Also, considering the State, during rebuttal closing argument, "Argued it was the text messages that got the defendant caught, and that the text were the reason that the trial was being held (RT. 741-744)-B.A. and N.P.'s testimony is corroborated by the text messages and David Easley. (RT. 742). Follow the law, look at the text messages, look at the testimony of B.A. and N.P. and hold Defendant accountable for what he did. (R.T. 744)." In light of this clear assertion by the State that the text messages were the only reason Petitioner was caught and only reason the trial was being held, appears to clearly demonstrate that, absent the introduction of the subject text messages, "a reasonable probability in fact exists that the outcome of the Petitioner's trial would have been different had his counsel moved to suppress the text messages illegally obtained without a warrant from Petitioner's service provider.

However, the police made no prior statements nor gave any indication that they or the State Attorney had looked at B.A.'s I-Pod or mother's phone record for text messages from the Petitioner. (*Id.*)

The State court and District Court, at no time during these proceedings have not established or demonstrated that the subject text messages were available through an alternate source, cannot speculate nor use hypothetical theory to inject conclusions not in the record in evaluating prejudice or lack thereof. However, the Petitioner has clearly demonstrated that the outcome would have been different had counsel moved to suppress the text messages illegally obtained; a new trial is due. *United States v. Cherry*, 759 F.2d

1196 (5th Cir. 1985); *Farina v. Sec'y, Dep't. of Corr.*, 536 Fed. Appx. 966, 985 (11th Cir. 2013); *Strickland,supra.* .

In claim 3, 5 and 8[2]

Petitioner further states that he respectfully reserves the right to file an objection to the Magistrate judge filing of a report and recommendation upon remand of this Honorable Court's granting the Petition for Writ of Certiorari and order of a full briefing.

In claim 4: The petitioner was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law where the trial court erred in denying Petitioner an evidentiary hearing, where trial counsel failed to object to the admission of Williams Rule evidence as to count(s) 1,2.. (Counsel failed to object when the State offered the evidence during trial).

Prior to trial, the state filed a notice, pursuant to section 90.404(2)(a), that it intended to introduce similar fact evidence of the nolle prossed incidents that allegedly occurred between the Petitioner and the alleged B.A. in Broward County Case No. 10-5071CF10A, 10-010543-CF-10-A. Trial counsel oral motion that Similar fact evidence be excluded, but the State court denied said claim based on the similarity of the evidence to the charged offenses, the proximity in time of the other acts to the charged offenses,

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[2] For the purpose of this argument the petitioner will consolidate **claim 3**: The petitioner was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law where the trial court erred in denying Petitioner an evidentiary hearing, where trial counsel failed to timely move to sever counts one and two from counts three through five. **claim 5:** The petitioner was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law where the trial court erred in denying Petitioner an evidentiary hearing, where trial counsel failed to object to the closure of the courtroom during the victim's testimony; and **Claim 8:** The petitioner was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law where the trial court erred in denying Petitioner an evidentiary hearing, where trial counsel failed to move for a judgment of acquittal.

and the alleged involvement of N.P. in the other acts. It was further noted that, during Petitioner's trial, the court noted Counsel's prior objection to the admission of the Williams Rule evidence for the record. The District Court's holding was incorrect. See, *Jurek v. Estelle*, 623 F.2d 929, 931 (5th Cir. 1980) which held that the Supreme Court has frequently stated that [a Federal Court's] affirmative duty is to examine the entire record and make an independent determination, of the State Court's findings. See, *Moore v. Fla. Dept. of Corr.*, 486 Fed. Appx. 810 (11th Cir. 2012).

The Petitioner further contends that the District Court, erroneously relied upon an inaccurate section of the trial record to support it's reasoning in denying Petitioner relief as to the instant claim. The trial record relied upon by the District Court is in reference to the State prosecutor objecting to the examination of a State's witness by the defense.

