19-7530

Docket No.: (*to be assigned*)

ORIGINAL

In the
SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 2020

ORANDO RICARDO THOMPSON, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*,

On Petition for a Writ of Certiorari to the
Supreme Judicial Court of Florida

PETITION FOR WRIT OF CERTIORARI

Orando Ricardo Thompson, *pro se*
DC No.: Q33044
Holmes Correctional Institution
3142 Thomas Drive
Bonifay, Fl. 32425

January 2020

QUESTIONS PRESENTED

1. Whether Strickland v. Washington, 466 U.S. 668 (1984), and its progeny which establishes review of claims of ineffective assistance of counsel, adequately allows consideration of the fundamental unfairness of a trial absent a showing of a reasonable probability of a different outcome.

PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND CORPORATE DISCLOSURE STATEMENT

PLEASE TAKE NOTICE, Petitioner states that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations, those persons also having an interest in the outcome of the case are as follows:

- Andy Thomas Esq., Public Defender, Second Judicial Circuit, State of Florida
- M.J. Lord Esq., Assistant Public Defender, State of Florida
- Virginia C. Harris Esq., Assistant Attorney General, State of Florida
- Pamela Jo Bondi, Former Attorney General, State of Florida
- Ashley Moody, Attorney General, State of Florida
- Michael C. Overstreet, Judge, Bay County, Fourteenth Judicial Circuit, State of Florida
- Rowe, Judge, First District Court of Appeals, State of Florida
- B.L. Thomas, Chief Judge, First District Court of Appeals, State of Florida
- M.K. Thomas, Judge, First District Court of Appeals, State of Florida

I hereby certify that no publicly traded company or corporation or that there is any corporation that owns 10% or any amount of stock is a party or has an interest in the outcome of the instant case.

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IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 2019

ORANDO RICARDO THOMPSON, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent,*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner, Orando Ricardo Thompson, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeal for the State of Florida in this case.

CITATION TO OPINIONS

The opinion of the First District Court of Appeals for the State of Florida (App. A, pp. 1 - 8) is reported at Thompson v. State, 257 So.3d 573 (Fla. 1st Dist. 2018). The decision of the Supreme Court for the State of Florida (App. C, pp. 10) declining to accept jurisdiction following briefing is reported at Thompson v. State, SC18-2015 (Fla. Tuesday October 8, 2019).

STATEMENT OF THE BASIS FOR JURISDICTION

The First District Court of Appeals for the State of Florida entered its judgment on October 15, 2018 (App. A, pp. 1 - 8). The Supreme Court of Appeal for the State of Florida denied jurisdiction on October 8, 2019 (App. C, pp. 10). The time

seeking review expires on Monday, January 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

The following is a concise statement of the facts material to the consideration of the questions presented. The review follows the Florida Supreme Court denial of to accept jurisdiction on October 8, 2019 to review the *per curiam* affirmed written opinion from the First District Court of Appeal in the State of Florida.

A. Thompson's Jury Trial

An unfortunate series of events took dynasty and unfolded in June 23, 2015 between the Petitioner, Orando Ricardo Thompson, and the victim, Caleb Halley.

Jarred Merrit testified that he also worked at Buddy's Seafood and knew both Halley and Thompson. On June 23, 2015, he saw them scuffling near the back door. He stepped in to break up the fight and saw that Halley was wounded. Halley said, "he stabbed me, bro." Merrit saw something protruding from the wound.

Thomas Rogers testified that he was one of the managers at Buddy's Seafood. He also saw the scuffle and saw two other people pulling the men apart. Halley pulled up his shirt and showed Rogers the wound and said "he stabbed me." He asked Rogers to get him to the hospital. Rogers put Halley in his truck. While seeking help, they encountered an ambulance, and EMS took over. Tommy Anderson testified that he had worked for the local police department for 21 years. He went to Buddy's Seafood after the incident and saw on the ground a broken

silver necklace, a broker pair of sunglasses, a short piece of lumber, a broken sword and drops of blood on the ground. He saw a handle, but said he did not notice a grip knife on the ground.

