IN THE SUPREME COURT OF THE UNITED STATES

ROOSEVELT JOHNSON,
Petitioner,

v.

Case No. _____

STATE OF FLORIDA,
Respondent.
_____/

JOINT APPENDIX TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the First District Court of Appeal of Florida.

Petitioner:

Roosevelt Johnson
DC# 390758
Okaloosa Correctional Institution
3189 Colonel Greg Malloy Road
Crestview, Florida 32539-6708

Respondent:

Attorney General, State of florida,
The Capitol Pl-01,
Tallahassee, Florida, 32399

Petition for Writ of Certiorari was filed on June 19, 2020.

INDEX OF APPENDICIES

Appendix-A

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2148

ROOSEVELT JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Alachua County.
Mark W. Moseley, Judge.

March 27, 2020

PER CURIAM.

AFFIRMED.

WOLF, B.L. THOMAS, and ROBERTS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Appendix-B

M A N D A T E

from

FIRST DISTRICT COURT OF APPEAL

STATE OF FLORIDA

This case having been brought to the Court, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with the opinion of this Court, and with the rules of procedure, and laws of the State of Florida.

WITNESS the Honorable Stephanie W. Ray, Chief Judge, of the District Court of Appeal of Florida, First District, and the seal of said Court at Tallahassee, Florida, on this day.

April 17, 2020

Roosevelt Johnson v.
State of Florida

DCA Case No.: 1D19-2148
Lower Tribunal Case No.: 01-1988-CF-3205-A

KRISTINA SAMUELS, CLERK
District Court of Appeal of Florida, First District

th
Mandate and opinion to: Hon. J. K. "Jess" Irby, Clerk
cc: (without attached opinion)
Hon. Ashley Moody, AG

Richard L. Rosenbaum

Appendix-C

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO.: 01-1988-CF-003205-A

DIVISION: II

vs.

ROOSEVELT JOHNSON,

Defendant.

ORDER DENYING SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court upon Defendant's "Successive Motion for Postconviction Relief Based Upon Manifest Injustice, or In the Alternative, Successive Petition for Writ of Habeas Corpus Based Upon Manifest Injustice; Request for an Evidentiary Hearing, and Incorporated Memorandum of Law," filed May 3, 2019, pursuant to Fla. R. Crim. P. 3.850; "Appendix 1," filed May 6, 2019; and, "Motion for Leave of Court to Enlarge Post Conviction Motion Page Limitation," filed May 3, 2019. Upon consideration of the motions, the memorandum of law, the appendix, and the record, this Court finds and concludes as follows:

Defendant's motion is procedurally barred as untimely under Fla. R. Crim. P. 3.850(b). A rule 3.850 motion is untimely if filed beyond the two-year limit prescribed by the rule. *See Wilkinson v. State*, 504 So.2d 29, 29 (Fla. 2d DCA 1987). The motion must be filed within two years after the movant's judgment and sentence become final. *See* Fla. R. Crim. P. 3.850(b). A movant's judgment and sentence become final "when any such direct review proceedings have concluded and jurisdiction to entertain a motion for post-conviction relief returns to the sentencing court." *Ward v. Dugger*, 508 So.2d 778, 779 (Fla. 1st DCA 1987). Defendant's judgment and sentence became final

on January 29, 1991, when the First District Court of Appeal issued its mandate on direct appeal. *Johnson v. State*, 571 So. 2d 58 (Fla. 1st DCA 1990). Because the instant motion was filed more than two (2) years after Defendant's judgment and sentence became final, it is procedurally barred as untimely. In addition, the motion fails to allege any ground which would meet an exception to the time-limitation. *See McClellion v. State*, 186 So. 3d 1129, 1132 (Fla. 4th DCA 2016) ("Incanting the words 'manifest injustice' does not excuse the procedural bars.") (citing *Cuffy v. State*, 190 So. 3d 86, 87 (Fla. 4th DCA 2015) ("[R]ule 3.850 contains no 'manifest injustice' exception to the rule's time limitation or bar against filing successive postconviction motions.")); *see also Green v. State*, 975 So. 2d 1090, 1115 (Fla. 2008) ("Habeas corpus is not to be used for additional appeals of issues that could have been or were raised on appeal or in other postconviction motions.").

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

I. Defendant's motion for leave of court to enlarge page limitation is **GRANTED**.

II. Defendant's motion is hereby **DENIED**. Defendant may appeal this decision to the First District Court of Appeal within thirty (30) days of this Order's effective date.

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida, on this 13th day of May 2019.

MARK W. MOSELEY
CIRCUIT JUDGE

Appendix-D

ROOSEVELT JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee
Court of Appeal of Florida, First District
571 So. 2d 58; 1990 Fla. App. LEXIS 9195; 15 Fla. L. Weekly D 2953
Case No. 89-1357
December 5, 1990, Filed

Editorial Information: Prior History

Appeal from the Circuit Court for Alachua County, Robert P. Cates, Judge.

Disposition:

Affirmed.

Counsel Reemberto Diaz, of Diaz & Batista, Hialeah, for appellant.

Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, for appellee.

Judges: Wentworth, J. Miner and Wolf, JJ., concur.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant sought review of a judgment of conviction and sentence for robbery, kidnapping and sexual battery in the Circuit Court for Alachua County (Florida). He contended that the trial court erred in admitting an out-of-court identification of him by the victim because it was the product of an unnecessarily suggestive photographic lineup.Where victim had opportunity to view her assailant face-to-face at the time of the crime and made an affirmative in-court identification of appellant, there was no substantial likelihood of irreparable misidentification.

OVERVIEW: Appellant challenged his conviction and sentence for robbery, kidnapping and sexual battery, for which he received a term of life imprisonment. He argued that the trial court erred in admitting an out-of-court identification of him by the victim because it was the product of an unnecessarily suggestive photographic lineup procedure. The lineup consisted of the photographs of six black males in addition to appellant, but was not restricted to black men who, like appellant, were known to have been former guests at the hotel where the victim worked. The single asserted visual contact between appellant and the victim occurred when the victim registered appellant as a hotel guest. The officer who compiled the lineup also testified that when compiling the lineup, she had no knowledge of whether any of the six individuals other than appellant had been guests at the hotel. Under these circumstances, the court affirmed the convictions. The court explained that where the victim had an opportunity to view her assailant face-to-face at the time of the crime and made a positive in-court identification of appellant, there was no substantial likelihood of irreparable misidentification.

OUTCOME: The court affirmed appellant's judgment of conviction. The court held that there was no substantial likelihood of irreparable misidentification of him by the victim where the victim had an opportunity to view her assailant face-to-face at the time of the crime and made a positive in-court identification of appellant.

LexisNexis Headnotes

Opinion

Opinion by: WENTWORTH

Opinion

{571 So. 2d 58} Appellant seeks review of a judgment of conviction and sentence for robbery, **{571 So. 2d 59}** kidnapping and sexual battery, for which he received a term of life imprisonment. Appellant argues that the trial court erred in admitting an out-of-court identification of appellant by the victim because it was the product of an unnecessarily suggestive photographic lineup procedure. Appellant finds no infirmity with the procedure except that the lineup, which consisted of the photographs of six black males in addition to appellant, was not restricted to black men who, like appellant, were known to have been former guests at the hotel where the victim worked. The single asserted visual contact between the victim and appellant prior to the crime occurred when the victim registered appellant as a guest at the hotel on one occasion a month before the crime. The officer who compiled the photographic lineup testified that, although she became aware at the time she was compiling the lineup that appellant had stayed at the hotel on one occasion prior to the crime and had been registered by the victim, she had no knowledge of whether any of the six individuals other than appellant had ever been a guest at the hotel or in contact with the victim prior to the crime. We find that the lineup was not impermissibly suggestive in that context.

Further, under the circumstances of this case, where the victim had an opportunity to view her assailant face-to-face at the time of the crime, and made a "very certain" in-court identification of appellant, we find no substantial likelihood of irreparable misidentification. *See Grant v. State*, 390 So.2d 341 (Fla. 1980). We also note that appellate failed to either move to suppress or object at trial to this evidence, and finding no fundamental error in the introduction of this out-of-court identification, we affirm.

Affirmed.

Appendix-E

ROOSEVELT JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee.
COURT OF APPEAL OF FLORIDA, FIRST DISTRICT
780 So. 2d 65; 2001 Fla. App. LEXIS 586
CASE NO. 1D99-2434
January 12, 2001, Opinion Filed

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

An appeal from the circuit Court for Alachua County. Stan R. Morris, Judge.

Counsel Marcia J. Silvers, Esq., of Dunlap & Silvers, P.A., Miami, for Appellant. Robert A. Butterworth, Attorney General; Sherri T. Rollison, Assistant Attorney General; James W. Rogers, Chief - Criminal Appeals, Office of the Attorney General, Tallahassee, for Appellee.

Judges: ALLEN, BENTON, and BROWNING, JJ., CONCUR.

Opinion

PER CURIAM.

AFFIRMED.

ALLEN, BENTON, and BROWNING, JJ., CONCUR.

Appendix-F

Filing # 88929671 E-Filed 05/03/2019 09:03:39 AM

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT IN AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

ROOSEVELT JOHNSON,
Defendant.

_____/

CASE NO: 88-3205CFA
DIVISION: F2 (COLAW)

SUCCESSIVE MOTION FOR POST CONVICTION RELIEF BASED UPON MANIFEST INJUSTICE, OR IN THE ALTERNATIVE, SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS BASED UPON MANIFEST INJUSTICE; REQUEST FOR AN EVIDENTIARY HEARING, AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Defendant, Roosevelt Johnson ("Johnson" or "Defendant"), by and through his undersigned counsel, and files this Successive Motion For Post-Conviction Relief Based Upon Manifest Injustice, Or In the Alternative, Successive Petition For Writ Of Habeas Corpus Based Upon Manifest Injustice; Request For An Evidentiary Hearing, And Incorporated Memorandum Of Law, file pursuant to Rule 3.850 and Rule 3.800, Florida Rules of Criminal Procedure, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 2, 9, 13, and 16 of the Florida Constitution, Manifest Injustice caselaw, and Habeas Corpus caselaw, requesting this Honorable Court enter an Order: (1) granting an evidentiary hearing on the Petition/Motion; and thereafter, (2) Vacating Defendant's Judgment and Sentence. and (3) requests leave: to a) supplement and/or amend his claims with new and/or additional evidence; see *Spera v. State*, 971 So.2d 754 (Fla. 2007); *Rogers v. State*, 782 So.2d 373 (Fla. 2001); *Brown v. State*, 596 So.2d 1026, 1027 (Fla. 1992); b) allowing the defendant to add

claims; see *Shaw v. State*, 654 So.2d 608 (Fla. 4th DCA 1995) (trial court must address new claims filed in amended rule 3.850 motion that were filed prior to expiration of two-year time limit and prior to trial court ruling on original motion); see also *Lanier v. State*, 826 So.2d 460 (Fla. 1st DCA 2002); *McConn v. State*, 708 So.2d 308 (Fla. 2nd DCA 1998); and c) provide a further memorandum of law in support of his claims for relief should one be deemed necessary, and as grounds and in support thereof states as follows:

MANIFEST INJUSTICE REVERSAL

This Court has inherent jurisdiction and authority to grant the relief requested by Defendant even on a successive [Rule 3.850] petition or claim, where failing to do so would result in manifest injustice. *Figueroa v. State*, 84 So.3d 1158, 1162 (Fla. 2d DCA 2012); *Stephens*, 974 So.2d at 457. *Johnson v. State,* 226 So. 3d 908, 910 (Fla. 4th DCA 2017).