Q. Okay-And you were so trustful of him that you confided in him that you had been sexually abused previously, correct?
MR. MILLS: Objection Judge, can we approach?
THE COURT: Approach.
MR. MILLS: Objection as to relevance. Any relevance is outweighed by the chance of unfair to the State. Rape shield comes into play here, as well. It's really not relevant to show- -
THE COURT: What's the relevance of this line of questioning?
MS. CHARLES: Just to show that she was close.

(R.T. at 452)

However, even though Counsel made an oral motion to exclude the Williams Rule evidence prior to trial, Counsel made no contemporaneous objection to the effect that the

evidence had on Counts One and Two which was "...precluded by some specific exception or rule of exclusion." (*McLean v. State*, 934 So. 2d 1248, 1255 (Fla. 2006)).

In the instant case, Counsel was deficient as she is presumed to stay abreast of the current procedures, cases, and attendant faculties of law, yet failed to object that the Williams Rule evidence was inadmissible under §90.404(2)(b) because only "...evidence of the defendant's commission of other crimes, wrongs or acts of child molestation is admissible..."

A. **Section *90.404*(2)(b), Florida Statutes** . The provision specifically addresses the admissibility of collateral offenses in a case in which the defendant is charged with child molestation: **1.** In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant. **2.** For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. *794.011* or s. *800.04* when committed against a person 16 years of age or younger. *90.404(2)(b)*. The Second District concluded that there is "no question" that in enacting section *90.404(2)(b)* "the legislature was attempting to alter or overrule the application of existing case law and to simplify the rules of admissibility in child molestation cases." *McLean, 854 So. 2d at 801.*

"[L]egislative intent is the polestar that guides a court's statutory construction analysis. In determining the Legislature's intent, we look first at the statute's plain language." *Reynolds v. State*, 842 So. 2d 46, 49 (Fla. 2002). Section 90.404(2)(b) broadly provides that evidence of the defendant's commission of other acts of child molestation is admissible regardless of whether the charged and collateral offenses occurred in the familial context or whether they share any similarity. To this extent, section 90.404(2)(b) abrogates our decisions in *Saffor v. State*, 660 So. 2d 668 (Fla. 1995), *Heuring v. State*, 513 So. 2d 122 (Fla. 1987) *and State v. Rawls*, 649 So. 2d 1350, 1353 (Fla. 1994).

However, the statute goes on to qualify this general statement by specifying that evidence of other acts of child molestation "may be considered for its bearing on any matter to which it is relevant." Thus, relevancy remains the threshold question. *See* 90.402, Fla. Stat. (2015) ("All relevant evidence is admissible, except as provided by law.").

Accordingly, the similarity of the prior act and the charged offense remains part of a court's analysis in determining whether to admit the evidence in two ways. First, the less similar the prior acts, the less relevant they are to the charged crime, and therefore the less likely they will be admissible. Second, the less similar the prior acts, the more likely that the probative value of this evidence will be "substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." *90.403*.

The similarity of the collateral act of molestation and charged offense is a critical consideration for the trial court in conducting an appropriate weighing under section *90.403*. The trial courts are gatekeepers in ensuring that evidence of prior acts of child molestation is not so prejudicial that the defendant is convicted based on the prior sexual misconduct. On this point, the federal decisions upholding Federal Rules of Evidence *413, 414*, and *415* against due process attacks are instructive. We discuss these decisions in more detail below.

B. Federal Rules of Evidence

Federal Rules of Evidence *413, 414*, and *415* establish exceptions to the general ban on character evidence in cases involving sexual assault and child molestation. *See*

Johnson v. Elk Lake School Dist., 283 F.3d 138, 150-51 (3d Cir. 2002); *United States v. LeMay*, 260 F.3d 1018, 1024 (9th Cir. 2001); *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998). Rule 413 applies to criminal trials for sexual assault, rule 414 applies to criminal trials for child molestation, and rule 415 applies to civil trials in which a claim is predicated on the alleged commission of a sexual assault.