Roger Rowell testified about the surveillance camera system that had been installed at Buddy's Seafood. He retrieved the data for June 23, 2015. There were several camera angles available. The video is included in the record on appeal.

Police officer Deegins reviewed the surveillance video. He testified that he interrupted Officer Talamantez's interview with Thompson to show him the video.

Officer Talamantez testified that he interviewed Thompson beginning at about 5 PM on June 23, 2015. (App. D, pp. 13). Officer Deegins interrupted and they watched the video. Talamantez was permitted to offer some narration of the video as to the time stamps and the people who could be seen on the video. He also identified screen shots. Talamantez repeatedly called the decorative sword "the murder weapon." (App. D, pp. 20, 47, 57, 65). He read Thompson his Miranda rights and proceeded to interview him. The interview was also on video and shown to the jury. (App. D, pp. 24). Thompson stated that the victim got a knife from underneath his shirt and that was when he got the board. (App. D, pp. 29).Halley took the board from Thompson and slapped him with a stick. (App. D, pp. 29). Thompson went inside and got the knife because he got mad when the victim slapped him. Thompson turned red and was not thinking. Thompson went back outside and slapped the victim on the leg with the knife. (App. D, pp. 30). In response to a question over who grabbed the first weapon, Thompson responded that he grabbed

a board after the victim pushed him. Thompson stated that he did not know the victim had a knife until it came out of his shirt. The victim threatened to cut him and then he dropped his weapon. A stick was involved in the fight, but Thompson did not remember which one of them grabbed the stick. (App. D, pp. 32). Halley slapped Thompson on or about his feet. (App. D, pp. 33).

In essence, the dispute arose because Thompson had added spices to a gumbo that Halley had made, and someone told Halley about it. (App. D, pp. 28). The video of the dispute was shown to the jury as well, and is in the record.

Thompson relayed that Halley had a knife, which he sharpens all the time, on a chain around his neck, and he said, "I'll cut you." (App. D, pp. 32). At some point a broom stick and a board were wielded. Mostly there was pushing and shoving. Thompson said he went inside and Halley did not follow. Thompson went to the spic room and obtained the decorative sword and went back outside. (App. D, pp. 34). Thompson said he went back out because he was upset, he was made and he had not expected to be hit or to be in a fist fight. (App. D, pp. 36). He said they were both being stupid, and that he did not intend to hurt Halley. He was swinging the knife and somehow Halley was stabbed. (App. D, pp. 37). He was wining at Halley's leg and not trying to stab him. (App. D, pp. 40). On the interview video, Thompson said he was angry, and that he had never seen himself that angry before. (App. D, pp. 42). He did not mean to cut Halley. He said it was a mistake to go inside and get the knife. (App. D, pp. 43).

Talamantez was supposed to be narrating the video only to the extent that he identified the time of the frames and who was in them. During his testimony he was asked about Thompson's statements during the interview, which had been shown to the jury. He responded not with straightforward answers, but by adding, several times, "which was inaccurate." (App. D, pp. 46). On cross-examination, when asked about his investigation, specifically about any investigation of a self-defense claim, the following occurred:

> "Q. But in a self-defense case you want, or in a fight which involves self-defense you want to completely investigate that aspect, isn't that true?
>
> A. This case wasn't about self-defense, it was the exact opposite of self defense."

(App. D, pp. 59).

When asked if he investigated whether Halley or Thompson may have been intoxicated he responded, "No, sir. It would have no merit on the case." (App. D, pp. 60). He also stated, in response to a question, that Thompson lied to him initially. A defense objection was overruled. (App. D, pp. 66).

Officer Brennan testified that he took photographs of the scene and collected evidence, including the board and broken broom handle, piece of broken knife handle, sword or knife.

Dr. Radtke, the medical examiner ("ME"), testified that the autopsy showed the cause of death was complications of an abdominal stab wound, and he classified it as a homicide. He testified that a stab wound that pierces the torso is a wound that is likely to lead to great bodily harm or death. He further testified that there

were two disrupted areas in the small bowel, and that he could not say with 100% certainty that the third wound, to the kidney, was caused by the defendant. He testified that toxicology results showed that Halley was using marijuana within the last day of his life. The State rested its case and the defense unsuccessfully moved for a judgment of acquittal.

