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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

LAWRENCE KEITH JOHNSON-PETITIONER

VS.

MARK INCH, SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, ET.AL,
RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

LAWRENCE KEITH JOHNSON
HAMILTON CORRECTIONAL ANNEX
11419 S.W. COUNTY ROAD #249
JASPER, FLORIDA 32052-3735

QUESTION(S) PRESENTED

1. Does any court that does not follow the well established law violate an individuals Constitutional rights, by simply denying without stating the reason or per curium affirming a motion or petition that was properly filed?
2. By the Fourth District Court of Appeal denying Petitioner's claim of ineffective assistance of appellate counsel and the claim of Conflict of Interest deny Petitioner his Due Process rights set out in both the State and Federal Constitutions?
3. Does a Judge that simply adopts the State's response, and denies a 3.850 motion without taking the time to review each claim and constitutional violation deny Petitioner his Due Process rights set out in both the State and Federal Constitutions?
4. Does a Petitioner have the right to have a copy of his discovery before trial to know the evidence and witnesses against him and if he does not receive this discovery did it violate his Due Process rights set out in both the State and Federal Constitutions?
5. Does a State witness that gets on the stand and lie violate ones Constitutional rights and if so and Petitioner has raised this claim and it was denied was the Court that denied this claim in error?
6. Does a Petitioner have to proceed all the way to the United State Supreme Court before he can get a Judge to uphold both the State and Federal Constitutions?

LIST OF PARTIES

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

[ ] 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:

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FLORIDA RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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

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

[X] reported at 2018 U.S. Dist. Lexis 198680; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[X] reported at 105 So 3d 536 (Fla. 4th DCA 2013); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the 4th DCA on 3.850 Motion + Appeal court appears at Appendix C to the petition and is

[X] reported at 227 So 3d 592 (Fla. 4th DCA 2017); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was July 9th 2019.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 24th 2019, and a copy of the order denying rehearing appears at Appendix E.

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

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

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

The date on which the highest state court decided my case was Jan. 2nd 2013. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: February 11, 2013, and a copy of the order denying rehearing appears at Appendix B.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Florida rules of Professional Conduct 4-1.7

4-1.7. CONFLICT OF INTEREST; CURRENT CLIENTS.

(a) *Representing Adverse Interests* Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) *Informed Consent* Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) *Explanation to Clients* When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) *Lawyers Related by Blood, Adoption, or Marriage* A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e) *Representation of insureds* Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Florida rules of Professional Conduct 4-1.9

4-1.9. CONFLICT OF INTEREST; FORMER CLIENT.

A lawyer who has formerly represented a client in a matter must not afterwards:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;

(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or

(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Florida rules of Professional Conduct 4-1.10

4-1.10. IMPUTATION OF CONFLICTS OF INTEREST; GENERAL RULE.

(a) *Imputed Disqualification of All Lawyers in Firm* While lawyers are associated in a firm, none of them may knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7 or 4-1.9 except as provided elsewhere in this rule, or unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) *Former Clients of Newly Associated Lawyer* When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) and (c) that is material to the matter.

(c) *Representing Interests Adverse to Clients of Formerly Associated Lawyer* When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by rules 4-1.6 and 4-1.9(b) and (c) that is material to the matter.

(d) *Waiver of Conflict* A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 4-1.7.

(e) *Government Lawyers* The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 4-1.11.

Article 1, § 9 of the Florida Constitution

Section 9. Due process.

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

Article 1, § 12 of the Florida Constitution

Section 12. Searches and seizures.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Sixth Amendment to the United States Constitution

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution

Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant was initially charged in November of 1996, with First Degree Murder F.S. 782.04 (1) (a) and (2) Capital Felony, and Burglary of a Dwelling w/ Grand Theft F.S. 810.02 (3)(a) and Grand Theft Auto F.S. 812.014. These charges were Nol-prossed in November of 1997, because the State could not locate their witness. In May of 2009, Defendant was rearrested for this same alleged crime. Defendant pled not guilty and proceeded to trial. On November 3rd 2010, Defendant was found guilty. Defendant filed a timely notice of appeal. On January 2nd 2013, (See Appendix "A"). the Fourth District Court of Appeal, per curiam affirmed Defendants Direct Appeal and on February 11th, 2013 they denied the rehearing.(See Appendix "B") The mandate was issued on March 1st 2013, Johnson v. State, 105 So. 3d 536 (Fla. 4th Dist. 2013). Defendant filed a Motion for Post-conviction Relief showing his constitutional violations during trial in December of 2013. This Motion was denied, Johnson v. State, 2016 Fla. App. LEXIS 3680 (Fla. 4th Dist. Mar. 10th, 2016). Defendant filed for a rehearing on May 21st 2015, Johnson v. State, 2016 Fla. App. LEXIS 6292 (Fla. 4th Dist., Apr. 20, 2016). Defendant filed an appeal which was denied on March 10th 2016.(See Appendix "C")

Petitioner states for the record that he first filed a 28 U.S.C. § 2254 Petition and Memorandum of law on October 28th, 2016, which was dismissed as premature. Petitioner refilled the same Petition and Memorandum of law on February 2nd 2017. Petitioner was then given an Order that he had to limit his 28 U.S.C. § 2254 Petition to twenty (20) pages, thus removing valuable facts that support his claims. Petitioner refilled the Petition and Memorandum of law after reducing it to the twenty (20) pages per the Order on March 28th 2017. Petitioner received an Order that the State had to show cause and that they had to prepare a complete appendix and they had to make sure Petitioner received a copy. Petitioner received an incomplete appendix as it was missing the 1996-97 record and did not include any pre-trial discovery material such as police reports and evidence receipts. Petitioner then filed a Reply as to the State's Rebuttal to Petitioner's 28 U.S.C. § 2254 Petition on May 26th, 2017. Petitioner received an Order striking (DE. 10,13,15,16 and 17) on July 17th, 2017.