Rule 414 is very similar to section *90.404(2)(b)* and provides in pertinent part:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant. *Fed. R. Evid. 414(a).*

The Ninth and Tenth Circuit Courts of Appeals have both held that rule 414 does not violate a defendant's right to due process. *See United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998); *LeMay*, 260 F.3d at 1027. The Eighth Circuit Court of Appeals has similarly held that rule 413 does not violate due process. *See United States v. Mound*, 149 F.3d 799, 800-01 (8th Cir. 1998).[3] Each of these courts found significant to its rejection of constitutional invalidity a determination that the collateral crime evidence allowed under these rules can still be excluded under Federal Rule of Evidence 403 if its prejudicial effect substantially outweighs its probative value. *See Castillo*, 140 F.3d at 882-83; *Mound*, 149 F.3d at 800-01; *LeMay*, 260 F.3d at 1026-27.[4]

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[3] Rule 413 provides in pertinent part:
In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. Fed. R. Evid 413 (a). The Eighth Circuit concluded that its analysis of rule 413 also applies to rule 414. *See Mound*, 149 F.3d at 800 n.2.

[4] Rule 403 is similar to section *90.403,* Florida Statutes, and provides:

In *Castillo*, the Tenth Circuit explained:

Rule 403 excludes evidence, even if it is logically relevant, if its prejudicial effect substantially outweighs its probative value. Because of the presence of these protections, only a very narrow question remains-whether admission of Rule 414 evidence that is both relevant under 402 and not overly prejudicial under 403 may still be said to violate the defendant's due process right to a fundamentally fair trial.

The due process violation that the defendant alleges here is that Rule 414 evidence is so prejudicial that it violates the defendant's fundamental right to a fair trial. Application of Rule 403, however, should always result in the exclusion of evidence that has such a prejudicial effect. See Fed.R.Evid. 403 (excluding evidence if its probative value is *substantially outweighed by danger of unfair prejudice*). Thus, application of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414.140 F.3d at 882-83.

The similarity of the offenses is one factor that federal courts consider in assessing whether the probative value of evidence of prior acts of child molestation outweighs its potential prejudice. *See LeMay*, 260 F.3d at 1028 (stating that one factor the trial courts must consider in conducting the rule 403 analysis is "the similarity of the prior acts to the acts charged"); *United States v. Sumner*, 204 F.3d 1182, 1187 (8th Cir. 2000) (concluding that the trial court did not abuse its discretion in admitting prior act evidence under rule 414 where "the prior acts were relatively recent in time and were substantially similar to the charged assaults").

B. Due Process and Section *90.404*(2)(b)

Collateral crime evidence violates a defendant's right to due process if it is so prejudicial that it denies the defendant a fair trial. *See LeMay, 260 F.3d at 1027*; *Castillo*, 140 F.3d at

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Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

883. Like the federal courts applying federal rule 403, we conclude that the application of section *90.403* should always render evidence inadmissible when it has such a prejudicial effect. In other words, if the potential prejudice is so great that admission of the collateral crime evidence will violate the defendant's right to a fair trial, then the probative value of the evidence must be "substantially outweighed by the danger of unfair prejudice."*90.403*.

As Judge Altenbernd observed in the decision below:

> [T]he new statute does not simply open the courthouse to all propensity evidence. As demonstrated in this case, section *90.403* still requires the trial court judge to act as a gatekeeper, weighing the probative value and the prejudicial effect of the proffered testimony. The testimony is introduced with a cautionary instruction to the jury, which is repeated in the final charge. The case law still requires that such testimony not become a central feature of the trial. Under these circumstances, when an issue of identity is not in dispute, we cannot conclude that this new rule of evidence violates the fundamental fairness required by due process. *McLean*, 854 So. 2d at 802.

The trial court's gatekeeping function is critical. In every case, the trial court must conduct the weighing required by section 90.403. As the Ninth Circuit noted, "[b]ecause of the inherent strength of the evidence that is covered by [Rule 414], when putting this type of evidence through the [Rule 403] microscope, a court should pay careful attention to both the significant probative value and the strong prejudicial qualities of that evidence." *LeMay*, 260 F.3d at 1027 (quoting *Doe v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000)). To guide the trial courts in deciding whether to admit evidence of prior acts of child molestation when it is offered to corroborate the victim's testimony, the Florida Supreme Court in *McLean,* discuss the steps that the trial courts should take. Of course, before even considering whether to allow evidence of prior acts to be presented to the

jury, the trial court must find that the prior acts were proved by clear and convincing evidence.