The defense recalled officer Talamantez, who testified concerning comments he wrote on still photos taken from the video of the incident and the times on the photos to establish sequence of events. (App. D, pp. 75). The photos indicated the knife wounds occurred a few seconds after Halley swung the mop handle. (App. D, pp. 89). When asked if he had investigated the defendant's past related to self-defense, Talamantez again said there was no issue of self-defense to look into. (App. D, pp. 93).

The defendant, Orando Thompson, testified in essence that he had worked with Halley at Buddy's Seafood for about five years, and that at one time they were roommates. Their relationship was up and down, and Halley would criticize Thompson for the way he did his job. Thompson testified that he saw Halley using drugs almost every day, and that he used "wax," which is a concentrated form of marijuana that he smoked with a pen device. Halley was always sharpening his knife. Once he saw Halley spit in a female coworker's ace. Halley had threatened other coworkers. Thompson testified that Halley had anger problems, and he thought he became more angry when he smoked wax.

On the day of the incident, Thompson tasted the gumbo and added spices. Another coworker told Halley, who became angry and started arguing with Thompson while Thompson was sitting down outside. Halley pushed his chest and then they were up in each other's faces. Thompson saw Halley feeling for his knife, and he grabbed a board. He dropped the board and was telling Halley to stop. Halley held the knife over his head. After a few seconds, Halley had the board and Thompson had the mop handle because he was terrified. Thompson went inside the building to the spice room and picked up the decorative sword. He took it back outside because Halley was coming towards the door with the board, and he was scared. Thompson said the fight was still going on. When he went outside Halley had the mop handle. Halley did not want to stop fighting. He said Halley hit his hand and he dropped the sword, but he picked it up again. For about thirteen seconds Thompson did not have a weapon. He said Halley was hitting him on his feet and he defended himself. Thompson said he was wearing a necklace that was torn off, and that he asked Halley numerous times to stop fighting. Halley still held the mop handle when Thompson told him he was bleeding and handed him a towel. Thompson tried to follow to the hospital, but did not because Halley's family would be there.

He talked to Officer Talamantez just after the incident. He was not lying to the Officer, but was just trying to recall what had happened. He had not been in fights before and was afraid during the incident. He had been telling Halley to stop and that he did not want to fight. He was a little afraid, a little angry, and in shock.

Thompson testified that he had never been in a fight before and he was surprised by Halley's response. He did not intend to stab him, it was an accident, he only meant to scare him with the sword. Thompson said Halley hit him ore than three times with the mop handle, and he had a bruised ankle. Thompson said neither of them realized Halley had been stabbed when it happened.

Dr. Radtke testified that Halley's blood was positive for metabolies of THC, which can affect your brain, about one hour after admission. He said usually THC slows people down and does not cause rage, but in rare circumstances it can make people angry or aggressive. Asked about "wax," he said it tends to be a concentrate, although he did not offer any detailed information.

Curtis Young was the ambulance driver. The defense sought to introduce his record of the incident, but the state contended it contained inadmissible hearsay that was not an excited utterance and not for medical diagnosis. Over defense objection, the court declined to allow the evidence that during the ambulance ride, Halley had said that he had been playing around with a friend and it was an accident. It was proffered for the record. Witness Cader, who was in the ambulance, said Halley had said he assumed the sword was a toy that was hanging on the wall.

Latonya Smith testified that she worked at Buddy's Seafood at the time of the incident. She called Halley Chief, but he was not very friendly to her. At one point, Halley lived with her and Thompson. Halley always wore a knife around his neck. He was aggressive towards her and Thompson. Halley smoked drugs at work, including wax. Halley was critical of Thompson's work. Smith said Thompson has a