With ALL due respect, the Petitioner was confined to making each sub-claim on the 3.850 issues, an actual ground and was limited to the space and lines in which to present his facts and limited to the number of pages he could use, and could not properly elaborate the numerous

claims, through no fault of the Petitioner. Petitioner also is limited to ten (10) pages to this Reply. The State has committed fraud upon the Court as they are continuing to make false claims in their response. The State continues to rely on testimony of Pasco Testa, a non-disclosed witness that defense counsel should have objected to and for which Petitioner has raised this claim in a post conviction motion. Further, because Petitioner never received any pre-trial discovery material until July of 2015, he was unaware that Pasco Testa was not listed as any witness, yet he was able to take the stand. Respondent says there is no BRADY violation to the fact that Mr. Testa was never on the witness list. This rational is contrary to BRADY and the fact that State has failed to provide both records, the 1996-97 and the 2009-10 in the Appendix as exhibits, and had they the record will show that Mr. Testa is not listed on any witness list. Respondent states; "that Mrs. Testa was listed so it is all right to let her husband testify, this is contrary to Federal law and an unreasonable determination, as to the facts on the record. The respondent talks about Pasco Testa's trial testimony. The Petitioner argued in ground three (3) sub-claim "L", of App. Ex. 14, that Pasco Testa was never listed as a State's witness. Cruz v. State, 222 So. 3d 572 (Fla. 4th DCA 2017).

The State continues to commit fraud by stating Petitioner's fingerprints were lifted from the doorjamb to the victim's master bedroom. Petitioner would like to point out how this is fraud as Sgt. Free was questioned on direct where he found Petitioner's fingerprints and he said, "This is the door where the air handler is." Then on cross-examination Free stated; "on the air conditioner closet door."

Then the State relies on testimony of Kevin Noppinger, stating Petitioner cannot be excluded as a contributor as to the DNA profile found in "A1", "B1" samples. There was NO testimony or proof given these two samples came from the victim. Kelly Smith testified she was sleeping at the crack house on Davis and Canal. Petitioner has clearly pointed out, with color pictures, in his 3.850 Motion that there are two houses; one on Davis and one on Canal. Kelly Smith cannot be in two places at the same time. The television was recovered from Canal Road, thus making Kelly Smith's testimony that it was Davis road false. "Knowingly presenting false testimony violates a defendant's right to a fair trial." Mooney v. Holohan, 55 S. Ct. 340 (1935) "It is simply intolerable ...if a state allows an innocent prison to remain incarcerated on the basis of lies." Maxwell v. Roe, 628 F. 3d 508 (C.A. 9 Cal. 1991). Duane Mills and Michelle Martinez both testified to collateral crime, which had no nexus or relevancy as to the charge of murder, as

neither one gave any testimonies to seeing petitioner at victim's home commit murder to warrant their testimony. "[t]he presence of a firearm in some proximity to collateral products of a drug crime but far from the locus of drug activities does not establish the requisite nexus." United States v. Rios, 449 F. 3d 1009, 1015 (9th Cir. 2006). The respondent did not include numerous police reports, which support the petitioner's claims. The respondent did not include the evidence lock-up receipts that clearly show the actual evidence placed into the evidence lock-up at the time of the alleged crime.

The Magistrate Judge then denied Petitioner's 2254 petition with a 98 page denial (See Appendix "D") stating Petitioner never developed his claims. Petitioner was limited to the number of pages and the fact that he had to take every sub-claim of his 3.850 post conviction relief motion and make them individual claim. The Petitioner in accordance with the court's order filed an Objections Motion to Judge Middlebrooks, which was denied; stating he adopts the Magistrates ruling. This is prejudicial as what is the purpose of an Objections Motion if the Judge is only going to adopt the Magistrates ruling.

Petitioner then filed a timely Notice of Appeal along with a Certificate of Appealability to the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court granted the Motion for Leave to Proceed in Forma Pauperis, and then denied Petition a Certificate of Appealability.

The Eleventh Circuit Court of Appeals denied the motion for Certificate of Appealability. (See Appendix "E"). Petitioner then filed a Motion for Reconsideration which was also denied, (See Appendix "F"), thus denying petitioner Due Process of Law as Petitioner stated a violation of his Constitution rights, showed where the denial of his claims went against or was contrary to well established Federal Law and the evidence presented during was in fact fabricated by the State's witnesses. The fact remains that no one has ruled on any of these issues on the merits of these claims. There has been no evidentiary hearing on any of these said claims and the denial of each claim without (1) attaching portions of the record to refute Petitioner's claim or (2) holding an evidentiary hearing the Court must accept Petitioner's claims as the facts that took place. The fact that NO Judge neither in the State court nor the Federal court has actually looked at the merits of these claims makes their ruling a violation of due process.

Furthermore, Defendant avers he has met and satisfied both prongs of Strickland v. Washington, 466 U.S. 668 (1984) and would further assert that each of his issues should be evaluated under United States v. Cronic, 466 U.S. 648 (1984).

REASONS FOR GRANTING THE PETITION

Petitioner has made a factual showing at every level of post conviction proceeding that show the constitutional violations that have occurred and presented these claims sufficiently to each court without receiving any hearing or relief, thus violating Petitioner's constitutional rights.