Here, Petitioner's prior alleged conduct were not acts of child molestation as defined in 90.404(2)(b)2 but an alleged unlawful sexual activity in Fla. Stat. 794.05(1), the same alleged type of activity the petitioner was charged with in Counts three, four, and five against B.A. (also the alleged Williams Rule victim.).

Counsel's failure to object to the admission of *Williams* Rule evidence on Counts One and Two as it was excluded by Rule 90.404(2)(b)(2) defining conduct of child molestation prescribed by § 794.011 or § 800.05 "*not*" 794.05(1), can not be viewed as a harmless error, especially in light of the fact that B.A. was allowed to testify as to the alleged Williams Rule evidence (nolle-pross in Broward County) in which she self-corroborated in her trial testimony on herself to prove nothing more than propensity. Moreover, the similar fact/Williams Rule Evidence came from Broward County which was nolle-pros "uncharged" on two (2) different occasions, making the truthfulness of said evidence to be questionable or valid. See, *Audano v. State*, 641 So. 2d 1356, 1359 (Fla. 2nd DCA 1994) "Admission of uncharged collateral accusation evidence against a defendant is reversible error".

Furthermore, the Williams Rule collateral act must be corroborated by a witness other than a victim. In other words, a victim should not be permitted to corroborate his or her own testimony as to alleged other bad acts and be the alleged victim in the crime(s) charged. William Rule evidence against count(s) 1,2 were not proven by clear and convincing evidence which lacked the unique characteristic and similarity to the charged

offenses. See, (.. *Heuring v. State*, 513 So.2d 122, 124 (Fla.1987)(*Feller v. State*, 19 Fla. L. Weekly S196 (Fla. 1994); F.S.A. Rule 90.404(2). Additionally, the defendant was and is entitled to a special jury instruction on limited scope of the similar fact evidence which did not happen (prejudice from no severance). Further, the State made it a feature of the trial first and foremost by beginning with the similar fact evidence in opening statement, and closing arguments, compounded by actual trial testimony which the jury could only have used it as a determinative factor in deliberation as a contributing factor in the verdict as the count(s) weren't severed. See, *State v. DiGuilio*, 491 So. 2d 1129, 1135, 1138 (Fla. 1986)(citing *Chapman v. California*, 386 U.S. 18 (1976), this error cannot be harmless. The allowance of this evidence deprived the petitioner a fair trial as to the elements of each incident alleged. Therefore, had it not been for Counsel's deficient performance, which in turn prejudices the Petitioner, there was a reasonable probability that the outcome of Petitioner's trial would have been different excluding the Williams Rule evidence against counts 1,2, because B.A. self-corroboration had a damaging effect on Counts one and two[5]. See, *Duncan v. State*, 291 So. 2d 241 (Fla. 2nd DCA 1974). Absent said testimony there is a reasonable probability Petitioner would have been exonerated and/or acquitted of said criminal offenses.

The Petitioner was denied his Sixth and Fourteenth constitutional right to effective assistance of counsel and due process of law, as the State Court's and District Court's denial of Ground Three is inadequate and based on unsupported State findings. These

[5] Counts 1 and 2 (N.P.) alleged forced acts; counts 3,4 and 5 and Williams Rules (B.A.) alleged consensual acts

findings put the Petitioner's core constitutional claim that trial counsel was ineffective for failing to object to the admission of prior bad acts as *Williams* rule evidence as to Count I and II, in an unreasonable light.

In claim 6: The petitioner was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law where the trial court erred in denying Petitioner an evidentiary hearing, where trial counsel failed to call multiple witness to testify.