reputation for being peaceful person and truthful person. Smith was not out back when the incident occurred, but when she saw Thompson come in, he looked frightened. She said wax is ten times stronger than marijuana. She said Halley was more aggressive when he drank and smoke marijuana. In deposition, she had said he was drunk often and aggressive most of the time, and she did not observe the wax to affect his mood. Joshua Merritt testified that he had worked at Buddy's for about ten years, and that he was not present during the incident. He was in the outside break area before the fight, and saw Halley smoking a cigarette. He could have been smoking wax, he had seen him do so several times. He had heard Halley call Thompson's work shitty. He had seen arguments before, but not fights, and no physical violence. He had seen Halley use the pen device for smoking. He thought Halley was using it to smoke wax just before the fight. Halley used his knife to break down boxes. He also said he had seen most people verbally angry at work. He did not recall hearing racial comments. He did not notice a difference in Halley's behavior when he smoked. He did not seem impaired or aggressive. He had not threatened to fight anyone.

Alexis Cooper also worked at Buddy's. She informed Halley that Thompson had added spices to the gumbo. Halley turned around and walked out. She did not see the incident. She had seen Halley smoke wax on the job. She recalled that he used his pen device that day. At the time it was unusual for employees to take breaks and smoke marijuana.

Thomas Rogers testified that he had worked at Buddy's for 20 years and was aware that Halley and Thompson had had a falling out. He did not observe the fight outside. There was no official policy about who could spice the gumbo. It was common for employees to complain about one another. He also recalled a problem between Halley and Smith. Halley sometimes came to him with complaints about Thompson.

Steven Pope drove into the back area of the business and saw what looked like two guys playing around. Then he figured out that they were fighting, so they broke it up. The white guy (Halley) had a broom handle and was smacking at the other guy with it. The black guy (Thompson) had him by his shirt. They looked tired.

Tommy Garret testified that he saw Thompson often at church functions and that he had a reputation for peacefulness and for being truthful. Darren Anderson testified to Thompson's reputation for peacefulness and truthfulness. Nick Barrios testified similarly.

Orando Thompson testified that he had given up smoking marijuana in February 2015 and was not smoking the day of the incident. He had never tried wax. He said he had taken a photo of his injured, swollen ankle shortly after the incident. He said Halley hit him with the mop handle. He said Halley never indicated that he wanted to stop fighting. He was saying, "come on, let's do this." The knife injury occurred right after the blow with the stick. He said Halley was the first one to go for a weapon, i.e., the knife around his neck. Then he picked up the

board. He only used the weapon after Halley hit him with the stick. He only intended to scare him off. Thompson said the fight was still going on when he retrieved the sword.

The defense proffered expert testimony seeking to show that at certain levels, THC causes irrational and aggressive behavior. The court declined to admit evidence because if found that the proffered evidence was only anecdotal and not established science. The court determined that evidence had been offered through the ME that in rare circumstances, THC can make people angry or aggressive and irrational. The defense rested its case.

B. Proceedings Below

Following the Petitioner's jury trial, he appealed to the First District Court of Appeal, which on October 15, 2018 *per curiam* affirmed the lower state court's decision with a written opinion. (App. A, pp. 1-8). The Petitioner raised various claims, many of which were affirmed without discussion. Nevertheless the panel of judges for the state court of appeals addressed three of his claims in their written order affirming his judgment and conviction. Central to this petition for writ of certiorari is the first issue addressed as fundamental error/ineffective assistance of counsel as to when the lead investigator was allowed to testify that this was not a self-defense case and to comment on the Petitioner's credibility. (App. A, pp. 5-6). The state court of appeals ultimately ruled that though counsel's performance was deficient for not objecting to several portions of the investigators statement, prejudice could not be established because video of the altercation would still be

admitted. (App. A, pp. 6). The ultimate rationale being the Petitioner was "unable to show that there is a reasonable probability that the outcome of his trial would have been different if defense counsel had objected to the investigator's testimony. (App. A, pp. 6). Thompson v. State, 257 So.3d 573, 579 (Fla. 1st Dist. 2018).

The Petitioner sought a rehearing addressing the aforementioned issue and that of the jury instruction. Rehearing was denied on November 19, 2018. Thompson v. State, 2018 Fla. App. LEXIS 17678 (Fla. 1st Dist. 2018). (App. B, pp. 9)

Subsequently, the Petitioner sought discretionary review from the Florida Supreme Court and after jurisdictional briefing, the court declined to accept jurisdiction on October 8, 2019 . (App. C, pp. 10).