"The term "manifest injustice," has been acknowledged as an exception to the procedural bars to post-conviction claims in only the rarest and most exceptional of situations." *Cuffy v. State*, 190 So. 3d 86, 87 (Fla. 4th DCA 2015).

The Claims raised below have never been ruled upon by the trial court on the merits and demand the relief requested based upon habeas corpus sounding in manifest injustice, ineffective assistance sounding in manifest injustice, and Florida caselaw as applied to the specific facts of Defendant's case that has evolved over the years since Defendant's Judgment and Sentence; relating back to that earlier time.

In *Benjamin v. State*, 20 So. 3d 945 (Fla. 3rd DCA 2000) the court held that due to the severity of the sentence, the trial court had jurisdiction to hear defendant's successive motion for

post-conviction relief, based upon manifest injustice grounds recognized as an exception to procedural bars that would normally be applied to the court's jurisdiction, including the doctrine of collateral estoppel:

> "In this case, the trial court denied relief on the theory that Benjamin had previously made this same claim and the claim was denied. However, because of the severity of the sentence, this case fits squarely within the 'manifest injustice' exception set forth in *State v. McBride*, 848 So.2d 287 (Fla.2003); see also *State v. Sigler*, 967 So.2d 835, 840 (Fla.2007) (stating that an illegal conviction falls within the concept of manifest injustice); *Cribbs v. State*, ___So.3d ___, 2009 WL 2634075 (Fla. 2d DCA 2009) (holding that, although defendant's VCC sentence claim was previously denied and affirmed on appeal and would typically be collaterally estopped, the court is compelled to correct a manifest injustice)." *Id.* at 946. [Italics added] **(e.g. severity of sentence exception to collateral estoppel bar)**

Similarly, defendants are permitted to file, and the court has jurisdiction to hear, successive Rule 3.800 post-conviction motions claiming illegality of sentence imposed, provided that defendant is not entitled to relitigate "a specific issue that has already been decided on the merits". *Garcia v. State*, 69 So. 3d 1003, 1004 (Fla. 3rd DCA 2011)(underline added). This would include new issues based upon developing caselaw that did not exist at the time of prior post-conviction motions filed on the same subject, but not the same specific issue, because petitions to correct illegal sentences may be filed "at any time". See *Garcia*.

This Court has jurisdiction to hear a defendant's illegal sentence post-conviction motion either as a Rule 3.800 Fla. R. Crim. P. petition, a Rule 3.850 Fla. R. Crim. P. petition, or as a habeas corpus petition. *See Brinson v. State*, 995 So. 2d 1047, 1048 (Fla. 2nd DCA 2008)("See *Zatyka v. State*, 872 So.2d 285, 286 (Fla. 2nd DCA 2004) (holding that a petition for writ of habeas corpus that raises a claim of illegal sentence should be treated as a motion filed pursuant

to rule 3.800(a)); *Walker v. State*, 965 So.2d 1281 (Fla. 2d DCA 2007) (reversing the denial of a rule 3.800(a) motion in which the petitioner challenged his prison releasee reoffender (PRR) designation on his conviction for BOLEO).") *Brinson* at 1048.

Similarly, this Court has jurisdictional authority to treat a habeas corpus petition as a petition filed pursuant to rule 3.850, in order to keep jurisdiction and to adjudicate the petition on the merits. This Court has jurisdiction to adjudicate Defendant's *habeas corpus* petition, regardless of where Defendant is currently housed, because Defendant's case was tried in Alachua County, Florida.

> "..when a petitioner improperly seeks relief under section 79.01, [merely because the defendant is housed in another county], the post-conviction court may convert the petition to a rule 3.850 motion, absent a procedural bar. See *Watts*, 985 So.2d at 22; *Curtis v. State*, 870 So.2d 186, 186 (Fla. 2d DCA 2004). Mr. Clough filed his petition pursuant to section 79.01. The post-conviction court properly treated it as a rule 3.850 motion because Mr. Clough was incarcerated in Gulf County and the claims raised in the petition collaterally attack his conviction and sentence. See *Valdez–Garcia*, 965 So.2d at 322." *Clough v. State*, 136 So. 3d 680, 682 (Fla. 2nd DCA 2014), citing *Valdez–Garcia v. State*, 965 So.2d 318, 321–22 (Fla. 2nd DCA 2007); *Watts v. State*, 985 So.2d 21, 22 (Fla. 2nd DCA 2008); and *Curtis v. State*, 870 So.2d 186, 186 (Fla. 2nd DCA 2004).

Clough is cited as authority for the proposition that it is no longer imperative for this Court to first determine whether a Claim fits squarely within a Rule 3.800, Rule 3.850 or *habeas corpus* petition slot. This Court has jurisdictional authority to adjudicate all of those categories of claims on the merits, regardless of their label. This Court also maintains jurisdiction to adjudicate all of Defendant's *manifest injustice* claims not previously adjudicated on the merits, regardless of whether this Court deems an individual claim or claims to be successive claims or not; especially based upon the severity of sentence imposed recognized exception to collateral

estoppel, which is codified in Rule 3.850(h)(2) Fla. R. Crim. P. (2019). *Benjamin*, supra.

Defendant contends that where the trial court commits fundamental error, or reversible error, highlighted by defense counsel's failure to move for judgment of acquittal, object, preserve a respective issue for direct appeal, or otherwise make a record, directly prejudicing Defendant, that *manifest injustice* has occurred. This court has jurisdiction to adjudicate Defendant's claims now on the merits, as opposed to denying the filing as successive, in order to correct errors constituting a *manifest injustice*. Defendant contends that claims not resolved on the merits are not successive, and are not time barred, pursuant to *manifest injustice* caselaw.

JUDICIAL NOTICE OF COURT FILES REQUESTED

Defendant requests that this Court take judicial notice of the Clerk's files in the above-styled case, including, but not limited to, the administrative sections of those files pursuant to Sections 90.201-203, Fla.Stat.

RULE 3.850 (2018) PROCEDURAL REQUIREMENTS

Grounds and Time Limitations

Defendant states that his Judgment and Sentence to Life in Florida State Prison, is contrary to the constitution and laws of the United States and State of Florida, and is otherwise subject to collateral attack. Although Defendant has been in custody for over 31 years now, only one *alibi defense claim* has been adjudicated by this Court on the merits. [Attachment 18]

The facts upon which Defendant's Claims below are predicated, in combination with related fundamental constitutional rights asserted, fundamental error of the trial court, other claimed ineffective assistance of defense counsel in plea negotiations, trial preparation, trial,

post-trial, and sentencing, and/or fundamental and/or reversible errors not objected to by trial counsel, were not reasonably ascertainable with the exercise of due diligence by Defendant either before, during, or after trial. Defendant has never previously had the benefit of meaningful post-conviction counsel. Defendant's main 1991-1998 post-conviction motions were pro se and were summarily Denied by this Court in short order fashion, infra, statement of the case.

It is wholly irrelevant whether Defendant's Claims below are made in a 3.800 Motion, a 3.850 Motion, or a Habeas Corpus Petition, and/or whether they are successive or not. The current Circuit Courts in Florida strive to answer the question whether new claims made are meritorious, and whether those meritorious claims demand relief on *manifest injustice* grounds to correct ANY *manifest injustice* of the past. The idea is justice. Many Florida Courts still depict a sign in the courtroom that reads: "We who labor here seek only the truth".

Statement of The Case

Defendant's Trial

Roosevelt Johnson was born on October 24, 1961. Johnson was charged by Amended Information with: Count 1: Robbery Firearm; Count 2: Kidnapping Firearm; and Counts 3-5: Sexual Battery Firearm. [Attachment 2[1], pps. 6-7] Johnson pled not guilty to all the charges. Johnson was convicted on all four counts on January 27, 1989 [Attachment 7, pps. 104-106] and was sentenced to life imprisonment x5. [Attachment 9, pps. 108-115] The case was presided over by the Honorable Robert P. Cates, Circuit Court Judge, Eighth Judicial Circuit of Florida. The State was represented by ASA Carlin. Johnson was represented by Craig DeThomasis, Esquire.

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[1] References are made to PDF paginated pages in Appendix 1 hereto. Individual page numbers shall designate the ROA page number and/or trial transcript page number, from which the Appendix 1 attachments were excerpted. See detailed description of Appendix 1 Attachments in the Statement Of Facts section, *infra*.

Defendant's Direct Appeal

Defendant appealed his trial convictions on the sole issue that the photo lineup was impermissibly suggestive and not supportive of the victims later "very certain" in court identification of Defendant at trial. The First DCA found no substantial likelihood of misidentification, because the victim saw her assailant face-to-face at the time of the crime, and Affirmed. *Johnson v. State*, 571 So. 2d 58 (Fla. 1st DCA 1991).

Defendant's 1991-1998 Continuing Post-Conviction Motion

On November 1, 1991, Johnson filed a Pro Se Motion for Post-Conviction Relief, pursuant to Rule 3.850 Fla. R. Crim. P. (R. 179-85) listing two grounds: 1.) Failure of trial counsel to move to suppress, or object to at trial, the *impermissibly suggestive photo lineup* entered into evidence; and 2.) Failure of trial counsel to call alibi witnesses Keith Mobley and Defendant's girlfriend "Emabelle" who would have testified that Defendant was at a different hotel at the time of these crimes. [DE 91][Attachment 13, pps. 124-130]

On November 7, 1991, the trial court Denied, Defendant's *impermissibly suggestive* photo lineup claim[2], but issued a Rule to Show Cause to the State regarding Defendant's claim 2 alibi defense claim. (R. 186-87[3]). [DE 92-95] Defendant appealed the partial denial on December 10, 1991 [DE 96-97], that was Denied by the First DCA on February 6, 1992. [DE 104-105] The State responded to the show cause order on January 31, 1992. [DE 103]

After a short succession of attorneys refusing Defendant's case, the court ultimately

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[2] The Court noted that the First DCA had just decided the photo lineup issue on his direct appeal.

[3] Certain introductory factual references are made directly to Defendant's 3.850 Record On Appeal ("ROA") filed with the Clerk Of Courts, without separate Appendix 1 references or attachment hereto.

appointed Tom Copeland, Esquire, as a Special Public Defender on February 8, 1993. [DE 124-125] (R. 198-200). Next, there was a five-year lapse with no substantive court hearings. On December 29, 1997, Defendant's post-conviction counsel filed a "Motion for Entry of Order Requiring the Preservation of Evidence" [DE 161-162]; that was subsequently Denied on May 12, 1998. [DE 166-167] On July 27, 1998 an evidentiary hearing was set for August 28, 1998.

After the hearing date was scheduled, Defendant filed one supplement and one more 3.850 motion directly with the Clerk, adding new claims for relief, that were not officially signed[4] by post-conviction counsel Tom Copeland and do not bear his signature, infra. It does not appear that any motion to amend Defendant's initial November 4, 1991 3.850 Motion was filed with the Court.