The State court reasoned that Petitioner was questioned at trial about Counsel's decision not to call Tillman as a witness and Petitioner indicated he was comfortable with her decision, (Doc. 17-5 at 228). The State court further noted that the trial court asked Petitioner if there were any witnesses he wanted Counsel to call that she failed to call and Petitioner twice responded negatively. (*Id.*). The petitioner hereby contends that the colloquy was insufficient to address Petitioner's claim of ineffective assistance of trial counsel, especially in light that Florida Courts do allow ineffective assistance claims based on Counsel's failure to call witness when the trial court's colloquy is not narrowly focused on the subject of calling witnesses. Thus, appellate courts have distinguished several Florida cases from situations where the trial court merely discusses the Petitioner's right to testify on his own behalf. *Law v. State*, 847 So. 2d 599,600(Fla. 5th DCA 2003), elicits testimony about whether the defendant was generally satisfied with counsel's representation, *Fletcher v. State*, 177 So. 3d 1010, 1014 (Fla. 5th DCA 2015), or holds no colloquy at all, *Townsend v. State,* 201 So. 3d 716, 718 (Fla. 4th DCA 2016).

In *Law,* this court reversed an order denying post conviction relief where the appellant claimed that his counsel was ineffective for failing to call two alibi witnesses. *Id.* at 600. The trial court denied the motion by pointing out that when the trial court questioned the defendant, the defendant indicated that the court should let defense counsel do his job, "in the best way he can," and that the defendant could have complained at the time of counsel's failure to call witnesses. *Id.* Although we concluded based on the record that the defendant made those comments in connection with his decision to testify rather than his right to call witnesses, we noted that "[the defendant's] statement indicating satisfaction, made after the state had rested, may have been made based on his belief that it was too late to call witnesses." *Id.*

The colloquy went as follows:

THE COURT: Mr. Holmes, your lawyer has called Ms. Wilkerson on your behalf and asked her questions. She's indicated that she will not be calling.
THE COURT: I do note that Mr. Tillman has been here throughout the trial I saw him a few minutes ago. Do you understand her decision to not call Mr. Tillman as a witness in the case?
THE DEFENDANT: Correct.
THE COURT: She's also indicted that there are no other defense witnesses to call. I've noted that I denied continuance and I sat those reasons out at the beginning of the trial. Denied the continuance for the purpose of Ms. Charles talking to Ms. Jacqueline Henry to determine if Ms. Jacqueline Henry would in fact, be a witness that she would call. I denied it because I found that Ms. Henry's identity and the substance of her testimony was not newly discovered evidence after taking a proffer from Mr. Tillman. So, now, the only question left is whether you would want to testify... (RT 689).

The colloquy clearly fails to address whether petitioners conceding to his counsel's strategy not to call witnesses or his claim of ineffective assistance of trial

counsel. See, *Cornly v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 890, 8 L.Ed. 2d 70; *Hodges v. State,* 43 Fla. L. Weekly D2678 (Fla. 5th DCA 2018); *Lott v. State*, 931 So. 2d 807, 819 (Fla. 2006).

The Florida Supreme Court have held that the on the record colloquy must address the advice given to a defendant pertaining to not calling witnesses who could challenged State's case. See, *Jacobs v. State*, 880 So.2d 548 (Fla. 2004)(If this colloquy had adequately reflected that the defendant knew of his right not only to present his own testimony but also to call witnesses and that he was freely an knowingly consenting to the strategy of counsel not to present a defense, there might be sufficient on the record consent to trial counsel's decision not call witnesses, thereby precluding a later objection to this strategy.").

Petitioner never argued that he did not waive the right to present witnesses or to testify on his behalf. Petitioner argued the advice he was given by trial counsel was insufficient to render his waiver knowing and voluntarily. Then record must show, or there must be an allegation and evidence which show, that an accused was aware of his rights but intelligently and understandingly rejected his rights. Anything less is not waiver, that satisfies the constitutional rights of the defendant. *Jackson v. Denno*, 378 U.S. 368,357, 84 S.Ct. 1774, 12 L.Ed 2d 908; *Cochran. Id.*