REASONS FOR GRANTING THE PETITION

The Florida Court of Appeals for the First District acknowledged (App. A, pp. 5-6) in its decision that counsel was ineffective but that prejudice was not substantive enough to inspire confidence in a different outcome. The decision of Strickland v. Washington, 466 U.S. 668 (1984) has been utilized widely by courts across the country, and the State of Florida. Yet in the ensuing years its holdings have been constricted, though not purposefully, to an outcome derivative approach when it applies to prejudice, and thus the need for guidance from this Court is acute.

This case is timely and there is an opportunity to provide that guidance when a court renders a decision of this particular nature. Moreover, the decision below is erroneous, and the issue that it addresses is important.

I. The Florida Court of Appeals for the First District and the subsequent denial of review by the Florida Supreme Court of Appeals goes contrary to the fundamental holding of the Sixth Amendment and Strickland v. Washington, *supra* that settles ineffective assistance of counsel claims in its interpretation of prejudice, fairness, and the outcome

In the summer term of 1984, this Supreme Court came to a pivotal decision as to the functionality of the Sixth Amendment right and how it extends to criminal defendants. This decision became the basis for over thirty-five years of a measurable standard towards the actions and inactions of their attorneys both appointed and selected. Best expressed in the words of Justice Brennan in his separate opinion:

> "I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their

> constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment."

Strickland v. Washington, 466 U.S. at 706.

Largely those words have grown to be prophetic, and in the intervening years have been widely utilized by both federal and state courts in adjudicating a variety of claims before them. And as Justice Brennan at the time accurately stated, it did not come to stunt the development of constitutional doctrine in this area in the years to come.

Truly the Strickland inquiry has come to focus on the ineffectiveness of counsel, followed by whether such shortcomings from counsel in turn prejudiced the criminal defendant and thus vitiated confidence in the outcome of the proceeding. Thus in the ordinary Strickland case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. In many cases where the court is able to show ineffectiveness but not prejudice, the inquiry stops there. Likewise, the inverse is also true.

From state circuit and appellate courts, to federal district and court of appeals, even to this Honorable Court, the Strickland test has been widely and consistently applied. Sometimes fluidly to apply to the specific circumstances that may inevitably arise in every criminal case, but rarely if ever deviating from the original holding of Strickland.

In Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the United States Supreme Court, this Court, stated that the Virginia Supreme Court had erred when it ruled that Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) modified the standard announced in Strickland. *See* Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("The Vrigina Supreme Court erred in holding that our decision in Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), modified or in some way supplanted the rule set down in Strickland."). This clarified the relationship between Lockhart and Strickland by stating that "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, [however,] there are situations in which the overriding focus on fundamental fairness may affect the analysis." Id. After indicating that, as explained in Strickland, there are a few situations in which prejudice may be presumed, the Court went on to say that there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Id. at 391-92.

The Petitioner arrives, as a result, to the instant question asking this Court to decide whether Strickland v. Washington, 466 U.S. 668 (1984) which established review of claims of ineffective assistance of counsel, adequately allows consideration of the fundamental unfairness of a trial absent a showing of a reasonable probability of a different outcome, where multiple errors on the part of counsel are apparent.

This issue in some form was brought before the Court in Weaver v. Massachussets, 582 U.S. __, 137 S.Ct. __, 198 L.Ed.2d 420 (2017), but the question was not ultimately reached. It is enough to conclude that the decision by the state court of appeals deviates from the heart of Strickland and the question presents one of national importance that continues with the unavoidable evolution of criminal law. The Court should grant certiorari to review this particular issue.