GROUND ONE: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Petitioner has properly argued ineffective assistance of appellate counsel claims in both of his Petitions for Writ of Habeas Corpus. To deny this claim would be contrary to the record as two (2) public defenders out of the fifteenth judicial circuit court were granted their motions to withdraw as they showed there was a conflict of interest. The State's key witness, Kelly Smith who pointed her finger at Petitioner during trail and stated; "without a doubt that's the man that committed this crime," proves the conflict of interest still exist, as it was her testimony that the jury relied upon for their guilty verdict. Respondent's assertion that there was no conflict of interest of Appellate counsel because there was no-one testifying on Appeal, is in conflict with Cuyler v. Sullivan, 446 U.S. 335 (1980), and the fact remains that Kelly Smith's testimony, is what the State relied for their conviction thus making this argument valid, as Kelly Smith was previously represented by the Public Defenders Office prior to her making any statement or testifying, thus showing that the Conflict still existed, and to state there is no conflict, is not supported by the record as Petitioner used the record to show that there is a conflict of interest. The respondent also fails to acknowledge Cuyler v. Sullivan, and the fact that the Appellate counsel was a Public Defender, out of the Public Defender's office, where there was a clear conflict of interest within the Fifteenth Judicial Circuit Court, shows there had to be the SAME conflict of interest in the Appellate Court, thus making the State Court's denial of this claim, contrary to and an unreasonable application of clearly established law, and to the facts in evidence as Petitioner properly argued this in both Writ's of Habeas Corpus. The Appellate court failed to, properly apply controlling law as determined by the United States Supreme Court for insufficient evidence. The unreasonable application of clearly established law is Federal the standard for determining sufficiency of the evidence in circumstantial evidence cases. *See* Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979), and In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), which is extremely different from the State standard and a clearly unreasonable AND contrary to application of established Federal

law. Williams v. Taylor, 529 U.S. 362 (2000). Thus, the respondent's response failed to address the cited standard cited by Petitioner. Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND TWO: DELAY IN PROSECUTION

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. Petitioner has the problem of the State purposefully delaying their prosecution, as State's claim for delay was Kelly Smith was unavailable for trial. (*See* App. Ex. 17 "A" nol-pros R.176).Respondent fails to address the issue raised by Petitioner, that in 2003 the Grand Jury ordered DNA testing and (1) Petitioner has never been provided the results of that testing (a Brady violation) Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), which then makes the denial of this claim contrary to Federal law, and (2) had Petitioner's DNA been included in the DNA analysis report, the Grand jury would have re-indicted Petitioner then in 2003 not wait another six years to do so. The issue is the withholding of exculpatory evidence that would exonerate Petitioner. "In evaluating an alleged violation of due process due to pre-indictment delay, the court must "'consider both the reasons for the delay and the prejudice to the accused.'" See Howell v. State, 418 So. 2d 1164 (Fla. 1st DCA 1982), citing United States v. Townley, 665 F. 2d 579, 581-82 (5th Cir. 1982). It is "the responsibility of the defendant to demonstrate actual prejudice resulting from any delay in arrest or indictments. Once the defendant has met his burden of proof, the burden shifts to the government to show why the delay was necessary." Howell, 418 So. 2d at 1170. See Jarrell v. State, 756 So. 2d 1102 (Fla. App. 1st Dist. 2000). In accordance with BARKER, there are 4 factors to be considered (1) "the length of the delay, whether the delay is presumptively prejudicial". Here we have a delay of six months until the arrest of Kelly Smith, which was on 05/28/1998. Then we have Detective TYZ ID. #3461 claiming, "I had found all three witnesses on 8/18/2003.

The state needed these witnesses so they could re-indict Lawrence Johnson. (2) "The reason for the delay". In this case, State can show no reason for the delay. (3) "Whether the accused has timely asserted his rights" and (4) "the existence of actual prejudice as a result of the delay". Here Defendant would like to point out the prejudice. There were witnesses that Defendant could have called had the delay not been so lengthy. Ms. Aluija, Ms. Fossum, and Ms.

Raymond all could have testified on behalf of Defendant, had they not passed away. *See* Barker v. Wingo, 407 U.S. 514, (1972).

This issue of Petitioner's right to a speedy trial and the fact that counsel waived his Constitutional right without Petitioner's consent has to be a denial of his due process rights. Petitioner has explained that he specifically told defense counsel that he did not want his right to speedy trial waived, yet counsel went ahead and waived Petitioner's right to a speedy trial. Petitioner does not see how anyone can waive one's Constitutional rights without some kind of approval in writing from the Petitioner. *See* Powell v. Alabama, 287 U.S. 45(1932). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND THREE: MOTION TO SUPPRESS

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. The record will reflect that Sergeant Free testified to only collecting two (2) DNA samples of fingernails and fingernail scrapings. Respondent is using the Probable Cause affidavit as to the fact that there was a Y-chromosome found in the DNA mixture. The record does not support contention. The DNA analysis report does not show that they found any Y-chromosome in the mixture of DNA that was tested. How did Jason E. L'Etoile tell a Judge that there was a Y-chromosome found in the DNA mixture just to get more DNA from Mr. Johnson, when this information is not available anywhere. The evidence receipt will reflect that there were ten (10) fingernail scrapings collected from the victim. Respondent states; "Petitioner never established prejudice because he cannot show that he could have successfully challenged the DNA evidence." Petitioner was never even given a discovery to challenge this evidence and yet the State continues to say Petitioner failed to do something or other. Respondent says; "Y-STR DNA is generally accepted in the scientific community" then why did they wait thirteen (13) years to test this DNA? The fact remains that if this Y-STR DNA is so acceptable then why is not there not case law showing how acceptable it is, respondent relies on a case out of Illinois. See United States v. Canfield, 212 F. 3d 7 (2nd Cir. 2000). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND FOUR: MOTION TO SUPPRESS