On August 5, 1998, Johnson filed a *Pro Se* Supplement[5] To Motion for Post-Conviction Relief. [DE 172] (R. 226-227) [Attachment 13, pps. 131-132] This *Supplement* listed additional ineffective assistance of counsel claims: 1.) Failure of defense counsel to advise Defendant of his right to: i.) testify at trial in his own defense, ii.) to participate decision making regarding evidence to present to the jury, or iii.) to participate in formulation of a defense strategy; 2.) Failure of defense counsel to present defense witnesses regarding: i.) the source of the coins, ii.) the source of the trash can, iii.) a witness who saw a different suspect in the area, iv.) a witness saw a female clerk in the office at the time of the offense, v.) regarding victim's examination

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4 Although not officially signed by post conviction counsel, counsel prepared these claims with witness testimony and other evidence for evidentiary hearing scheduled for August 28, 1998, infra. [Attachments 14, 16-17]

5 Instead of listing these new claims as additional new claims, Defendant listed these claims as "supplements" to paragraph 14 of Defendant initial 1991 Pro Se 3.850 filing. This filing is time stamped August 5, 1998, but appears in the Clerk's docket as filed on July 31, 1998.

where no serological or hair evidence of sexual battery was found, vi.) whether a trash can was missing from Econo Lodge Room 213, vii.) whether Red Carpet Inn used the same type of trash can as Econo Lodge, viii.) that defendant was not "well spoken" as described by the victim, and ix.) that defendant had [6] gold teeth and tattoos on the date of the offense; 3.) Failure of defense counsel to request a forensic examination of the clothing of both the victim and Defendant, which were both in police evidence; 4.) Failure of defense counsel to take depositions from and present testimony regarding: i.) the officer whose notes included victim's description of the assailant, conflicting with the written police report, ii.) the officer who talked with a witness who saw another potential suspect in the area at the time of the offense, and iii.) the officer who talked with a witness who saw a female clerk in the office at the time of the offenses. *Id.* at pps. 131-132.

Then again, four days prior to the scheduled hearing on August 28, 1998, on August 24, 1998, Johnson filed a Pro Se "Motion for Post-Conviction Relief-*Brady* Violation". [DE 174] (R. 228-234) [Attachment 13, pps. 133-138]. The *Brady* violation claimed related to the failure of the prosecution to disclose evidence favorable to Defendant, including, Detective Fern Nix's notes that the victim could not identify the assailant's clothing; portions of Nix's notes related thereto given to the defense were incomplete, as favorable to Defendant.

On August 28, 1998, post conviction counsel Tom Copeland, provided the Court with "Defendant's Offer Of Proof Pursuant To Florida Statute § 90.104(1)(b) In Support Of Defendant's Motion For Post-Conviction Relief"[6]. [Attachment 16, pps. 143-148] This filing

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[6] There is no record in the Clerk's docket that this document was ever filed by Tom Copeland with the Clerk Of Courts in this case, however, the document was appended to this Court's Order [Attachment 18]; appended to that Denial. In other words, it was filed by the Court as an attachment, not by Copeland.

listed probable testimony of thirteen (13) witnesses to be called by post conviction counsel at Defendant's August 28, 1998 scheduled hearing in support of Defendant's 1991 original 3.850 Motion alibi witness claim, as well as all of Defendant's supplemental claims made in August, 1998, prior to the scheduled hearing. The hearing was conducted on August 28, 1998, however, Defendant was only permitted to present evidence in support of the *alibi defense* claim; the single issue that the Court issued a Rule To Show Cause ordering the State to respond withing 45 days of November 7, 1991. (R. 514-597) [Attachment 18]

On September 14, 1998, post conviction counsel Tom Copeland, filed "Defendant's Memorandum Of Law In Support Of Defendant's Right To Supplement Defendant's Motion For Post Conviction Relief" [Attachment 17 149-153], regarding the Court's decision on August 28, 1998 to not permit Defendant's supplemental filings post November 4, 1991, or any of the witness testimony or other evidence prepared by post conviction counsel Tom Copeland specifically for the August 28, 1998 hearing scheduled. [DE 177-178] (R. 254-258)

> "At the hearing held on Defendant's Motion for Post Conviction Relief held on August 28, 1998, this Court refused to consider the Supplement, or allow the introduction of evidence concerning it. The Court did accept Defendant's written Offer Of Proof and agreed to consider a memorandum in support of Defendant's right to supplement his original Motion for Post Conviction Relief." *Id.*

On April 21, 1999, the Honorable Stan R. Morris, entered an order Denying Johnson's Motion for Post-Conviction Relief, denying the initial *alibi defense* claim on the merits, and finding the supplement and second motion untimely filed. (R. 263-278) [Attachment 18, pps. 154-170]. On May 12, 1999, Johnson filed a Motion for Rehearing (R. 353-355), that was denied on May 26, 1999. (R. 358). Much of this Order, in so many words, explained the Court's rationale in explaining all of the specific reasons why post conviction counsel Tom Copeland

was an inept[7] post conviction counsel. *Id.* Although Copeland did not endorse these filings *per se* as they do not bear his signature, Copeland was prepared to litigate all of Defendant's claims and supplemental claims at the August 28, 1998 evidentiary hearing.

Johnson appealed to the First District Court of Appeals. [DE 200] (R. 360). On January 12, 2001, the 1st DCA Per Curiam Affirmed the trial court's Denial of Motion(s) for Post-Conviction Relief. *Johnson v. State*, 780 So.2d 65 (Fla. 1st DCA Jan. 12, 2001). Mandate filed February 1, 2001. [DE 227]

Motion Correct Illegal Sentence and Motion For Post Conviction DNA Testing

On August 16, 2001 Defendant filed a Pro Se Motion To Correct Illegal Sentence. [DE 231] that was Denied [DE 234], appealed [DE 239] and Affirmed with Mandate issued on July 11, 2002. [DE 243-244]

On September 30, 2003 Defendant filed a "Motion For Post Conviction DNA Testing" [DE 246] On February 26, 2004 the Court issued an Order requiring the State to respond. [DE 250] On September 29, 2004 a hearing was conducted where the Court found that *the evidence could not be produced* for DNA testing. [DE 273-274] On January 24, 2005 the Court Denied Defendant's Motion For Post Conviction DNA Testing, and found that the sexual assault kit used

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[7] Although Florida does not per se legally recognize an ineffective assistance of post conviction counsel claim, pursuant to the Florida Rules Of Criminal Procedure, it should under *manifest injustice* grounds, especially in consideration of the cumulative effect of ALL ERRORS that is considered in *manifest injustice* caselaw. If there ever was a case of ineffective assistance of post conviction counsel, based on Judge Morris' scathing rebuke of Tom Copeland, this is it. Copeland waited five years after being appointed to schedule the hearing, had Defendant file Pro Se Supplements not ratified by Copeland, and then Copeland all along prepared to prosecute all of Defendant's additional Pro Se Claims without ever filing a Motion with the Court to Amend Defendant's original November 4, 1991 3.850 filing. See infra, Defendant's April, 2008 Petition For Writ Of Habeas Corpus For Leave To File A Belated Post-Conviction Motion, filed by attorney Marcia J. Silvers, Esquire.

on victim D.P. was either lost or destroyed on or after January 18, 1989[8]. [DE 285] [Attachment 19, pps. 171-173]

Defendant's 2005-2006 *Pro Se* Post Conviction Motions

On September 28, 2005, Johnson filed a successive Pro Se Rule 3.850 Fla. R. Crim. P. Motion, claiming that his judgment and sentence was unlawful, because the State had either lost or destroyed, *in bad faith*[9], the sexual assault kit and DNA evidence pertaining to rape victim D.P. [DE 290-292] The Pro Se Motion was Denied on February 28, 2006 (as filed March 2, 2006). [Attachment 19, pps. 171-173] [DE 293-294] An appeal was filed [DE 297-298] that was Affirmed with Mandate issued on August 18, 2006. [DE 309-310]

On July 19, 2006, Johnson filed a successive Pro Se Rule 3.850 Fla. R. Crim. P. Motion for Post-Conviction Relief based on *newly discovered evidence*. Johnson claimed newly discovered evidence by virtue of the mishandling, loss, or destruction of the sexual assault kit of victim D.P. by the State. [DE 305] that was Denied on November 2, 2006. [DE 314] Defendant appealed on November 30, 2006 [DE 319] that was Affirmed with Mandate issued on June 6, 2007. [DE 323]

Thereafter, on February 17, 2011, Johnson filed a Motion for Post-Conviction Relief, pursuant to Rule 3.800 Fla.R.Crim.P. Johnson's Motion was Denied on February 21, 2011. On

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8 The sexual assault kit of victim D.P. was lost or destroyed on or after January 18, 1989; and Defendant's trial period was January 26-27, 1989. As such the kit may have been lost or destroyed prior to Defendant's trial, contrary to what this Court's February 28, 2006 Order states. ("In addition. the kit was lost or destroyed after Defendant's conviction, thus reducing the inference that it was done in bad faith." *Id.*) The issue of *Bad faith* is irrelevant to the *Brady* violation now claimed below, see Claim 2, infra.

9 Defendant Pro Se never addressed the *Brady* violation aspect regarding the loss or destruction of the victim's sexual assault kit prior to Defendant's trial that is addressed in Claim 2, infra, for the first time in the instant Petition/Motion.

March 9, 2011 Defendant appealed the court's Denial that was Affirmed with Mandate issued on July 14, 2011. On June 27, 2011 Defendant filed a Motion For Public Records that was Denied on Jully5, 2011.

On October 14, 2013, Johnson filed a Pro Se Motion To Correct Illegal Sentence that was Denied on October 18, 2013. On October 28, 2013, Johnson filed a Motion For Enlargement Of Time that was Denied on October 31, 2013. On November 4, 2013 a Motion For Rehearing was filed that was Denied on November 6, 2013.

On February 18, 2014 Johnson filed a Pro Se Motion For Post Conviction Relief, Denied on February 20, 2014, Appealed on March 21 2014, and Affirmed with Mandate issued on September 16, 2014.

There have been no other substantive defense filings in the above styled case since 2014.

Ancillary Case Number - Extraordinary Writ Alachua County

On April 29, 2008, Defendant filed a Petition For Writ Of Habeas corpus For Leave To File A Belated Post Conviction Motion, through counsel Marcia J. Silvers in the above styled case, that was assigned Case No.: 01 2008-CA-001969 by the Clerk Of Courts. [Attachment 20, pps. 174-196] The basis of that Writ was the failure of two prior post conviction counsels, prior to Tom Copeland's appointment, to timely file supplements requested by Defendant. The Court conducted an evidentiary hearing on December 19, 2008 and ultimately Denied the Writ on December 22, 2008, finding that Defendant's claims were unsupported by trial testimony received from post conviction counsels, appointed prior to Copeland. [Attachment 21, pps. 197-200] Defendant appealed on January 9, 2009 through counsel, that was Affirmed on May

25, 2010 with Mandate issued on June 7, 2010.

Certification Statement

Defendant speaks and reads the English language and Certifies [at the end of the instant Motion/Petition that Defendant has personally read, the Motion/Petition and understood it's content, that the Motion/Petition is filed in good faith, with reasonable belief that it is timely filed, as excepted by the rules of criminal procedure and *manifest injustice* Florida caselaw, has merit, does not duplicate previous motions/Petitions that have been adjudicated by this Court on the merits, and that the facts contained in the Motion/Petition are true and correct.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction to review Roosevelt Johnson's post-conviction claims based upon Rule 3.850 Fla. R. Crim. P., and/or based upon *habeas corpus* grounds. Additionally, Defendant raises 5th, 6th, and 14th Amendment claims. Specifically, Defendant lodges 6th Amendment ineffective assistance of counsel claims, and 5th Amendment due process claims, each applicable to the State of Florida pursuant to the 14th Amendment to the United States Constitution. This Court has jurisdiction on *manifest injustice* grounds as filed either under a Rule 3.850 motion [or successive 3.850 motion], or as a 3.800 motion [or successive 3.800 motion], or as filed as a *habeas corpus* petition [or successive *habeas corpus* petition]. The claims made below are not duplicitous of any other claims made by Defendant in the past. No court has addressed in good faith the Claims made below on the merits.

Defendant's conviction, judgment and sentence in this case, under the specific facts presented and in conjunction with related ancillary fundamental errors in trial, demand that

Defendant's Judgment and Sentence be Vacated now and remanded for a new trial.