II. The Decision of the State Court of Appeals is Erroneous

In the instant case the First District Court for the State of Florida concluded that although "defense counsel's performance was deficient because he should have objected to several portions of the investigator's testimony, Thompson cannot establish that he was prejudiced by the failure to object because the video of the altercation would still have been admissible." (App. A, pp. 6). The court in its decision reasoned that the Petitioner was unable to show a reasonable possibility that the outcome of his trial would have been different. (App. A, pp. 6). It is evident that the decision in Strickland set forth that even errors by counsel that were professionally unreasonable, did not warrant setting aside the judgment of a criminal proceeding if it had no effect on the judgment. Id. at 691-692, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Counsel failed to object at trial to various portions of the testimony of Officer Talamantez with comments that were inappropriate and objectionable; such as, when Officer Talamantez commented on the credibility of the Petitioner in asserting that his statements were either inaccurate or untrue. (App. D, pp. 11-93).

The issue of which the Petitioner brings to the instant court is that the mechanical nature of Strickland being applied in criminal cases should not totally focus on a prejudice determination followed by ineffectiveness. Specific errors by counsel that when raised, whom by their very form, compel courts to evaluate both the attorney's performance and fairness of the proceeding. The principles are set to guide the process of the decision allowing the ultimate focus of inquiry to be the fundamental fairness of the proceeding. And in the end "despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. U.S. at 696.

What is more, this was elucidated by this Court in Weaver v. Massachussets, 582 U.S. __, 137 S.Ct. __, 198 L.Ed.2d 420 (2017):

> "For when a court is evaluating an ineffective assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.' Ibid. Petitioner therefore argues that under a proper interpretation of Strickland, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair."

Id. at L.Ed.2d 434-435.

This goes in line with the dissenting opinion of Justice Brennan in Strickland, that disagreed with the emphasis of attorney error having an impact on a trial that would undermine confidence in the outcome to be sufficient to overturn a conviction. The procedures in place through the Sixth (6th) and Fourteenth (14th) Amendment allow all criminal defendants the right to a fair proceeding with

competent counsel appointed or retained by them before the prosecution's case. To determine that the errors of counsel, although apparent and prejudicial, are insufficient to warrant a new trial due to the weight of other evidence is a complete abridgement of those rights. The Sixth Amendment does not hold that a manifestly guilty defendant after a trial which he was represented by a manifestly ineffective attorney is enough to sustain that the right was not violated. The constitutional protections are extended to all defendants, guilty or not; not only so that innocent persons be not convicted, but also that every defendant have his rights vigorously and conscientiously advocated by an able lawyer. Strickland, 694 U.S. at 711. When counsel renders ineffective assistance at trial to such a degree, then the defendant does not receive meaningful assistance in meeting the State and consequently violates his due process rights.

This can not and should not be done so, because it would impose upon defendants a weighty burden that would covertly legitimize convictions and sentences on the basis on patently incompetent conduct by defense counsel. The Petitioner would posit that the position of many reviewing courts has placed the emphasis of Strickland to an outcome derivative analysis as this Court has warned against and a clarification to the standard is necessary to ensure that the rights of criminal defendants is protected. There is an increasing set of instances where trials are held that counsel is ineffective to such a degree and that in further review of whether the outcome could be changed, determine that the prejudice inquiry has not been met. In other words, the fundamental fairness of the proceeding is

wantonly infringed upon. A similar position was looked into by this Court in Lockhart v. Fretwell, 506 U.S. 364, 122 L.Ed.2d 180, 113 S.Ct. 838 (1993). Where the Court stated that to show prejudice under Strickland a defendant must demonstrate that counsel's errors are so serious as to deprive him of a trial whose result is unfair or unreliable, Strickland, at 687, 80 L.Ed.2d 674, 104 S.Ct. 2052, not merely that the outcome would have been different. Id. at 364.

As the district court reached only on the probable effect of counsel's errors at the time of the trial proceeding, the broader and more important point that his trial proceeding reached an unreliable or unfair result was missed entirely. Nix v. Whiteside, 475 U.S. 157, 175, 89 L.Ed.2d 123, 106 S.Ct. 988 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"). The outcome determinative effect in Lockhart sought not to allow the defendant a windfall in a proceeding where an objection that would have been supported by a decision in a state criminal sentencing proceeding that was subsequently overruled. "Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Id. at L.Ed.2d 188-189, U.S. at 368-370; *see also* Allen v. McNeil, 611 F.3d 740 (11th Cir. 2010). With that being said, the fairness of a proceeding is what is at heart with the right of the Sixth Amendment that is afforded to every criminal defendant. It is