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. Defense counsel rendered ineffective assistance for not filing a

motion to suppress identification evidence prior to the trial. Defense counsel who is a competent and knowledgeable trial attorney, in both State and federal law, knew that Fla. Evidence Code 90.104.5 Motion in Limine and Rule 12 Fed. Crim. P., "require a defendant to move to suppress identification evidence before trial." Defense counsel's deficiency can be seen here as we look at the factors to be weighed when dealing with identification or misidentification: (1) "the witness's opportunity to view the culprit at the time of the crime", in this case, the State has failed to proffer any witness's testimony that they actually saw defendant commit this alleged crime;(2) the witness's degree of attention at the time of the crime, Kelly Smith Stated; "I was sleeping that night" (App. Ex. 41 pg. 681-690). When questioned by defense counsel, "In fact, you really weren't paying much attention at all to what was going on with the television set, Her answer was; "Yes, sir." (3) the accuracy of the witness's description of the culprit prior to the identification, Here Kelly Smith describes Lawrence Johnson as; "He had a long face, big nose moustache, receding hairline, hair light color"; (4) the witness's level of certainty when identifying the defendant at the confrontation, Here Kelly Smith stated she knew defendant, and was told by the police who it was they were looking for as a suspect; (5) the length of time between the crime and the confrontation; Kelly Smith was shown a photo line-up about a week later. See Neil v. Biggers, 409 U.S. 188 (1972). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND FIVE: EXCULPATORY WITNESS RICKY MILLS

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. The fact is Mr. Lerman did not investigate, interview, take depositions of possible exculpatory witnesses, thus improperly preparing for a murder trial. Furthermore, Mr. Lerman did not file any Pretrial motions to suppress evidence, explore expert witnesses to assist him in preparing and presenting a complete defense, which demonstrates that defendant, was prejudiced. "Counsel rendered ineffective assistance in failing to call possibly exculpatory witnesses." Jackson v. State, 711 So. 2d 1371 (Fla. App. 4 Dist. 1998) Defendant pointed out that (1) these witnesses were available to testify at trial, (2) what each witness would have stated. Defendant demonstrated how this deficiency in counselor's performance was prejudicial, as the jury did not hear this exculpatory testimony, thus violating defendant's due process rights. See Jones v. Trammell, WL6844824 (CA 10 Okla. 2014). The record, clearly establishes that defense

counsel failed to use the investigator the courts appointed and paid for investigative purposes. "Counsel's deficient performance clearly harmed and prejudiced defendant." See Tosh v. Lockhart, 879 F. 2d 412 (C.A. 8 Ark. 1989). Furthermore, Defendant avers he has met and satisfied both prongs of Strickland v. Washington, 466 U.S. 668 (1984) and would further assert that each of his issues should be evaluated under United States v. Cronic, 466 U.S. 648 (1984). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND SIX: EXCULPATORY WITNESS DEBRA MEGIAS

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. The Attorney General goes on to say Deborah Megias would have stated; "She saw two Black males loading or unloading items in the swell in front of the victim's house". This coincides with the BOLO put out by Detective Cardinal at approximately 9:30 p.m., August 1st, 2016, according to the police report. The Attorney General say's "this does not mater as nothing links them to the murder or even that they were loading the victim's car." Yet there were fingerprints on the victim's car that were not the Petitioner's, and had they been run they might have belonged to one of the black males seen at the victim's home and in her car. See Jones v. Trammell, WL6844824 (CA 10 Okla. 2014). The record, clearly establishes that defense counsel failed to use the investigator the courts appointed and paid for investigative purposes. "Counsel's deficient performance clearly harmed and prejudiced defendant." See Tosh v. Lockhart, 879 F. 2d 412 (C.A. 8 Ark. 1989). Furthermore, Defendant avers he has met and satisfied both prongs of Strickland v. Washington, 466 U.S. 668 (1984) and would further assert that each of his issues should be evaluated under United States v. Cronic, 466 U.S. 648 (1984). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND SEVEN: EXCULPATORY WITNESS DALTON GLASPER

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal.

Well, Kelly Smith, the same person who claims the Petitioner is the one who did this, first claimed Dalton Glasper was the one who committed the instant offense. Yet the Attorney General does not want you to know this, as the Dalton Glasper is a black male, which would link him as a possible subject, since Deborah Megias and Detective Cardinal both make claims, as to black males, at both victim's home and to victim's car. The fact that Dalton Glasper, is a black

male, was accused of this crime, he believed by Kelly Smith, shows that counsel's performance fell below the standard guaranteed a defendant. "Exclusion of defense evidence of third-party guilt denied defendant of a fair trial." Holmes v. South Carolina, 126 S. ct. 1727 (U.S.S.C. 2006). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND EIGHT: EXCULPATORY WITNESS RICHARD NICASTRO

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. Defendant's trial counsel was deficient in his performance, as he never investigated the fact that Richard Nicastro stated, that one Kenny Wolford was the individual that committed the alleged crime for which Defendant is in custody for. Defendant only found out years later in July 14th, 2015, that there was an individual that (A) had motive to do harm to the victim; (B) new the victim as he mortgaged a home from the victim; and (C) that he Kenny stated to those around him, "that he was going to get that old lady". This is valuable exculpatory evidence that would have given the jury a clear and convincing view as to what really took place, and would have allowed them to return a verdict of **not guilty as to Defendant. See** *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S. Ct. 2527, 156 **L.** Ed. 2d 471 (2003). Here counsel never informed Defendant of Richard Nicastro, or Kenny Wolford. These individuals testimony would have shown reasonable doubt as to Defendant's guilt. "A claim that trial counsel failed to investigate or call exculpatory witnesses when facially sufficient must either be refuted by attachments or an evidentiary hearing held." Ford v. State, 825 So. 2d 358, 361 (Fla. 2002). "Because the trial court did not comply with the requirements of Rule 3.850, we reverse the summary denial of Pierre's motion for post conviction relief." Pierre v. State, 79 So. 3d 168 (Fla. App. 3 Dist. 2012).