Due Process

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. V. The Fourteenth Amendment declares that no state shall deprive any person of life, liberty, or property without due process of law. U.S. Const. Amend. XIV, § 1. The Florida Constitution also provides that no person shall be deprived of life, liberty, or property without due process of law. Art. I, § 9, Fla. Const. Thus, the right to due process is conferred not by legislative grace, but by constitutional guarantee. *Beary v. Johnson*, 872 So.2d 943 (Fla. 5th DCA 2004).

Ineffective Assistance of Counsel

The United States Constitution protects the right of an accused to have the effective assistance of counsel. U.S. Const. Am. VI; Const. 1963, Art. 1, § 20. Individuals accused under Florida law have a corresponding Florida Constitutional rights to effective counsel at all stages of the proceedings. Fla. Const. Art. 1 § 16. The right to have the assistance of a lawyer is a fundamental component of our criminal justice system: "Their presence is essential because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 648, 104 S.Ct. 2039 (1984)." That a person who happens to be a lawyer is present at trial alongside the accused, however," is not enough to guarantee the right; this is because the right "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v Washington*, 466 U.S. 688,104 S.Ct. 2052, 80 L.Ed.2d 674, 685 (1984). For that reason, the right to counsel includes the right to the effective assistance of

counsel. *Id.* at 686. That is, an accused is "entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. " *Id.* at 685 (emphasis added). Where an accused's counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," the accused has not received the effective assistance of counsel. *Id.* at 686.

Habeas Corpus

In *Quarles v. State*, 56 So.3d 857, 858 (Fla. 1st DCA App. 2011) The 1st DCA stated: "the rules of procedure applicable to petitions for the extraordinary writ of habeas corpus are set out in Chapter 79, Florida Statutes, and rule 1.630, Florida Rules of Civil Procedure." *See also Bard v. Wolson,* 687 So.2d 254 (Fla. 1st DCA 1996). If the complaint states *prima facie* grounds for relief, the trial court must issue the writ, requiring a response from the detaining authority. § 79.01, Fla. Stat.; Fla. R. Civ. P. 1.630(d)(5).

Furthermore, the court determined that "[i]n order to state a *prima facie* case for a writ of habeas corpus, the complaint must allege: 1) that the petitioner is currently detained in custody; and show 2) "by affidavit or evidence probable cause to believe that he or she is detained without lawful authority." § 79.01, Fla. Stat. *See also Smith v. Kearney,* 802 So.2d 387, 389 (Fla. 4th DCA 2001) ("To show a *prima facie* entitlement to habeas relief, the petitioner must show that he is unlawfully deprived of his liberty and is illegally detained against his will.'").

This Court has jurisdictional authority to hear and adjudicate on the merits, any claim filed by Defendant below that is subsequently deemed by this Court to fit into the category of a *habeas corpus* claim, notwithstanding that Defendant is currently housed in Century Correctional

Institution, Escambia County, Florida, and not in Alachua County, Florida. *Clough*, supra.

Manifest Injustice

According to *State v. Akins*, 69 So.3d 261 (Fla. 2011), [u]nder Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *Muehleman v. State*, 3 So.3d 1149, 1165 (Fla. 2009) (alteration in original) (recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous) (quoting *Parker v. State*, 873 So.2d 270, 278 (Fla. 2004)); [a]n illegal sentence is "one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." *Williams v. State*, 957 So.2d 600, 602 (Fla. 2007); see also *State v. McBride*, 848 So.2d 287, 289 (Fla. 2003); see *State v. J.P.*, 907 So.2d 1101, 1121 (Fla. 2004) (same); *Parker v. State*, 873 So.2d 270, 278 (Fla. 2004) (same); see also *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 106 (Fla. 2001) ("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" (quoting *Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla. 1965))).

STATEMENT OF FACTS AND LEGAL ARGUMENTS

A front desk clerk at the Econo Lodge motel in Gainesville, Florida, State's Victim D.P[10] (hereinafter "D.P."), testified that shortly before 9:00 a.m. on July 9, 1998, a large black male

[10] The State's victim's initials are stated in this Petition/Motion in respect of the victim's rights to privacy, and in compliance with this Court's redaction policies against filing confidential privacy information in the Clerk's file, otherwise available for public inspection.

walked into the lobby area of the Econo Lodge and rapidly approached her. When D.P. asked, "May I help you?" the man jumped over the counter and pushed a gun into her back, telling her not to make any noise. He forced her to put all the money from the cash drawer into a bag. She gave him six rolls of coins and some dollar bills totaling $202.00. He then demanded that she take him to an unoccupied room. She complied and, in the room, he sexually assaulted her. After getting dressed, he tied her up with a scarf on the bed and left. After the man left the room, D.P. broke free and called the police. (T. 76-112[11])

The entire incident lasted about fifteen (15) minutes. (T. 87) While D.P. and the man were inside the unoccupied room, D.P. never got a good look at the man's face. (T. 104) The only time she saw the man was at the point of initial contact when he rapidly approached her in the lobby, and this initial contact was only a few seconds. After he point the gun at her in the lobby, she testified that she never saw his face again. (T. 102)

D.P. told the police that the man never ejaculated when he sexually assaulted her. Based on the police officers' initial investigation at the motel, the police were looking for a black male in a green Cadillac. (T. 29)

Approximately five (5) hours after D.P. called the police, Johnson was arrested after he was stopped in a blue Hyundai for a traffic infraction by a deputy sheriff of the Alachua County Sheriff's Department. (T. 45) During the traffic stop, the Deputy noticed that Johnson had a gun inside his vehicle. Johnson was arrested on a weapons charge and both he and his vehicle were taken into custody. A search warrant was later obtained. Several rolls of coins were found on the

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[11] References are to trial transcript page number. Here "T. 76-112" references those respective pages of the Defendant's trial transcripts and corresponding to the page numbers listed.

floorboard of the car driven by Johnson along with a Rubbermaid trash can, which although was similar to those used in rooms at the Econo Lodge motel, could also be found anywhere. (T. 48, 150-51) The blue Hyundai was owned by someone other than Johnson. (T. 58)

Five (5) days after the alleged sexual assault of D.P., at a photographic lineup of seven black males including Johnson was conducted, D.P. was unable to identify Johnson. A detective testified that D.P. appeared to be shaken by Johnson's photograph but she told the detective that she could not identify him as the perpetrator of the crime. (T. 34-35) [see also Attachment 1, pps. 3-5]

Notably, Johnson had stayed at the Econo Lodge several times prior to the alleged sexual assault. D.P. herself had previously check him in on June 6, 1988, only one month before the alleged sexual assault occurred. (T. 89) The detective who conducted the photo lineup was aware at the time of this photographic lineup that Johnson had previously been a guest at the Econo Lodge motel and D.P. had personally checked him in as a guest there. (T. 38) None of the other individuals whose pictures were shown to D.P. had ever had any previous contact with D.P..

Evelyn Walker ("Walker"), a maid at the Econo Lodge, testified that she had seen Johnson when he stayed at the Econo Lodge on several occasions before the alleged sexual assault occurred. (T. 62) According to Walker, at about 8:45 a.m. on July 9, 1988, she saw someone walking down the corridor of the motel by himself who she felt had been a guest there before. (T. 71) After the crime, she was shown a photographic lineup and the only photograph in the lineup that she recognized as being that of a prior guest at the Econo Lodge was that of Johnson. She then identified Johnson as the person she had seen in the motel corridor on July 9,

1988. (T. 73, 75)

Regina Davis ("Davis") and her sister, Rhonda Sheppard ("Sheppard"), testified that they saw a blue Hyundai driven by a black male leaving the parking lot of the Econo Lodge motel between 9:00 a.m. and 9:15 a.m. on July 9, 1988. Sheppard was unable to identify Johnson as the person she saw in the blue Hyundai that day. In fact, in court, she identified a photograph of a person other than Johnson as the person she saw in the blue Hyundai that day. (T. 118-121) After the alleged sexual assault occurred, Davis and Sheppard spoke to the other maid, Walker, and Walker told them she believed the man who used to stay as a guest at the motel in Room 119 was the man she saw in the motel corridor on July 9, 1988. (T. 68, 122, 132-134) Davis knew Johnson as a guest who stayed at the motel in Room 119 on a prior occasion. She had become friends with Mr. Johnson and had listened to music in his room before. (T. 130) She testified that the man she saw in the blue Hyundai that morning was Johnson. (T. 126)

At trial, D.P. looked at Johnson, the only black man in the courtroom and identified him as the man who assaulted her six months earlier. This, despite the fact that she only saw him as the man who assaulted her for a few seconds. This she did with undeniable help of an extremely unfair show-up in the courtroom. (T. 88) Notably, at the pre-trial photographic lineup before D.P. had an opportunity to talk to her co-workers at the Econo Lodge, she could not identify Johnson. (T. 35-35)

Although multiple fingerprints were lifted from the room at the Econo Lodge where the alleged sexual assault occurred, only one print was later readable, and did not match Johnson. (T. 198-199)

The day of the Econo Lodge robbery Johnson was a guest at the Red Carpet Inn in Gainesville where he was staying with his girlfriend. (T. 168-169, T. 174-175, T. 177) It was also undisputed that, at the time of the crime was committed, Johnson had "numerous gold teeth in the front of his mouth." (T. 169) Yet, D.P. testified she never saw any gold teeth in the mouth of the person who assaulted her. (T. 106-107) D.P. described her assailant as clean-shaven. However, Johnson had a moustache and stubble on his face on July 9, 1988. (T. 109)

D.P. testified that the man who assaulted her wore a t-shirt so his arms were exposed. She further testified that she did not notice any tattoos on his arms. (T. 106) At trial, the judge refused to allow Johnson to remove his jacket worn in court for the prior two days to display Defendant's tattoos to the jury. Johnson's attorney did not present any witnesses to testify about the tattoo and did not cross-examine the State's witnesses about the tattoo so the trial judge did not permit him to mention Johnson's tattoos in his closing argument, finding that there was no evidence of Defendant's tattoos in evidence of record in the trial. (T. 215-222)

Defense counsel presented no defense witnesses, or defense evidence. (ROA 296)

Johnson was convicted on all counts on January 27, 1989. He was sentenced to life imprisonment. [Attachment 9] [Attachment 22]

Appendix 1 - Attachments 1-23

Appendix 1[12] - Attachments 1-23 are attached hereto and incorporated by specific reference into the body of the instant Petition/Motion, as if fully set forth herein.

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12 Appendix 1 was compiled in compliance with Rule 9.220 Fla. R. App. P. 2018. Part of this new 2018 Appendix rule requires indexed, bookmarked, text searchable, and PDF pagination of documents. References to Appendix 1 documents are made by Attachment #, and where appropriate by either PDF pagination number, trial transcript number, or both numbers. The entire trial transcripts from Defendant's trial are not attached, however, excerpts cited are included in this Appendix as directly applicable to arguments made herein.