Here, although Petitioner replied that he did not wish to call more witnesses, he only did so based upon trial counsel's advice not to call any other defense witnesses. Counsel at the closing of the State's case, called one witness, Ms. Wilkerson after which counsel then advised Petitioner and his family members that she felt that the State had not

proven their case, and there was no burden on the defense to prove anything, and therefore, there was no need to put on any other witnesses. And as a result of Counsel's "*misadvise*", the petitioner agreed to not call or present any other witness (es). (Emphasis added). See, *Hamilton v. State*, 860 So. 2d 1028, 1029(Fla. 5th DCA 2003)(quoting *Law* at 599); *Fletcher v. State*, 177 So.3d 1010 (Fla. 5th DCA 2015). This advice was ineffective because not only did the State call the alleged B.A. and N.P. testify, the State, introduced the illegally seized text messages, which were extremely prejudicial.

In this case, Counsel failed to call David Tillman-Assist. Coach who traveled to Orlando, Fl/Orange County with petitioner and the combined Track Team on March 12-13, 2010. Had *Mr. Tillman* been called to testify, he would have told the jury that when the team arrived in Orlando/LaQuinta Hotel, he and Petitioner assisted each other in assigning rooms to the athletes and chaperons. After room assignments, a trip to the track-complex, dinner, and the mall; they all returned to the hotel about 10:00 p.m., where there was a team meeting in the hotel lobby. Around 11:30 p.m. the front desk notified Petitioner and Tillman of a disturbance in the hallways. They both responded by getting all the athlete to their assigned rooms and in doing so, they found alleged victim N.P. naked in David Easley's assigned room. Tillman would further testify that N.P. came to the room he shared with petitioner and his fiancée Ashley Ferrell on the morning of March 13, 2010 which all were present, as N.P. pleaded Petitioner not to tell her mother (one of the chaperons) that she (N.P.) was caught naked in bed with David Easley the night before. Tillman would have also told the jury that he was present when alleged victim B.A. confided in Petitioner that her mother's live-in-boyfriend sexually assaulted

her. Tillman witness Petitioner telling both N.P. and B.A. that he would have to report the incident to school officials which caused both girls to threaten retaliation. Because Tillman was with the petitioner the entire trip, he would tell the jury that petitioner was never alone with either girl and could not have committed the acts as alleged. Tillman's testimony would have challenged the credibility of B.A. and N.P. by showing Petitioner had no time to go to B.A.'s room on March 12, 2010 after the team arrived to hotel, because petitioner had to do room assignments for about 35 individuals and himself. That between room assignment and going to the sports complex, the mall, and back-there could be no thirty minutes sex break (TR 350-353). Tillman testimony would have refuted N.P.'s testimony that Petitioner ordered everyone out of his room, then forced himself on her, by telling the jury that he, Ashley Ferrell, and Petitioner, was getting ready for the track meet, breakfast, and packing for the trip back home when N.P. arrival to talk to petitioner and nobody left the room throughout there conversation. Finally, Tillman would have told the jury that he stayed/shared the room with Petitioner and his fiancée Ashley Ferrell all night, and Petitioner never could have spent the night with B.A. Tillman was present and available to testify at trial, but was not called.

Counsel failed to call *Kanetra Bright*, an athlete who was available to testify at trial. Ms. Bright also travel to Orlando on March 12-13, 2010 and was assigned to a room directly across from B.A. and witnessed who she think was team member Virgil Boldin go into B.A.'s room about 11:30-11:45 p.m. on March 12, 2010, which Casey Byles exit the room she shared with B.A. Bright never witnessed Virgil Boldin exit B.A. room before she fell asleep. Ms. Bright would have further testified to witnessing Petitioner

and Tillman escorting N.P. from David Easley's room around same time of B.A.'s allegation not calling Ms. Bright was ineffective assistance. *Nelson, supra.*