Here the State never listed Richard Nicastro as a witness because the State did not want the jury to hear this evidence. They the State had already formed in there minds that Defendant was the individual that committed this alleged crime as the evidence shows they never ran the fingerprints left on the victims car through N.C.I.C. to see if the prints belong to anyone other than Defendant thus showing prejudice to Defendant. See Brady v. Maryland, 373 U.S. 83 (1963) Here the police did not list what agency or who even took the statement from Richard Nicastro, thus showing they did not want anyone to be able to investigate this information. Defense counsel was deficient in the fact that he never listed this witness for the defense or

deposition him. "Within the state's discovery exhibit the state demanded the defendant, within fifteen days, to furnish to the prosecutor a written list of the names and addresses of all witnesses whom the defendant expected to call at the trial. See Fla. R. Crim. P. 3.220(d) (1) (A). However, the defendant never furnished the prosecutor with any witness list. Williams v. State, 143 So. 3d 1120 (Fla. App. 4th Dist. 2014) This was prejudicial to the Defendant because: (A) Defendant was unaware of this valuable witness (Richard Nicastro) as he was not given his discovery until July 14th, 2015; (B) because had Defendant know this person Richard Nicastro had this information, Defendant would have asked the court to hold a Nelson Hearing as to defense counsel's ineffective assistance, then and there before trial; and (C) Defendant could have fired counsel, and hired an attorney who made sure that the jury heard Mr. Nicastro's statement and how Kenny Wolford had opportunity and motive to do harm to the victim so they the jury could have acquitted him.

The Florida four (4) pronged criteria to state a facially sufficient claim of ineffective assistance of counsel for failing to call a witness is fully met and satisfied by (1) naming the witness, (2) delineating their testimony, (3) setting forth how this testimony could have changed the outcome of the proceedings; and (4) the witness(es) availability. See Paul v. State, 4 So. 3d 27 (Fla. 4th DCA 2009); citing McLin v. State, 827 So. 2d 948 (Fla. 2002).

The Defendant has met each of these prongs as well as the fact that the Defendant was unaware of witness Richard Nicastro until July 14th, 2015, which constitutes newly discovered evidence. The State and Federal Constitutions require the provision of effective assistance of counsel as they are the way and means that each of the Defendant's other rights were to be secured. When, as here, trial counsel failed in the performance of duties by failing to fully investigate the Defendant's case and by depositioning, subpoenaing and calling Richard Nicastro became impossible for the Defendant to secure each of his rights, which were instead violated.

The Petitioner has no idea why counsel did not call Richard Nicastro, which is why an evidentiary hearing was mandatory, especially where the Petitioner's actual and factual innocence was implicated. *See* House v. Bell, 547 U.S. 518 (2006); U.S.C. 4th, 5th, 6th, 8th, 9th and 14th Amendments; Wiggins v. State, 539 U.S. 510 (2003).The Petitioner did NOT learn about this witness until he was provided partial discovery in July 2015, so the Petitioner has no idea if he was available to testify at trial. This is why evidentiary hearing is required when there is a reasonable probability that the outcome would have been different. The Petitioner on accord with

well-established law has consistently claimed that if proven the Petitioner would be entitled to relief. *See* Smith v. Singletary, 170 F. 3d. 1051 (11th Cir. 1999). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND NINE: FAILED TO IMPEACH KELLY SMITH

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. The Attorney General again wants you to believe that; "Detective Cardinal saw a man wearing a white painter's cap exit as blue car and enter the crack house." The same crack house that Kelly Smith claims to have been in, and that Kelly Smith claimed Petitioner came in with a TV set. Detective Cardinal does not make the same claim. He is a trained officer of the law and he does not see anyone carry a TV set into this crack house, as the State's witness claims. The Attorney General again is not addressing the issues at hand, "that there is no way Petitioner could have come to the crack house on Davis Road in a blue car as the State wants everyone to believe was the victim's, as Kelly Smith stated the times Petitioner was allegedly to come by was between 12:00 a.m. and 4:00 a.m." Here Petitioner will point out the police report clearly refutes Kelly Smith's claim and in fact will prove she lied under oath.

Petitioner will also point out that the Attorney General claims that it would be disingenuous for counsel to object. If Kelly Smith was telling the truth, she would not need to go back and look at what she stated, because the truth never changes. As Petitioner pointed out, Kelly Smith and Michelle Martinez both changed their stories to satisfy the State, and it came out during cross-examination that Kelly Smith was a confidential informant who has been paid for her testimony in the past. Why not now? The State withheld that information from Petitioner so Petitioner was unprepared for trial with a confidential informant as a witness. If counsel himself stated; "this is something defense counsel do not do" then how did he give "effective assistance"? Both Kelly Smith and Michelle Martinez gave such conflicting stories during the trial. The jury was unable to decide if in fact these witnesses were telling the truth as the state purposely left out jury instruction "10" under 3.9 weighing the evidence, which stated; "Was it proved that the general reputation of the witness for telling the truth and being honest was bad?" Therefore, when the jury does not have proper instructions, they are cannot make proper decisions concerning a person's life and liberty. Moreover, counsel's deficient performance and

resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND TEN: COLLATERAL CRIMES

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. Respondent states: "The testimony by Mr. Mills went to Petitioner conscious of guilt and suggested that he fled town". Here Petitioner has shown that neither Michelle Martinez nor Mr. Mills had any direct evidence as to the murder for which he was on trial for their testimony did in fact prove bad character which is contrary to the federal law which states collateral crime evidence cannot be used to prove bad character.