Attachment #:	Description Of Documents:	PDF Pagination:
Attachment 1	Detective Fern Nix Supplemental Report	3-5
Attachment 2	Amended Information 1-24-1989	6-7
Attachment 3	State Witness Barbara Doran Trial Testimony	8-22
Attachment 4	Trial Transcripts Excerpts	23-55
Attachment 5	ASA John C. Carlin Trial Closing Arguments	56-76
Attachment 6	Jury Instructions Printed	77-103
Attachment 7	Verdict Forms	104-106
Attachment 8	Scoresheet	107
Attachment 9	Judgment & Sentence 1-27-1989	108-115
Attachment 10	Florida Motel 2603 SW 13 Street, Gainesville	116-119
Attachment 11	Clerk Docket Case 01 1988 CF 2935	120-122
Attachment 12	ASA John C. Carlin Memorandum 8-12-1988	123
Attachment 13	Defendant's 1991-1998 Post Conviction Filings	124-138
Attachment 14	Defendant's 1997 Motion To Preserve Evidence	139-141
Attachment 15	Order Denying Motion Preserve Evidence	142
Attachment 16	Defendant's Offer Of Proof Evidentiary Hearing	143-148
Attachment 17	Defendant's Memo Of Law Right To Supplement	149-153
Attachment 18	Order Denying 1991-1998 Post Conviction Relief	154-170
Attachment 19	Order Denying Post Conviction DNA Testing	171-173

GROUNDS FOR RELIEF
TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF THE CASE WOULD HAVE BEEN DIFFERENT

Standard for Ineffective Assistance Claims

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Constitution Amendment VI. The Supreme Court teaches us that the criminal defendant's right to counsel "is the right to the effective assistance of counsel." United States v. Gonzalez-Lopez, 548 U.S. 140, 147, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (emphasis added) (Page 1228 internal quotation marks & citation omitted). The right to 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).

Under the dictates of *Strickland v Washington*, 466 U.S. 688,104 S.Ct 2052, 80 L.Ed.2d 674 (1984), a defendant is entitled to effective assistance of counsel which conforms with community standards. In Strickland, the United States Supreme Court promulgated a two-prong test outlining the standard for judging ineffective assistance of counsel claims. Specifically, counsel is ineffective when: 1) his or her representation falls below an objective standard of reasonableness, and 2) but for the deficiency in representation, there is a reasonable probability

that the result of the proceeding would have been different. *Id.* at 687.

Roosevelt Johnson asserts that his trial counsel's preparation and performance before and after trial fell below an objective standard of reasonableness. There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Based upon the facts of this case, Johnson's claims exceed the "probability sufficient to undermine confidence in the outcome" standard.

To substantiate the first prong, the defendant must prove that his counsel's representation was objectively unreasonable and that the alleged deficiency was not sound strategy. *Strickland*, supra; *Darden v. United States*, 708 F.3d 1225 (11th Cir. 2012). Although there is a strong presumption that a particular act or omission constitutes sound trial strategy, this presumption is not insurmountable. See, e.g., *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989); *Chatom v. White*, 858 F. 2d 1479, 1485 (11th Cir. 1988); *Code v. Montgomery*, 799 F.2d 1481, 1484 (11th Cir. 1986). The mere incantation of the word "strategy" does not insulate attorney behavior from review. The attorney's choice of strategy must be reasonable under the totality of the circumstances. *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992).

Ineffective assistance may consist of a variety of acts and omissions. It may consist of a variety of different errors, including failing to conduct adequate pretrial investigation. See *Holsomback v. White*, 133 F.3d 1382 (11th Cir. 1998); *Code v. Montgomery*, 799 F.2d 1481, 1483-84 (11th Cir. 1986); *Nealy v. Cabana*, 764 F.2d 1173, 1177-78 (5th Cir. 1985). Counsel may be ineffective for failing to move to suppress statements or evidence obtained in violation of

a defendant's constitutional rights. See *Huyne v. King*, 95 F.3d 1052, 1057-58 (11th Cir. 1996); *Smith v. Dugger*, 911 F.2d 494, 497-98 (11th Cir. 1990). Counsel may also commit Ineffective Assistance of Counsel during the plea-bargaining process. See *Lafler v. Cooper*, 132 S.Ct. 1376, 1387 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (U.S. 2012).

Roosevelt Johnson's defense counsel never competently explained the plea offer or the ramifications thereof to Johnson, or the strengths and weaknesses of the State's case, or the fact that defense counsel had prepared no defense case whatsoever. Johnson was never advised that the State was seeking life in prison for Johnson, if convicted. Defense counsel received various offers from the State to resolve Johnson's case, yet failed to present them Johnson or advise Johnson of the ramifications of not considering a plea offer.

Counsel can be ineffective for failing to impeach an important prosecution witness, see, e.g., *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989); *Blackburn v. Foltz*, 828 F.2d 1177, 1183-4 (6th Cir. 1987), or for failing to present exculpatory evidence or witnesses. See *Nealy v. Cabana*, 764 F. 2d 1173, 1177-78 (5th Cir. 1985). Counsel also may be constitutionally ineffective for refusing to call a defendant to the stand contrary to his wishes. *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (*en banc*). This is only a sampling of the variety of errors which the courts have deemed constitutionally ineffective assistance of counsel.

Once ineffective assistance of counsel is established, the courts turn to the "prejudice prong" of *Strickland*. To establish prejudice, the defendant need only show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome of the case. *Strickland*, 466 U.S. at 687; *King v. Strickland*, 748 F. 2d 1462, 1463 (11th Cir. 1984).

In *Murray v Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the United States Supreme Court held that even a single error may constitute ineffective assistance of counsel if that error is egregious enough. Also see *Cuyler v Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Here, the errors, singularly and cumulatively warrant an evidentiary hearing and ultimately a new trial. Based upon the foregoing a new trial is warranted or, at a minimum, an evidentiary hearing is required.

Roosevelt Johnson's Conviction and Life Sentence Presents A Manifest Injustice

Johnson claims meet the "manifest injustice exception" to Rule 3.850, Fla.R.Crim.P. Specifically, *manifest injustice* claims are viewed without applying a strict two (2) year limitation period for filling a Motion for Post-Conviction Relief, or denial based solely upon *collateral estoppel* grounds, which are now an exception to this Court's continuing jurisdiction. Historically in Florida, successive motions including untimely post-conviction motions, were previously barred under Rule 3.850(h), as not meeting jurisdictional requirements of the court. Johnson claims that a true manifest injustice occurred in his case, in violation of Johnson's 5th, 6th, and 14th Amendment rights under the United States Constitution and applicable provisions of the Florida Constitution, and that this Court should take jurisdiction to adjudicate Johnson's claims below on the merits now for the first time since 1989.

Courts have held that the *law of the case doctrine* will not bar relief in a post-conviction

rule 3.800(a) motion seeking to correct an illegal sentence that otherwise constituted a manifest injustice. See *Lawton v. State*, 731 So.2d 60, 61 (Fla. 2nd DCA 1999). Even the writ of habeas corpus can occasionally be employed to obtain release from a sentence that results in a manifest injustice. See *Haager v. State*, 36 So.3d 883, 884-85 (Fla. 2nd DCA 2010) (exercising the court's inherent authority to grant a writ of habeas corpus to provide relief on a claim raised in a rule 3.800(a) motion, which would have otherwise been barred by the law of the case doctrine, to prevent a manifest injustice from occurring); see also *Figueroa v. State*, 84 So.3d 1158, 1162 (Fla. 2nd DCA 2012) (holding that relief may be provided to prevent a manifest injustice "in the exercise of this court's inherent authority to grant a writ a habeas corpus").

However, "appellate courts have 'the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.'" *State v. Akins*, 69 So.3d 261 (Fla. 2011) (citing *Muehleman v. State*, 3 So.3d 1149, 1165 (Fla. 2009)). Manifest injustice would result if relief is not granted in this case. *Coleman v. State*, 128 So.3d 193 (Fla. 5th DCA 2013).

The manifest justice exception calls for this Court to grant Johnson the relief requested due to counsel's repeated lapses in judgment throughout trial. Johnson was facing a maximum sentence of life imprisonment The State initially offered a plea of seventeen (17) years with a six (6) year minimum mandatory. Then, the State offered a plea offer of twelve (12) years with a three (3) year minimum mandatory. Defense Counsel did not relay the plea offers to Johnson so that he could make a decision as to how to he wanted to proceed. If Johnson had known the true and correct penalty he faced and been adequately apprised of the testimony and evidence against

him, he would have entered a guilty plea to the charge in exchange for a twelve (12) year sentence. Johnson should be released immediately under a twelve (12) year sentence. The State's twelve (12) year plea offer that was never communicated to Roosevelt Johnson, in consideration of the specific heinous facts of this case, is in itself a true manifest injustice for which Johnson is constitutionally afforded relief under the dictates of *Strickland*.

Here, an evidentiary hearing is required to resolve the conflict in the facts surrounding Johnson's claims of ineffective assistance of counsel; as well as in the interests of justice. The factual controversies in Johnson's case require both an evidentiary hearing and a new trial. Further, a hearing is required to permit legal argument on Johnson's claims from which this Court may thereafter adjudicate Johnson's claims on the merits.

CLAIM 1 TRIAL COUNSEL WAS INEFFECTIVE FOR PERMITTING *OFF THE RECORD* TRIAL CONFERENCES, WITH AND WITHOUT THE JURY PRESENT TO BE CONDUCTED REGARDING EVIDENTIARY AND TESTIMONIAL ISSUES MATERIAL TO THE DEFENSE CASE, AT CRITICAL STAGES OF THE PROSECUTION WHERE DEFENDANT'S PRESENCE IN THE COURTROOM WAS MANDATORY, SUCH THAT NO RECORD OF THESE SIDEBARS EXISTED, AS FUNDAMENTAL ERROR OF THE TRIAL COURT

The trial court routinely conducted off the record sidebars in Defendant's trial. Although

some of these sidebars appear innocuous, there are a few that don't and should have been conducted on the record.[Attachment 4, pps. 23-26, 33-34, [R. 129, R. 161, R. 233, R. 234, R. 265, R. 266, R. 383. (Counsel invited to Chambers before Defendant's sentencing with no record)]

The following testimony is illustrative of off the record discussions had sidebar with the Jury present, that Defendant was neither privy to, or waived his presence for, in critical stages of the prosecution[13] regarding evidence and testimony to be received in trial. Bradley A. West, Gainesville P. D. was the crime scene technician responsible for collection of fingerprints and other forensic evidence at the crime scene, including the victim's clothing:

> [Cross Examination by defense counsel MR. DeTHOMASIS]
> "Q Having knowledge that there was a sexual battery alleged to have occurred in Room 213 did you take any steps necessary to obtain the sheets or the bedspread or any of the items within the room? A I obtained the clothing that was left in the room, sir.
> Q Is that answer to mean then that you did not obtain the sheets or bedspread?
> A No, sir, I did not.
> Q Have you ever in your experience as a criminalistics evidence technician to take into evidence what appeared to be hair samples in any particular case?
> A Yes, sir, I have.
> Q Do you have knowledge that hair samples can scientifically be matched to a particular suspect? A Yes, sir, I understand that can be done.
> Q Additionally in the case of a sexual battery investigation would semen samples if present on any piece of fabric be something that you would want to take into evidence?
> MR. CARLIN: I am going to object to that question as irrelevant.
> THE COURT: Sustained. What he might be interested in doing in any investigation is irrelevant to this investigation, Mr. DeThomasis.
> MR. DeTHOMASIS: Can I approach the bench for a moment, Your Honor?
> THE COURT: Sure. (Thereupon, a sidebar conference was conducted out of the hearing of the reporter.)
> BY MR. DeTHOMASIS:

[13] This issue also ties into the *Brady* violation regarding evidence lost or destroyed by the State prior to the commencement of Defendant's trial, infra, for which no *Brady* Notice was provided to defense counsel.