Counsel was ineffective for failing to call *Eugene Davis*, a member of the track team who was available to testify at trial. Mr. Davis would have told the jury, he traveled to Orlando on March 12-13, 2010 and he was assigned to a room with David Easley, Cesar and Michael at the hotel and after unpacking the team loaded back on the bus and went to the track complex, dinner, the mall and then back to the Hotel were Petitioner conducted a team meeting. Mr. Davis would have further testified that around 11:15-11:45 p.m. on March 12, 2010, N.P. came to his room he shared with David Easley, Cesar, and Michael; to visit David Easley. Mr. Davis, Cesar and Michael exited the room and stood in the hallway until petitioner and Tillman came to clear the hallway. In doing so, Petitioner and Tillman found N.P. and David Easley naked in bed and petitioner ordered both to put clothes on, as petitioner and Tillman then escorting N.P. back to her assigned room. Mr. Davis would have testified that he think he saw Virgil Boldin go into B.A. room while standing in the hallway around same time period. Davis testimony would have question the veracity of both B.A. and N.P. by showing; both girls were having sex with members of the track team, not petitioner at the relevant times, and further undermined N.P.'s testimony that she never had sex. Not calling Mr. Davis was ineffective. *Nelson, surpa.* Finally, counsel was ineffective for not calling Ashley Ferrell as a defense witness who was available and present at trial. Ms. Ferrell would have testified, had she been called, that she is petitioner's fiancée, that she drove to Orlando on March 12, 2010 from Broward County after posting bail for Petitioner's brother in Winter

Haven, Florida and she arrived to the Hotel around 4:00 p.m. that afternoon. Ms. Ferrell stayed in petitioner's Hotel room and at no time could Petitioner have went to B.A.'s room and spent the night. She would have further testified that she was present when the front desk notified Petitioner of a hallway disturbance, and during Petitioner's response she witnessed Petitioner and Tillman escort N.P. out of David Easley's hotel room; she also would have testified she was present on March 13, 2010 morning visit by N.P. where she asked Petitioner that her mother not be told that she was in David Easley's room having sex. Ferrell witnesses Petitioner inform N.P. that he was only gonna report such incident to school official.

Counsel was also ineffective for failing to call David Tillman to testify of exculpatory evidence which was proffered prior to trial July 12, 2012 (TR- 22-32). During the proffer, Mr. Tillman testified about Ms. Jacqueline Henry who was listed as a State witness in this case, but was not present at trial. The substance consisted of Ms. Henry stating she had personal knowledge the alleged victim B.A. is lying on the petitioner to obtain money for a lawsuit; it had come to light that a situation like this had happened in the petitioner's past but that case was dismiss, and the lawsuit money was still paid by the employer and B.A. and N.P. had heard about it prior to allegation and charges (counts 1-5) of the information. Trial counsel moved for a continuance, but denied. Trial ensued and Ms. Henry was not present at trial, but Mr. Tillman was present and defense counsel failed to call Tillman to the stand and testify to his exculpatory information that could've cast doubt on Petitioner's guilt. See, *Honor v. State*, 752 So. 2d 1234 (Fla. 2nd DCA 2000).

By trial counsel failure to call multiple witnesses to testify and challenge the State case, Counsel failed to perform within reasonably expected standards. Prejudice is inherently clear, because had it not been for counsel's deficient performance, there was a reasonable probability that the out come of the defendant's case would have been different, especially in light of the fact that these witnesses would have brought into question and challenged the credibility of the State's alleged witnesses, considering the trial was a swearing-match (credibility battle) that was decided upon witness credibility, the only evidence pertaining to the Petitioner's guilt was the uncontested and unchallenged testimony of B.A., N.P. David Easley, and the illegally seized prejudicial text messages, and had it not been for Counsel's deficient performance which in turns prejudice the petitioner, the Petitioner would have been exonerated of all charges. *Strickland v. Washington*, supra.

In claim 7: The petitioner was deprived of his Sixth and Fourteenth Amendment right to effective counsel, a fair trial and due process of law where the trial court erred in denying Petitioner an evidentiary hearing, where trial counsel misadvised the petitioner that his testimony was unnecessary.