a right that is too fundamental and absolute to be ignored or sidestepped. Thus when counsel commits various trial court errors in allowing a witness to testify impermissibly, ineffectiveness ensues, the criminal defendant is prejudiced depending on what occurred. Moreover though the court at times may rule that the outcome would not have changed, this narrows the view of Strickland to the outcome of a proceeding and not the fairness of the proceeding itself and the constitutional protection afforded to a criminal defendant. Jefferson v. Fountain, 382 F.3d 1286, 1298 (11th Cir. 2004) ("As the Supreme Court explained in its Fretwell opinion, the critical focus of the Strickland prejudice inquiry is not results *per se*, but the fairness and reliability of the adversary proceeding in question"). Notably, this Court nineteen years ago reasoned that the rule in Strickland was not supplanted or modified in some way by Lockhart, rather denoting that there are situations where "the overriding focus on fundamental fairness may affect the analysis." Id. at 391. The meaning to effective assistance boils down to ensuring a fair trial to be the guide. Since "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the ``benchmark" inquiry in evaluating any claim of ineffective assistance is whether counsel's performance ``so undermined the proper functioning of the adversarial process" that it failed to produce a reliably ``just result." Strickland, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Prejudice requirement places itself in the assurance of a fair trial, where the right is not

infringed if the attorney mistake does not question whether the proceeding was just. Impairment of a fair trial is how we distinguish between unfortunate attorney error and error of constitutional significance. Strickland, Fretwell, and Williams all instruct that the pure outcome-based test on which the Court relies is an erroneous measure of cognizable prejudice. As Justice Scalia in the separate opinion of Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) eloquently stated:

> "In ignoring Strickland's ``ultimate focus . . . on the fundamental fairness of the proceeding whose result is being challenged," 466 U.S., at 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674, the Court has lost the forest for the trees . . . "

Id. 182 L.Ed.2d at 418.

Reflecting on the instant case, the law enforcement officer's improper comments on the Petitioner's credibility and on the sole asserted defense of self-defense completely vitiated the Petitioner's right to a fair trial. The sole defense presented at trial was self-defense, and a law enforcement officer repeatedly tried to undermine that defense by making comments he certainly knew were improper. These comments were especially harmful because they came from a law enforcement officer. Bartlett v. State, 993 So.2d 157 (Fla. 1st Dist. 2008). The Petitioner presented testimony in support of his defense of self-defense. He was entitled to be heard on that issue without the undue prejudice of a law enforcement officer telling the jury that the Petitioner was not truthful and it was not a self-defense case, and to have the jury properly instructed in accordance with the evidence presented. Officer Talamantez made comments in reference to "the murder weapon," (App. D, pp. 47, 57, 65), made statements like "which is also not true," or

"it would have no merit on the case," (App. D, pp. 46-48, 60) and that the case was not self defense (App. D, pp. 59). These comments impugned the defense and counsel further exacerbated these issues with failure to object. The Court in Strickland cautioned:

> "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.
>
> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."

Id. U.S. at 696.

In cautioning future courts not to apply the Strickland prongs for claims in a mechanical fashion, the Court reminded that the ultimate inquiry should be the fairness of the proceeding. It does not matter that a result be obtained with a defendant that is clearly guilty, if he is represented by a clearly deficient attorney, the adversarial process breaks down, even without a showing that the outcome would have been different. Granted there may be instances where counsel fails to make minor objections that have merit but otherwise do not wholly violate defendant's rights. It can be considered that those are instances where ineffectiveness lacks sufficient prejudice, but then again, the claim revolves on