Q Officer West, you did not collect any hair samples in this case, correct?
A Not directly, no, sir.
Q You did not collect any semen samples or what appeared to be semen samples?
A Not directly, no, sir.
MR. DeTHOMASIS: I have no further questions, Your Honor. [Still on the record]
THE COURT: I'm disturbed by the fact that Officer West did not respond directly to your question, Mr. DeThomasis. I just call that to your attention.
MR. CARLIN: Your Honor, I think that based on his prior answer to what he collected that–
THE COURT: I don't know what not directly means.
MR. CARLIN: May we approach he bench, Your Honor.
THE COURT: Sure.(Thereupon, a sidebar conference was conducted out of the hearing of the reporter.)
BY .MR. DeTHOM.ASIS:
Q Officer West, when you say indirectly is it fair to say that panties that you would collect or the apron that you would collect may in fact have had semen samples or hair samples?
A That's correct, sir.
Q You didn't specifically take an item into evidence because it appeared to you at that time to be a semen specimen?
A That's correct, sir.
Q And likewise you did not take in a hair follicle into evidence?
A That's correct.
Q But in your experience items of clothing such as bras or panties could in fact contain either hair or semen samples?
A Yes, sir.
Q And your primary purpose of collecting items and turning them over to someone who would later test for those?
A Yes.
Q So when you mention indirect there may in fact have been semen samples and/or hair samples? A Yes, sir. MR. DeTHOMASIS: No further questions.
MR. CARLIN: I have no further questions of this witness.
THE COURT: You may stand down, Mr. West."
[Attachment 4, pps. 32-35] [T. 183-186]

The sexual assault kit used to collect DNA evidence from victim D.P. had already been lost or destroyed by the State prior to the commencement of Defendant's trial, on or after January 18, 1989. [Attachment 19, p. 171]

This sidebar conference conducted off the record, without the presence of Defendant, without any waiver of presence by Defendant, presents fundamental error of the trial court, which appears to have been knowingly acquiesced by defense counsel, as well as counsel from the State in an effort to protect the trial record, by not having any record. The sidebar arguments are not of record. Any motions made are not of record. Any decisions made by the trial court related thereto are not of record.

Here, defense counsel was clearly not being the zealous advocate of Defendant's rights that the Sixth Amendment to the United States Constitution and *Strickland* demands.

Rule 2.070(d) Fla. R. Jud. Admin. (1992)[14] states in pertinent part:

"(d) Record. When trial proceedings are being reported, *no part of the proceedings shall be omitted unless all of the parties agree to do so* and the court approves the agreement. When a deposition is being reported, no part of the proceedings shall be omitted unless all of the parties and the witness so agree." *Id.* [Emphasis added]

Defendant was not present by virtue that defense counsel never communicated with him the detail of any off the record sidebars, and Defendant only learned after the fact that these sidebars and Chamber meeting were not being transcribed by law. As such, Defendant was not present for these critical stages of his prosecution, either actually or constructively. Defendant did not agree for trial counsel to have off the record sidebar discussions in his trial, and did not waive his right to have a complete trial record, for which Defendant now claims fundamental error of the trial court, and knowing acquiescence of defense counsel to the off the record trial conference conducted without his knowledge or consent. This is particularly important due to the fact that

[14] The 2018 amended version of this rule is identical, but is now found at Rule 2.535(c) Fla. R. Jud. Admin. (2018)

the police lost or destroyed DNA evidence prior to Defendant's trial and withheld that knowledge from defense counsel. No *Brady* Notice regarding the lost or destroyed DNA evidence was provided to defense counsel. Defense counsel never asked Bradley A. West the operative question, being, do you know why the panties and other articles of clothing were not tested for DNA evidence, such as semen and hair follicles; or where are the DNA test results from the sexual assault kit forensically tested by your Department.

Rule 3.180(a)(1972-present) Presence of Defendant, states:

"(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:

(1) at first appearance;
(2) when a plea is made, unless a written plea of not guilty shall be made in writing under the provisions of rule 3.170(a);
(3) *at any pretrial conference, unless waived by the defendant in writing*;
(4) *at the beginning of the trial during the examination*, challenging, impaneling, and swearing of the jury;
(5) *at all proceedings before the court* when the jury is present;
(6) *when evidence is addressed to the court out of the presence of the jury* for the purpose of laying the foundation for the introduction of evidence before the jury;
(7) at any view by the jury;
(8) at the rendition of the verdict; and
(9) at the pronouncement of judgment and the imposition of sentence.

(b) Presence; Definition. A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, *and has a meaningful opportunity to be heard* through counsel on the issues being discussed." *Id.*

Defendant was not present at sidebar conferences, did not waive his presence personally or through counsel, and there is no record. There was no meaningful opportunity to be heard through counsel or to have knowledge about what was being said after the fact, because these sidebars were all off the record.

Defendant states that the off the record hearing conducted outside of his presence was at a

critical stage of his prosecution for which Defendant's presence was mandatory, pursuant to Rule 3.180(a) Fla. R. Crim. P.; especially in consideration that there is no trial record of these critical proceedings, such that they were akin to a trial conference or a conference to discuss whether the case would be presented to the Jury or not, or under what parameters, regarding venue, subject matter jurisdiction of the trial court, and failure of the Indictment as charged.

> "Under Florida Rules of Judicial Administration 2.070(c), portions of trial court proceedings can be omitted from the record if all parties agree to do so and the court approves the agreement. Where a criminal defendant agrees to conduct proceedings off the record and then remains silent as to any potential objection, he cannot later benefit from the lack of record." *Fleehearty v. State*, 712 So. 2d 396, 397 (Fla. 4th DCA 1998)

Defendant made such no such waiver of a trial record for a hearing that Defendant had no advance notice was conducted outside of his presence. Defense counsel acquiesced and participated in this *informal* off the record hearing related to critical matters pertaining to Defendant's DNA evidence to Defendant's prejudice such that Defendant did not receive effective assistance of trial counsel.

CLAIM 2 **DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE STATE'S SUPPRESSION OF IMPEACHING EVIDENCE FAVORABLE TO DEFENDANT, AS DP'S SEXUAL ASSAULT KIT AND OTHER EVIDENCE COLLECTED BY POLICE FOR FORENSIC EXAMINATION WAS LOST OR DESTROYED BY THE STATE PRIOR TO THE COMMENCEMENT OF DEFENDANT'S TRIAL; THE STATE FAILED TO DISCLOSE THESE FACTS TO DEFENSE COUNSEL IN A *BRADY* NOTICE; DEFENSE COUNSEL FAILED TO UNCOVER THESE FACTS INDEPENDENTLY, AND THE STATE LATER CAPITALIZED ON DNA ARTICLES NEVER TESTED IN IT'S CLOSING ARGUMENTS WITHOUT OBJECTION FROM DEFENSE COUNSEL**

On January 24, 2005, this Court entered an Order finding that the sexual assault kit was lost or destroyed sometime after January 18, 1989, and could not be produced by the State for

DNA testing. [Attachment 19, p. 171] Defendant's trial was conducted on January 26-27, 1989, and the fact that the victim's sexual assault kit was either 'lost or destroyed' by the State immediately prior to trial should have been disclosed to defense counsel as favorable evidence for use in impeaching the credibility of the police investigation and the State's prosecution case. It is patently unreasonable to lose or destroy such a critical piece of evidence as the victim's sexual assault kit. Early on in this case, upon sexual assault examination, no evidence of vaginal trauma was found to exist [Attachment 1, p. 4], making the entire vaginal rape allegation highly suspect, even prior to the sexual assault kit being lost or destroyed just prior to Defendant's trial.

> "Claims involving the State's suppression of favorable evidence are analyzed under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), recognizing a due process violation where the defendant shows "(1) that favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) that because the evidence was material, the defendant was prejudiced." *Beasley*, 18 So.3d at 487.
>
> In contrast, claims involving the State's destruction of evidence "potentially useful to the defense" are analyzed under *Youngblood*, recognizing a due process violation "only if the defendant can show bad faith on the part of the State]." *Guzman v. State*, 868 So.2d 498, 509 (Fla.2003); see also *King v. State*, 808 So.2d 1237, 242 (Fla.2002) ("The landmark case of ... Youngblood, and all cases since, requires a defendant o show bad faith on the part of the person destroying evidence before any relief can be afforded."); see also 1 Charles W. Ehrhardt, Florida Evidence § 401.1, at 164–65 (2015 ed.) ("In a criminal case, due process apparently is not violated by the state introducing circumstantial evidence or testimony which the state has lost or destroyed unless it is shown that the destruction was in bad faith and there is actual prejudice to the accused.")." *Patterson v. State*, 199 So. 3d 253, 257 (Fla. 2016)

On February 28, 2006 in this Court's Order Denying Motion for Post-Conviction Relief [DNA Testing], this Court stated that it would not consider further claims made by Defendant regarding *bad faith* loss or destruction of DP's sexual assault kit. [Attachment 19] Defendant

raises this ground here as a due process violation under *Brady v. Maryland*, and not as a bad faith destruction of evidence in respect of this Court's February 28, 2006 Order. *Id.*

Defendant was convicted of three counts of rape, while carrying a firearm. [Attachment 7, pps. 104-106] The only evidence of rape adduced at trial was DP's testimony regarding three separate rape episodes. Crime Scene Technician Bradley A. West collected DP's panties and apron from the crime scene, supra, Claim 1 testimony. These articles were never tested. The sexual assault kit was lost or destroyed. The forensic evidence collected was material to both the State's prosecution of Defendant and to the defense case. Had defense attorney been told via a *Brady* Notice that the sexual assault kit was lost or destroyed, defense counsel could have used this information for impeachment purposes of all the State's witnesses in Defendant's trial, and moreover, may have uncovered that all of the forensic evidence collected at the crime scene was likewise lost or destroyed by police, which would have devastated the State's case just based upon sloppy police work alone; thereby raising reasonable doubt, and altering the course of Defendant's trial dramatically.

Not only did the State fail to file a *Brady* Notice with the defense, the State also mislead the Jurors in closing arguments regarding the forensic evidence with these statements, without objection by defense counsel:

> "The question of physical evidence. That is another argument about, you know, you haven't been shown this therefore there is no proof therefore Mr. Johnson didn't do the rape. Her clothing? She was disrobed at the time. The bedding? If there was again. And I won't belabor the fact, but if there was anything on the bedding, if there was anything that excused Mr. Johnson, something said it couldn't have been him or if there was anything in that bedding that said it was Mr. Johnson, I promise you, I assure you you would have it here before you. I cannot create it. We don't create

evidence[15] any more than we lie on the stand." [T. 260-261] [Attachment 5]

Defendant's state and federal due process rights were violated. First, Bradley A. West's testimony was very guarded regarding crime scene evidence collected, supra, Claim 1, (e.g. collected "not directly"). Then, the Court was concerned that West's testimony was not responsive, supra, Claim 1. Then, there was an off the record sidebar regarding West's testimony, supra, Claim 1. Then years later it was discovered by Defendant that the sexual assault kit was lost or destroyed prior to Defendant's trial. But that was after this Court denied Defendant's Motion to Preserve Evidence. [Attachment 14, pps. 139-141] [Attachment 15, p. 142] When articles were still available for DNA testing, this Court Denied Defendant's Motion for DNA testing[16]. [Attachment 19, pps. 171-173] There remains an open issue whether the police likewise lost or destroyed other articles of clothing collected by West, prior to West's testimony in Defendant's trial, as Copeland only cited records of evidence location without physically inspecting those locations listed. [Attachment 14, pps. 139-141] Defense counsel was completely ineffective at rooting out these critical deficiencies in evidence, either through independent defense investigation, deposition processes, or through cross examination in Defendant's trial. Defense counsel called no witnesses regarding the loss or destruction of evidence, the failure of DNA testing or forensic examination of articles collected, to explain why articles were not tested,

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15 Conversely, the State did lost or destroy evidence before Defendant's trial. [Attachment 19]