It is well settled that a criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. *Rock v. Arkansas*, 483 U.S. 44, 49-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992). This right is personal to the defendant, and cannot be waived by the trial court or defense counsel. *Id.*; *Brown v. Artuz*, 124 F.3d 73, 77-78 (2 Cir. 1997). It "is one of the rights that are essential to due process of law in a fair adversary process,'" and it is

"[e]ven more fundamental to a personal defense than the right of self-representation." *Id.* Thus, every criminal defendant is privileged to testify in his own defense, or refuse to do so. *Faretta v. California*, 422 U.S. 806, 834 n. 45, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial counsel, and is therefore a component of effective assistance of counsel. *Teague*, at 1533; *Sexton v. French*, 163 F.3d 874, 882 (4 Cir. 1998). The proper vehicle for an argument that a defendant's right to testify was violated by his trial counsel is a claim of ineffective assistance of counsel, which requires analysis under *Strickland v. Washington*, *supra*. . See, *Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999) (citing *Teague*, at 1534). The *Teague* court reasoned that an attorney's performance would be deficient under the first prong of the Strickland test if counsel refused to accept the defendant's decision to testify and refused to call him to the stand to testify or, alternatively, where counsel never informed the defendant of his right to testify and that the ultimate decision belonged to the defendant alone. *Id.*

Here, the record is clear, that counsel's decision to advise petitioner not to testify constituted deficient performance under *Strickland,* supra.

Petitioner will agree that the record conclusively established that the Petitioner freely and voluntarily waived his right to testify. Although inarticulately drafted, the Petitioner's position was not that he did not freely and voluntarily waive his right to testify, but that he was "*misadvised*" by Counsel of the contours and ramifications of the right to testify or not testify. (Emphasis added). Even though voluntarily followed, counsel was nevertheless deficient because no reasonable counsel would have

discouraged him from testifying. See, *Ortiz v. Jones,* 2017, U.S. Dist. LEXIS 102981 (11th Cir. 2017).

The Petitioner contends that at the close of the State's case, trial counsel deficiently advised Petitioner that "*[T]here's no need or burden on the defense to prove anything-it's on the State" and she (trial counsel) felt that the State didn't prove their case beyond a reasonable doubt and there were no need to mess things up.*"(Emphasis added)

Petitioner further contends that he was prejudiced by Counsel's bad advice and would have testified that he never had any sexual contact with N.P. or B.A. in Orange County or Broward County, Florida, and that both girls made up the allegations to prevent Petitioner from reporting their sexual indiscretions with boys on the track team.

In the case of N.P., Petitioner would have elaborated to the jury that he and his assistant Mr. Tillman discovered N.P. having sex with David Easley upon entering her room March 12, 2010 around 11:45 p.m. . Petitioner would have further testified that N.P. on the morning of March 13, 2010 visited his hotel room wanting to discuss the situation of being caught with track team member, David Easley (TR- 538-539) and Mr. Tillman and Ms. Ferrell were present and did not leave during her visit. Petitioner would have also testified to specific details and that he had got circumcised on October 12, 2006; four years before the allegation, which would have clearly refuted the testimony of B.A. that the Petitioner was not circumcised. (TR-486,487). Petitioner would have also, testified that he did not stay the night with B.A. as he was in his own room with his fiancée Ashley Ferrell and Assist. Tillman. However, defense counsel misadvised the

Petitioner by telling him that there was no need for him to testify. The Petitioner avers that his testimony was necessary to give his version of events and present medical records to refute the accusations by the alleged victims through their testimony.

Counsel's ineffectiveness can not be viewed as a harmless error, especially in light of the fact that the State's case went unchallenged and uncontested, there was no direct or physical evidence linking Petitioner to the alleged criminal acts.

Here, Petitioner fits squarely into the second category. Petitioner hereby contends that his attorney strongly advised him not to testify because of concerns that putting Petitioner on the stand would distract from, if not undermine entirely, petitioner's defense of innocence.

Petitioner further contends that when his counsel advised him not to testify, his counsel held a fundamentally erroneous misconception of the State's case in chief. Because of counsel's bad advice and misapprehension of the State's case, petitioner contends that the advice he received regarding whether to testify was inaccurate and such that he could not intelligently and knowingly waive his right to testify at trial.

CONCLUSION

Based on the foregoing, this court should grant the Petition for Writ of Certiorari and order full briefing.

R L H S. X79461
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