itself. Strickland, 694 U.S. at 697. If there is insufficient prejudice then there can also not be ineffectiveness to such a degree, because the action or inaction of counsel would have not impacted the case in any material way so counsel's performance should not come to question and can not be thereby labeled as ineffective. Reflecting back to the instant case, the state court of appeals decided that impermissible comments by the investigator improperly invaded the province of the jury as to fact-finding and credibility issues. Yet the determination that prejudice could not be established because video of the altercation being admissible was erroneous. Though video surveillance of the Petitioner and Halley was available and viewed by the jury it was not wholly incriminating and merely detailed the sequence of events that transpired. As a matter of fact, the Petitioner took the stand to testify as to his self-defense claim and what transpired. Nonetheless, when the jury heard testimony stating that the Petitioner was not credible, that this was not self-defense, the Petitioner's case was substantially weakened and his credibility questioned. This was not done only by a lay witness, but a police investigator that like it or not the jury gives greater weight to; thus giving it a presumption of prejudice without more. It is well established that officers by virtue of their positions are given a higher degree of credibility by the jury when testifying in a criminal case. Singlehandedly the officer discredited the defense theory of self-defense and continually commented on the culpability of the criminal defendant.

Moreover, it is arguable that the decision of the state court of appeals is wrong in and of itself in that the erroneous portions of testimony by the

investigator, even with the surveillance video, prejudiced the Petitioner enough that the reliability of the trial could come into question. As this issue was compounded by prosecutor's closing arguments that highlighted the officer's statements, and providing a narrating account as to the video when the jury would have been able to review it for themselves. The testimony of a live witness is inherently prejudicial when the video is not an event in dispute but rather the circumstances surrounding it, such where outside testimony would be damaging.

III. The Question Presented Is Important

Even prior to the Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), it was acknowledged that the constitutionally afforded right to every criminal defendant to be represented on his behalf by a competent attorney, either retained or appointed, in any ensuing criminal proceeding was a constitutionally afforded right. It was so that when the decision that came forth through Strickland that it in turn narrowed down the test as to how to determine whether counsel was ineffective and as a result streamlined the entire process. As a matter of fact, both Congress and this Court have stressed and recognized the importance of the Sixth Amendment. The question here is one of importance in that it affects a multitude of often similarly situated criminal defendants, and seeks to develop itself within the evolving arena of law. Consequently, the decision by the state court of appeals in this matter was wrong and should warrant review.

This issue is one of a constitutional nature premised upon the assistance of counsel afforded to all criminal defendants in and through the Sixth Amendment of

the United States Constitution. The law on this matter is such as to warrant further consideration. Similar to how certiorari was granted in Pointer v. Texas, 380 U.S. 400, 401 (1965) to consider the novel and important question whether the Confrontation Clause of the Sixth Amendment is applicable to the states; in United States v. Gouveia, 467 U.S. 180 (1984) with certiorari granted to review "the Court of Appeals' novel application of our Sixth Amendment precedents" respecting the right to counsel in the context of prison inmates held in administrative detention during an investigation of the murder of a fellow inmate; review in the instant case is warranted. This Court has recently touched upon, but not answered, this question in Weaver v. Massachussets, 582 U.S. __, 137 S.Ct. __, 198 L.Ed.2d 420 (2017) and is such that it has a level of importance to be considered. Furthermore not only is the decision by the court below incorrect but it is one which involves multiple criminal defendants. Likewise there is an importance of the issue "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). The combination of these factors present should lead this Court to believe that this case is sufficiently important to warrant further review.

This standard here does not seek to extend to appellate cases where the prejudice requirement seeks to show that the appeal would have been successful. Nor is the proposed standard one that would vitiate the prejudice requirement entirely. The Petitioner proposes a modification to the standard where the court makes a determination first as to counsel's ineffectiveness, followed by a

determination as to whether said ineffectiveness was abundant enough to eliminate the fundamental fairness the Sixth Amendment guarantees in a criminal proceeding.

In sum, the authority for Strickland is one whose ultimate focus of fairness and in keeping with the Sixth Amendment standard announced in our constitution should place undue emphasis on which is a matter of great importance not only to the Court but to criminal defendants everywhere. This case presents an opportunity for the Court to address this issue and to bring clarification and guidance to this area. Therefore, the Court should grant the petition.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

O. Thompson

Orando Ricardo Thompson, *pro se*
DC No.: Q33044
Holmes Correctional Institution
3142 Thomas Drive
Bonifay, Fl. 32425

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