16 From a practical standpoint the Alachua County State Attorney's Office as the mister of justice in Defendant's case should have welcomed the opportunity to DNA test the articles of clothing in evidence for the assailant's DNA , when requested by Defendant and at the expense of Defendant. The fact the State fought so hard to prevent the DNA testing, and to prevent the Court from Ordering preservation of evidence, coming at the heels of losing or destroying the sexual assault kit prior to trial and without advising Defendant via a timely filed *Brady* Notice, casts doubt that even the State believes that Defendant raped the victim in this case. Especially in consideration that there was no evidence of a sexual assault trauma upon the victim in this case. [Attachment 1]

etc. that could have been used to impeach all of the State's witnesses and drive home sloppy police work and reasonable doubt in Defendant's case. Next there is the material and fundamentally unfair *Brady* violation. The State never advised defense counsel that forensic evidence was lost or destroyed by police prior to Defendant's trial commencing. Finally, you have the State advising the Jury in closing that if there was any forensic evidence either inculpating Johnson or exonerating Johnson [on articles either not collected or not tested] that the Jurors would have [somehow] heard about it from the State, that is a ridiculous proposition on it's face. [T. 260-261] [Attachment 5, pps 70-71]

Throughout this process defense counsel exhibited ineffective assistance of counsel markedly below the standards pronounced in *Strickland*. Defense counsel never got to the root of the matter prior to or during trial, at least on the record, regarding *why* there was no DNA testing performed. Now we know why the sexual assault kit was not DNA tested, because the police lost it or destroyed it. This unrefuted fact alone, had it been known by Defendant at the time of Defendant's trial, would have been used for impeachment purposes. As such, it is irrelevant whether Defendant could prove the sexual assault kit was exculpatory[17] or not. *Patterson*, supra. would have created reasonable doubt in the minds of the Jurors, as the loss or destruction of evidence favorable to Defendant, vis a vis suppression of impeachment evidence for all of the State's witnesses called, coupled with the State's *Brady* violation, deprived Defendant of his due

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[17] The Court's logic for denying Defendant's prior bad faith destruction of evidence claim [Attachment 19] is inapplicable here, because Defendant would have used the *Brady* Notice regarding the loss or destruction of the sexual assault kit to impeach all of the State's witnesses regarding the rape counts, which would have created reasonable doubt in the minds of the Jurors whether the rapes occurred at all, or whether Defendant was the assailant or not. It is not reasonable to believe in this case that the State lost the sexual assault kit. The argument goes that if the State intentionally destroyed the kit, Defendant is not guilty, and if the State lost the kit, the investigation and prosecution of Defendant is sloppy thereby raising reasonable doubt on these critical issues regarding the rape counts. Once the rape counts fail, the entire State's prosecution fails, as unreliable.

process rights in trial and constitutional rights to effective assistance of counsel.

CLAIM 3 DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED BY THE STATE'S CLOSING ARGUMENTS THAT DEFENDANT'S STATEMENT TO POLICE ESTABLISHING AN ALIBI DEFENSE WAS A LIE, THAT DEFENDANT IS A LIAR, THAT THE STATE'S WITNESSES TELL THE TRUTH, THAT ASA CARLIN CAN PERSONALLY VOUCH FOR THE CREDIBILITY OF DETECTIVE COOPER OR CARLIN "WOULD HAVE HIS JOB," AND OTHER ARGUMENTS CONSTITUTING FUNDAMENTAL ERROR, WITHOUT ANY OBJECTION FROM DEFENSE COUNSEL OR INTERVENTION FROM THE TRIAL COURT *SUA SPONTE*, IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant's post Miranda custodial statement was taken by Gainesville Police Detectives while in custody in the county jail. Defendant's statement to police was a denial of involvement in the crimes, an explanation where Defendant was earlier that day, and an explanation regarding the rolls of coins and plastic bucket found inside the blue Hyundai he was driving, the fact he was staying at the Red Carpet Inn with his girlfriend, etc. e.g. a denial and *alibi defense*. Defendant's statement to police constituted a reasonable hypothesis of innocence on it's face[18]. Instead of investigating Defendant's *alibi defense* that Defendant was in Jacksonville at the time of these offenses, ASA Carlin told the Jury instead: "Why didn't the police follow up in Jacksonville? Was he really there? No. Because we knew where he was.", see infra. [Attachment 5, p. 67]

The State capitalized on Defendant's denials in closing arguments, but then went over the

[18] Possession of firearm by convicted felon was not charged separately in Defendant's Amended Information in this case. [Attachment 2] Possession of a concealed firearm by convicted felon was charged in State v. Johnson, Case No. 01-1988-CF-2935 that was Nolle Prosequi on January 24, 1989, by written letter received from ASA John C. Carlin. [Attachment 11, p. 121]

line reaching fundamental error by calling Defendant a liar, while simultaneously telling the Jurors that the State's witnesses were not liars, personally vouching for the credibility of State's witnesses, continually referring to the State and State's witnesses as "we", and lastly by requesting that the Jurors "advocate" for the prosecutor because he was "sandwiched" in. There are multiple statements that violate golden rule. There were no objections by defense counsel. The trial court did not intervene either to stop the State *sua sponte*. There were no sidebars during the State's closing arguments and certainly no objections by defense counsel. The cumulative effect of these prejudicial statements in closing by ASA John C. Carlin constitute fundamental error for which Defendant did not receive a fair trial.

1. "You felt it, we all did, *the truth of our words* and the truth of our identification. We know who he is. We knew he was the rapist when she turned and pointed him out." [Attachment 5, p. 58, T. 248]

2. "And the why, well, we have what might be called an outline. He went to Jacksonville, left Gainesville Friday night, left Jacksonville about eleven o'clock that morning and came back here at two p.m. and was stopped. *Now, we know that that is a lie*, which brings us to the end." [Attachment 5, p. 60, T. 250]

3. "I anticipate he may talk about the roll of coins. Yes, he was gone four hours so maybe he bought something from some guy and therefore that is how he got this roll of coins. If that in fact were true, if indeed he got this during that four-hour period of time from somebody else, the real rapist, *why did he lie about it?* Why not really come out and tell what he was really doing? Why not? Why say he is in Jacksonville? Because he didn't want anybody to know where he really was." [Attachment 5, p. 66-67, T. 256-257]

4. "Why didn't the police follow up in Jacksonville? Was he really there? No. Because we knew where he was." [Attachment 5, pps. 66-67, T. 256-257]

5. "I find it outrageous, I guess you would expect me to find it outrageous, to say that Miles Cooper would come in here and lie to you. If I thought Miles Cooper would lie to you under oath I would be after his job in a heartbeat." [Attachment 5, p. 69, T. 259]

6. "I cannot create it. *We don't create evidence any more than we lie on the stand.*" [Attachment 5, p. 71, T. 261]

7. "I have one more thing to ask you to do.....In his defense of Mr. Johnson he is going to raise a number of points with you. The only thing I can ask you to do is just in your own mind as you get these points is say what would . Carlin say in rebuttal to that. Basically you have to *be my advocate*[19] because I won't have another chance to talk to you." [Attachment 5, p. 75, T. 265] [Italics added]

The first paragraph makes the victim's identification of Defendant "our identification", meaning the victim's identification, the State Attorney's identification, and the Jurors identification; wholly improper. There is no "our identification". The Jurors are seated to determine witness credibility, and whether a proper identification was made, not to listen while the State tells the Jurors who is lying and who is telling the truth, in so many words.

The second and fourth paragraphs makes Defendant's denial, reasonable hypothesis of innocence, and alibi defense [not investigated by police whatsoever] a lie, so it can be discarded by the Jurors. Then Carlin told the Juror's "we knew where he was".

19 ASA Carlin stopped short of inviting the Jurors to dinner after they convicted Defendant.

The third paragraph makes Defendant's statement regarding the roll of dimes[20] another lie by Defendant. The roll of dimes was critical to the State's case, infra, Claim 4. So now, ASA Carlin has called Defendant a liar regarding being in Jacksonville at the time of these offenses, plus called Defendant a liar for explaining to police post Miranda where the rolled coins came from. This is fundamental error requiring reversal of Defendant's conviction standing alone.

The fifth paragraph is ASA John C. Carlin personally vouching to the Jurors that Detective Miles Cooper from the Gainesville PD is not a liar, and in fact, if ASA John C. Carlin thought that he would come to testify in Defendant's trial and lie, that ASA Carlin would personally be after Cooper's job! This argument is quite remarkable as ASA Carlin has made himself an authority to the Jurors of who is telling the truth and who is lying, such that the Jurors don't have to bother determining witness credibility on their own.

The sixth paragraph is projection on ASA Carlin's part: "I cannot create it. We don't create evidence any more than we lie on the stand." ASA Carlin did not tell the Jurors or defense counsel that the State loses or destroys evidence, as that was a secret at the time of Defendant's trial regarding the victim's sexual assault DNA kit. Moreover, Defendant argues in Claim 4, infra, that the State indeed created evidence for use in the Econo Lodge prosecution, e.g. the pinnacle roll of dimes, that was not evidence of the Econo Lodge robbery whatsoever.

The seventh paragraph is a request by ASA John C. Carlin that the *Jurors advocate for him*, when he is not speaking, to disbelieve defense counsel anticipated arguments before any are made. By this point ASA Carlin has elevated the Jurors with that comment to *honorary*

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[20] The roll of dimes was entered into State's evidence without any voir dire from defense counsel. As described in Claim 4, the roll of dimes should not have been entered into State's evidence, because it did not come from the Econo Lodge cash drawer, and could not be authenticated by Barbara Dolan whatsoever, infra.

prosecutors advocating for the State and the prosecution; all in violation of Defendant's rights to a fair trial and effective assistance of trial counsel.

ASA Carlin, without any defense objection, called Defendant a liar twice, stated several times that the State's witnesses were telling the truth and/or would not lie, and then gave a personal credibility reference for Detective Miles Cooper, incorporating a personal belief that Cooper would not come to court and lie. ASA Carlin made effective use of golden rule to the State's advantage creating fundamental error for which Defendant did not receive a fair trial standing alone.

In *O'Callaghan v. State*, 429 So. 2d 691 (Fla. 1983), during the defendant's trial testimony about his presence at the crime scene, the prosecutor stated: "That's a lie. I would like to go to the bench." *Id.*at 696. In response, the Supreme Court of Florida stated it is "unquestionably improper" for a prosecutor to assert that the defendant has lied. *Id.* Any trial lawyer should know that this type of conduct is completely beyond the limits of propriety. However, the remarks did not warrant a

reversal of the conviction in the O'Callaghan case.

In *Washington v. State*, 687 So. 2d 279 (Fla. 2nd DCA 1997), the defendant denied the accusations of sexual battery and sexual activity with a minor and the prosecutor, in addressing the defendant's testimony, stated:

> "Joseph Goebbels, who was a propaganda minister for Germany back at the time of Adolf Hitler, had a theory. He believed that you should lie to the people but that you shouldn't lie with small lies because you can get caught in small lies. What you should do is you should lie big, come up with a big lie because that's something that you might be able to have the people buy is the big lie. Of course, at that time it was that the Jews were responsible for everything that was wrong in the world and they should be exterminated. Well, the defense in this case is

nothing but a big lie." Id. at 280.

The Second District Court of Appeal in Washington stated: "[I]t is difficult for us to perceive a more egregious and prejudicial statement," , and held "[i]t is 'unquestionably improper' for a prosecutor to state that the defendant has lied ...it constitutes an improper statement of opinion by the prosecutor. *Id.* (citing *O'Callaghan v. State*, 429 So.2d 691, 696 (Fla. 1983)). The second district concluded it had "no choice but to reverse Washington's judgment and sentence. *Id.*

In *Bass v. State*, 547 So. 2d 680 (Fla. 1st Dist. Ct. App. 1989), the prosecutor told the jury "[i]f you want to tell Jimmy Wayne Bass he lied, there is only one verdict, guilty. The man is guilty."*Id.* at 682. The First District Court of Appeal concluded the prosecutor's remarks "could have been and were likely construed by the jury as directing them to 'send a message' about lying in the courtroom rather than focusing their attention on whether the state had proven Bass' guilt beyond a reasonable doubt." *Id.* at 682-683

A similar comment was made by the prosecutor in *Jones v. State*, 449 So. 2d 313 (Fla. 5th Dist. Ct. App. 1984). The Jones prosecutor did not mince words when he said: "What about Tyrone Jones? I submit, that when Tyrone Jones took the stand, he lied to you." *Id.*at 314. The First District Court of Appeal reversed because of the "improper comments and argument and the state's tenuous case against Jones." *Id. at* 314.