Yes. The court has overlooked and/or misapprehended the law and facts in their denial of this claim The State claims, "this claim lacks merit." and they go on to say, "The testimony was relevant to establish Defendant's identity as the killer." Neither, Duane Mills nor Michelle Martinez testified they saw Defendant kill anyone. Defense counsel was deficient, as he never asked these witnesses if they saw Defendant enter into the victim's home, strike victim, or kill victim Ms. Kiger. The state has made the claim that these witnesses testimony were relevant to prove defendants identify. The testimony of uncharged collateral crimes with no nexus to the charged crimes is inadmissible. The testimony of Defendant buying crack does not prove identity to a murder. "In advertent admission of pieces of crack cocaine unrelated to offenses with which Defendant was charged, was prejudicial to Defendant." Jenkins v. State, 719 So. 2d 1012 (Fla. App. 4 Dist. 1998) the testimony of Defendant driving off a car lot with a used car has no relevancy to the charged crime of murder. Here, defense counsel did not even cross-examine Mr. Mills to ask had he seen Defendant at the alleged crime scene. "A trial court cannot admit evidence of a collateral crime without first determining that the Defendant's involvement in the collateral crime is proven by clear and convincing evidence. "A trial court cannot admit evidence of a collateral crime without first determining that the defendant's involvement in the collateral crime is proven by clear and convincing evidence." Moore v. State, 127 So. 3d 607 (Fla. App. 4 Dist. 2012)

Here you have a known crack user herself, Michelle Martinez making a claim that; "Defendant picked her up in a beige car and mumbling something about a TV." "The trial court abused its discretion when it admitted collateral crime evidence to establish identity, and the trial court abused its discretion when it admitted collateral crime evidence to establish intent and the

absence of mistake." Vice v. State, 39 So. 3d 352 (Fla. App. 1 Dist. 2010). Here the state presented these collateral crimes just to prove bad character. Defense counsel was deficient for allowing these witnesses to testify to crimes that had no relevancy to Defendants charges. "Admission of collateral evidence was unduly prejudicial to defendant." Corson v. State, 9 So. 3d 765 (Fla. App. 2 Dist. 2009). This claim warrants a new trial for the facts on record show there is no nexus to warrant the testimony if these witnesses, thus making this evidence inadmissible. Furthermore, Defendant avers he has met and satisfied both prongs of Strickland v. Washington, 466 U.S. 668 (1984) and would further assert that each of his issues should be evaluated under United States v. Cronic, 466 U.S. 648 (1984). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND ELEVEN: CROSS- EXAMINATION

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. Respondent makes a false statement as Petitioner does list each person. Counselor failed to cross-examine and how that deficiency in performance prejudiced Petitioner as counselor failed to present an adversarial challenge to the state's presentation of these witnesses. This violated Petitioner's due process rights guaranteed to him by the United States Constitution.

Yes. The court has overlooked and/or misapprehended the law and facts in their denial of this claim The State claims, "Defendant failed to demonstrate any prejudice." Defendant is untrained in law and has never been given his Discovery, in this case. Defendant may lack in certain skills such as writing. This does not excuse the fact that he does not have the proper documents to address his issues. This is a Constitutional issue as Defendant has the right to know the evidence the state has accumulated at public expense so he can properly know the facts surrounding the case. "A fair and full cross-examination of a witness upon the opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree cross-examination of a witness upon subject converted in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error." See Coco v. State, 62 So. 2d 892 (Fla. 1953). As this claim is an

absolute right, defense counsel is well aware of his duty and cannot bypass his assistance to his client. Counselors deficient performance, led to prejudice in the fact that Defendant did get to cross-examine the witnesses, which would have given the jury a chance to acquit Defendant. Furthermore, Defendant avers he has met and satisfied both prongs of Strickland v. Washington, 466 U.S. 668 (1984) and would further assert that each of his issues should be evaluated under United States v. Cronic, 466 U.S. 648 (1984). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND TWELVE: JURY INSTRUCTIONS

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal.

Respondent is stating; "this claim is based on mere speculation." The State's whole case was mere speculation, the stacking of inferences, with no competent substantial evidence, which is contrary to law. The record shows that Petitioner was charged with first degree murder and burglary with an assault or battery. Defense counsel told Petitioner; "that if we waive all lesser included offenses that the jury would have to return a not guilty verdict as there was no premeditation." Defense counsel never explained felony murder or the fact that the State could proceed on a theory not charged in the indictment. Cole v. Arkansas, 333 U.S. 196, 92 L. Ed. 644, 68 S. Ct. 514 (1948).

"The trial Judge has no discretion in whether to instruct the jury on a necessary lesser-included offense. Once the Judge determines that the offense is a necessary lesser-included offense, an instruction **MUST** be given. Montgomery v. State, 39 So. 3d 252,259 (Fla. 2010), quoting State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1996).Respondent is making an unreasonable determination of the facts, as "Petitioner must be tried as the indictment states." The Federal law is clear on this matter. "The standard of review for whether there is a material variance between the allegations in the indictment and the facts established at trial is twofold: First, whether a material variance did occur, and, second, whether the defendant suffered substantial prejudice as a result." United States v. Chastain, 198 F. 3d 1338, 1349 (11th Cir. 1999).

The indictment charged Petitioner with a burglary with an assault or battery. There was no mention of theft, yet the State presented evidence of "possession of stolen property" which is

not in the indictment. The fact is the record will show that were the jury instruction says (the crime alleged) the State never claimed that there was any theft, or were the jury instruction says (the crime alleged) they the State would have stated theft or some similar charge. The State was able to proceed on an uncharged theory and was allowed to get a conviction based on a definition to an uncharged crime instead of proving all the `elements, which the law says the State MUST prove in order for the jury to reach a verdict. The record will reflect that a trained officer, Detective Cardinal never saw Petitioner enter the crack house carrying any T.V. set as the State made the jury believe through a confidential informant Kelly Smith, who would say anything to stay out of jail. The record will reflect that the State led the jury to believe that this crack house that was being staked out by Detective Cardinal, that Kelly Smith says she was at, was the same crack house that the police recovered the T.V. set form when in fact it is not the same house as Petitioner pointed out in his Post conviction relief motion. Petitioner even had pictures taken as Defense counsel seemed to think this is not important. "But that, in the absence of a charge in the indictment, it was reversible error for the trial court to try defendant on a charge of interference with steel shipments." See Stirone v. United States, 361 U.S. 212 (1960). The fact remains a fundamental error in the jury instructions are governed by In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) and Yates v. United States, 354 U.S. 298 (1957). The jury instructions themselves show upon the face of the record that they were incorrect. (See Respondent's Exhibit 12). Furthermore, the jury rendered a general jury verdict which does require a new trial pursuant to Yates v. United States, 354 U.S. 298 (1957).Then the other sub-claim was sufficiency of the evidence which is clearly governed by Jackson v. Virginia, 443 U.S. 307 (1979); for which the courts and the respondent's made a denial decision that contrary to and an unreasonable application of clearly established law as determined by the United States Supreme Court. "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. at 364. See also United States v. Gaudin, 515 U.S. 506, 522-523, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) (holding that criminal convictions "must rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"). Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND THIRTEEN: FALSE TESTIMONY BY SERGEANT FREE

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. The record will reflect that Sergeant Free testified to only collecting two (2) DNA samples of fingernails and fingernail scrapings. The evidence receipt will reflect that there were ten (10) fingernail scrapings collected from the victim. Respondent states; "Petitioner never established prejudice because he cannot show that he could have successfully challenged the DNA evidence." Petitioner was never even given a discovery to challenge this evidence and yet the State continues to say Petitioner failed to do something or other. Respondent says; "Y-STR DNA is generally accepted in the scientific community" then why did they wait thirteen (13) years to test this DNA? The fact remains that if this Y-STR DNA is so acceptable then why is not there not case law showing how acceptable it is, respondent relies on a case out of Illinois. See United States v. Canfield, 212 F. 3d 7 (2nd Cir. 2000) Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND FOURTEEN: FINGERPRINTS ON THE VICTIM'S CAR

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. Defense counsel was clearly deficient in his performance for not presenting (A) the fingerprints found on the roof of the victim's car; (B) For not securing a subpoena for Jim Wearing. His testimony would show that he never tested the fingerprints found on the victim's car, to anyone other than Defendant, showing bias towards Defendant. "In 2004, through an unusual series of events, the previously unidentified fingerprints were identified as belonging to one Jeremy Scott. Based on that identification, Schofield filed a motion for postconviction relief seeking a new trial based on the "newly discovered evidence" of the identity of the individual who left the fingerprints. The postconviction court initially summarily denied relief on the ground that this evidence was not "newly discovered." This court, however, found that the identity of the individual who left the fingerprints was properly characterized as "newly discovered evidence," and we therefore remanded for the postconviction court to hold an evidentiary hearing on Schofield's claim." See Schofield v. State, 32 So. 3d 90, 93-94 (Fla. 2d DCA 2009). Here Defendant did not get to have these fingerprints examined to see whom they belonged to, as Defendant was never given this information about the fingerprints left on the top of the victim's car until July of 2015 when the Defendant was provided partial discovery. Had Defendant known of this exculpatory evidence he could have had the prints ran through N.C.I.C.,

to see whose they were and to show his actual innocence. This allows defendant to file under newly discovered evidence. Nordelo v. State, 93 So. 3d 178 (Fla. 2012 (citing) Jones v. State, 591 So. 2d 911 (Fla. 1991).

The Defendant was unaware of these facts until he received the partial discovery provided by counsel in July 14th, 2015. The Defendant has diligently sought pretrial discovery since being arrested in 2009. Yet did not receive pretrial discovery from his trial attorney until late 2015, thus clearly constituting newly discovered evidence. The State court made an unreasonable determination of the facts without holding an evidentiary hearing and only addressing two grounds, which was a fatal constitutional defect in the State court proceedings and a contrary to application and objectively unreasonable in their findings. 28 U.S.C. § 2254 (d)(2), (e)(1); See Williams v. Taylor, 529 U.S. 420 (2000). This newly discovered evidence would have cast serious doubt upon the State's version of events and undermines correctness of the end result.

The State and Federal Constitutions are in place as Safeguards to ensure that the laws are evenly and equally applied, and due process is afforded in all proceedings. These rights are normally secured through the provision of effective assistance of counsel. When, as here, trial counsel failed in the performance of duties by failing to provide the Defendant with a full and complete copy of pretrial discovery that was prepared at the public's expense, it became impossible for the Defendant to secure each of his rights, which were instead violated. Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

GROUND FIFTEEN: MISADVISE OF PLEA OFFER

Petitioner has properly argued ineffective assistance of trial counsel claims in his 3.850 motion and the appeal. The second prong of Strickland dealing with how this deficient performance either prejudiced or injured the Defendant is the FACT that had the Defendant known that counsel was not going to present the exculpatory DNA evidence and other facts showing that the Defendant did not commit the charged offenses, the Defendant would have accepted the State's ten (10) year plea offer and not received the life sentence the Defendant is now serving. "But For" Constitutionally ineffective counsel's unprofessional, unreasonable and untactical decision and/or failure to correctly convey the State's ten (10) year plea offer and the fact that counsel was not going to present the exculpatory evidence, the Defendant would have

accepted the State's ten (10) year plea offer and not proceeded to trial, thus changing the outcome of these proceedings which clearly undermine correctness of the end result. *See* Alcorn v. State, 121 So. 3d 419 (Fla. 2013); (citing); Strickland v. Washington, 466 U.S. 668 (1984); Lockhart v. Fretwell, 506 U.S. 364 (1993)

This reason why this claim falls under newly discovered evidence is that the Defendant could not present a competent claim without first having his complete pretrial discovery, which he did not receive until July of 2015, so Defendant was unaware of this exculpatory evidence which had it been presented to the jury, it would have led to the jury returning a not guilty verdict. The jurisprudence in the State of Florida pertaining to claims of this nature changed when the United States Supreme Court rendered the opinions in Lafler v. Cooper, ---U.S. --- , 132 S.Ct. 1376 (2012); Missouri v. Frye,---U.S.---, 132 S.Ct. 1399 (2012). In 2013 our Florida Supreme Court issued the decision in Alcorn v. State, 121 So. 3d 419 (Fla. 2013).

Counsel clearly misadvised the Defendant to reject the State's plea offer making the rejection involuntary and caused the Defendant to receive a life sentence, which is an extreme difference form ten (10) years in prison. *See* Lafler, supra; Missouri, supra; Powell v. Alabama, 287 U.S. 45 (1932). Had counsel correctly advised the Defendant, the Defendant would have accepted the State's plea offer, the Court would have accepted the State's plea and the Defendant would not have proceeded to trial which clearly would have changed the outcome of these proceedings requiring that relief be granted.

The State throughout these proceedings has claimed that the evidence against the Defendant is "overwhelming", but the Defendant never received any pretrial discovery so the Defendant rejected the favorable plea offer based on trial counsel's "incompetent" advice that "he was likely to be acquitted" pursuant to the DNA evidence. *See* Flint v. State, 184 So. 3d 610 (Fla. 2nd DCA 2016); (citing and quoting) Perez v. State, 893 So. 2d 629, 629 (Fla. 3rd DCA 2005)

The Defendant has stated a facially sufficient claim based on newly discovered evidence that was received when the Defendant's trial counsel finally provided bits and pieces of pretrial discovery in July of 2015. The Respondent in addressing claim D, shows that the State court's clearly made an unreasonable and contrary to application of controlling law as determined by the United States Supreme Court in Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376 (2012) and Missouri v. Frye, 566 U.S. 134, 132 S. CT. 1399 (2012).What the Respondent and state courts

failed to acknowledge is that the Petitioner was misadvised not to accept the state's Ten (10) year plea offer "because of conclusive DNA evidence that proved the Petitioner did not commit the charged offense." The Petitioner did not know and still does not know if such evidence exists because the Petitioner only receives partial pre-trial discovery in July 2015. Again, material facts are in dispute, which require ad evidentiary hearing due to the fact if proven true entitles the Petitioner to relief. *See* Thomas v. Zant, 697 F. 2d 977 (11th Cir. 1983) U.S.C. 4th, 5th, 6th, 8th, 9th and 14th Amendments. Moreover, counsel's deficient performance and resulting prejudice violated Defendant's state and federal constitutional rights. U.S.C., 6th, and 14th Amends., Fla. Const. Art. 1 §§, 9, and 12.

CONCLUSION

The Petitioner is literally fighting for his life when the face of the record shows a true fundamental constitutional miscarriage of justice that should be corrected by whatever means necessary. "The scope and flexibility of the Writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and law matters. The very nature of the Writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced corrected." *See* Harris v. Nelson, 394 U.S. 286 at 291 (1969).

Petitioner would like to express that there is no law for which the State can present false evidence to secure a guilty verdict. Petitioner hopes that there is someone out there that believes in the law and will see that the State did in fact present false evidence during the trial and that this someone who believes in the law, will correct this fundamental error and issue an ORDER to the trial Court to hold a new trial based on the facts presented, or at least issue an ORDER for an evidentiary hearing so that Petitioner can present these facts to the Court in the manner that the United States Constitution has insured each citizen of this great county has a right to.

In closing the Petitioner feels compelled to put it upon the record and in this Reply, that justice is not supposed to be illusive, especially where there are numerous documents, which PROVE the Petitioner's actual, and factual innocence. Pro se motions are to be liberally construed regardless of how in artfully they are pleaded. *See* Haines v. Kerner, 404 U.S. 519 (1972).

CERTIFICATE OF COMPLIANCE

LAWRENCE KEITH JOHNSON-PETITIONER

VS.

MARK INCH, SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, ET.AL,

RESPONDENT(S).

As required by Supreme Court Rule 33.1 (h), I certify that the petition for writ of certiorari contains 11,093 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 19 day of November, 2019

Respectfully Submitted,

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