ASA Carlin's accusations that Defendant's post Miranda denial and alibi statement was a lie, coupled with only the State's witnesses telling the truth, and his opinions associated with both and personal reference for Miles Cooper rise to the level of fundamental error in the State's

closing for which Defendant did not receive a fair trial, based upon fundamental error committed by the trial court, without objection from defense counsel. Defense counsel should have put a "halt" to ASA Carlin right away with a timely objection and sidebar conference[21] to stop ASA Carlin in his tracks with these egregious comments and opinions and golden rule violations. That did not happen and Defendant was convicted as a result of it. In fact, there are so many improper arguments, comments, and fundamental errors within ASA Carlin's closing arguments [Attachment 5, pps. 56-76] that this closing could be used as an outline for improper prosecutorial arguments in closing under Florida caselaw.

CLAIM 4. DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED BY ADMISSION OF THE ROLL OF DIMES INTO STATE'S EVIDENCE, REPRESENTING THE PINNACLE IDENTIFICATION ARTICLE OF EVIDENCE PLACING DEFENDANT AT THE ECONO LODGE; WHERE DEFENSE COUNSEL FAILED TO VOIR DIRE THE WITNESS,\; WHERE WITNESS LATER REVEALED THAT DIMES ENTERED INTO STATE'S EVIDENCE WERE NOT PROPERLY AUTHENTICATED SPECIFICALLY AS HAVING COME FROM THE ECONO LODGE CASH DRAWER, AS OPPOSED TO A LEGITIMATE SOURCE, SUCH THAT DEFENDANT WAS WRONGFULLY CONVICTED AND DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant was convicted with a forced in court identification from D.P. of Defendant, where the State knew that D.P. could not identify Defendant from the photo lineup. [Attachment 1] These matters were litigated on appeal and as such, are not relitigated here, except that Defendant would ask this Court to consider that claim once again, but just for purposes of the cumulative effect all errors in Defendant's trial, Claim 11, *infra.*

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[21] Albeit an off the record objection and sidebar conference. All of Defendant's sidebar conferences were off the record, supra.

The one *special* roll of dimes entered into evidence as State's Exhibit #14 [Attachment 3, p. 11, T. 137], through the testimony of Barbara Doran, Econo Lodge Manager, without advance voir dire or objection from defense counsel, should never have been entered into State's evidence, because Barbara Doran could not authenticate that specific roll of dimes of having been in the Econo Lodge cash drawer. The roll of dimes became ASA Carlin's most valuable piece of evidence tying Defendant to the Econo Lodge in the State's prosecution; more important in fact, that D.P.'s in court identification[22] of Defendant as her assailant. The identity of D.P.'s assailant, the Econo Lodge robber and her alleged rapist was the sole issue at Defendant's trial, notwithstanding that there is still no evidence 31 years later that D.P. was raped other than D.P.'s testimony standing alone.

ASA John C. Carlin argued in closing:

> "When you look at the other rolls you may find them to be generic. This one is not. This one has a brand name on it spelled r-a-p-e . . That puts him [Defendant] in the lobby on July 9th when an armed robbery took place. I want to offer you a scenario because I know that there is some thought that maybe this is such a generic waste can that it could come from anywhere, even though we know it looks like one from that motel." [Attachment 5, p. 62, T. 252]

This particular roll of dimes does not spell "r-a-p-e", but in fact spells "F-l-o-r-i-d-a M-o-t-e-l". The Florida Motel, a fairly Florida iconic Gainesville motel built in 1935, stood next door to the Econo Lodge, with a physical address of 2603 SW 13th Street, Gainesville, Florida; whereas the Econo Lodge was situated at 2649 SW 13th Street [aka Highway 441]. [Attachment 10, pps. 116-119] In 2018, the Florida Motel and property was sold to Comfort Suites. This is significant, because the roll of dimes in question was wrapped in green colored paper, taped at

[22] The Jurors heard that D.P. could not identify Defendant from the photo lineup, and knew that D.P. was identifying Defendant in Court as her assailant for the very first time.

both ends, and stamped "Florida Motel". This roll of dimes was recovered from the front floorboard of the blue Hyundai that Defendant was driving when Defendant was pulled over some 5 hours after the Econo Lodge robbery, together with several generically wrapped coins that were not identifiable by anybody.

Barbara Doran was the State's witness used to authenticate this one roll of special dimes. Prior to her testimony Doran had met with police and initialed the coin roll, to add to her authentication legitimacy at trial. The dimes were entered into State's evidence with no voir dire and no objection from defense counsel, regarding authentication, or predicate for admission. The dimes should not have come into State's evidence whatsoever, because the dimes were not properly authenticated as having come from the Econo Lodge cash drawer. Essentially, Doran authenticated that particular roll of dimes as being different than the rest, as opposed to any meaningful authentication of that specific roll of dimes having come from the Econo Lodge cash drawer.

On cross examination, after the dimes were already admitted into State's evidence, defense counsel asked Barbara Doran these questions and she responded more accurately and honestly, than she did when answering the State's questions used to lay a foundation for admission of the roll of dimes into State's evidence originally.

> "Q Ms. Doran, is it correct that at the time, in fact, July 9th, the policies and procedures of the clerks who were handling the cash did not include a practice of initialing rolled coins?
> A That's correct.
> Q The rolls themselves never were stamped with the name Econo Lodge?
> A There were no identifying marks.
> Q Are you identifying them at this point?
> A Yes, I am.
> Q And have you learned since this time the need to identify them if you are to

properly be able to identify them as being yours?
A Yes.
...
Q There is one roll of coins you picked out that has your initials on it and also has some words. It looks like Florida M-o-t and then it is cut off by a piece of tape.
A That's Florida Motel. That's next door to us.
Q Are you connected to the Florida Motel, the Econo Lodge?
A No.
Q Same owner?
A No.
Q Did this roll of coins as opposed to all the other rolls of coins stands out because it is the type of roll that needs to be folded and taped at the end as opposed to being closed by a machine?
A Well; it stood out because it was unlike the others. We didn't tape it that way.
Q Are you saying this particular roll of coins came to you and was placed in yo ur cash drawer? Are you saying this one in particular or one like it was in the cash drawer?
A I am saying one that looked like that.
Q Are you saying the other rolls of coins you were shown in this bag are definitely not from your motel?
A No, I'm not saying that.
Q You just can't identify them as being from your motel?
A They are generic in nature." [Attachment 3, T. 141-143]

This cross-examination testimony from Ms. Doran reveals that the particular roll of dimes stamped "Florida Motel" was not authenticated as having been in the Econo Lodge cash drawer, just "one that looked like that." *Id.* None of the coins entered in Defendant's trial were properly authenticated and should not have been admitted into evidence, but for, defense counsel's approach of conducting voir dire after the items are already admitted into evidence; when it is too late.

The identification of the Florida Motel roll of dimes having come from the Econo Lodge robbery in the above styled case was contrived by the police and prosecutor in toto.

The Econo Lodge robbery occurred on July 9, 1988. Defendant was in custody since that

time. At the time of Defendant's arrest, the police seized a firearm, some coin rolls, some cash, and a plastic garbage pail. Police also seized Defendant's clothing and personal affects at the time of arrest.

On July 26, 1988 the State filed the case of State v. Roosevelt Johnson, Alachua County Case No.: 01 1988 CF 2935A, based upon Gainesville PD Investigation No.: GPD 8813531, charging Defendant with Count 1: Armed Robbery and Count 2: Possession Of A Concealed Firearm By Convicted Felon. [Attachment 11, pps. 120-122]

On August 12, 1988 ASA John C. Carlin wrote the following Memo addressed to Detective Fern Nix, GPD, excerpted in pertinent part:

> "Fern: You will be receiving a subpoena on the Econo-lodge rape case against Mr. Johnson. I am bringing both you and the victim in together. Prior to our meeting, it would be helpful if you would show the victim the ~allowing items to see if she could recognize them:
>
> a. The 357 Magnum blue steel revolver
> b. The rolled coins (other than ones ID ' d by Comfort Inn.
>
> Your report does not indicate if the victim gave a description of the clothes her assailant was wearing. If she did not, please obtain one and then show her any clothing currently in evidence which might match her description.
>
> We need to nail Mr. Johnson down a little bit tighter in this case. The physical ID in the Holiday Inn West case and the rolled coins in the Comfort Inn case pretty well nail him. The Econo Lodge case is at this juncture a marginal trial case. Thanks John. End Of Memo" [Attachment 12]

This Memo on it's face evidences that fact that the police and the State may have used evidence from three (3) separate Gainesville PD investigations in the instant case wrongfully, in order to make the instant case jive in a jury trial.

Then on the same day, August 12, 1988 the State filed the above-styled case: Case No.:

01 1988 CF 3205 A, based upon GPD Investigation Number: GPD 88-13520; a different GPD investigation of Defendant than listed in Case No. No.: 01 1988 CF 2935A, based upon Gainesville PD Investigation No.: GPD 8813531. The same evidence seizures from Defendant's blue Hyundai were used in the Comfort Inn case and the Econo Lodge case. The roll of dimes identified in the Comfort Inn case was entered into evidence in the Econo Lodge case, with the perfunctory authentication provided by Barbara Doran; wrongfully.

Defendant was denied a fair trial and effective assistance of trial counsel as guaranteed by the United States and Florida constitutions, requiring reversal of Defendant's convictions and a new trial.

On January 24, 1989, immediately prior to Defendant's trial on January 26, 1989, but after the State lost or destroyed D.P.'s sexual assault kit on or after January 18, 1989, ASA John Carlin Nolle Prosequi Case No. 01-1988-CF-2955. [Attachment 11, p. 121]

It appears that the special "Florida Motel" roll of dimes entered into State's evidence as Exhibit 14 in Defendant's trial, were either previously authenticated in the Gainesville PD's investigation of the Comfort Inn, or were not evidence of anything whatsoever, just marked differently. In either scenario, these dimes were not legitimately authenticated by Barbara Doran in the Econo Lodge case and should have been excluded from evidence in Defendant's trial.

CLAIM 5 DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED BY THE STATE'S CLOSING ARGUMENTS THAT SHIFTED THE STATE'S BURDEN OF PROOF TO DEFENDANT, WITHOUT DEFENSE COUNSEL OBJECTION, REPRESENTING FUNDAMENTAL ERROR OF THE TRIAL COURT, SUCH THAT DEFENDANT DID NOT RECEIVE A FAIR TRIAL

ASA John C. Carlin made the following closing arguments in Defendant's trial that unconstitutionally shifted the burden of proof, without objection or record made by defense counsel [Attachment 5, p. 65, T. 255]

> "Incidentally, if there was something specific that a defendant wanted to bring before. you he has that opportunity to subpoena Sgt. Bishop himself, the same subpoena power I have. So anything really important he had to say he could have subpoenaed her himself but he did not." *Id.*

ASA Carlin impermissibly shifted the burden of proof to Defendant by suggesting that Defendant should have called witnesses in the defense case to present evidence to the Jurors to prove that he is not guilty. This statement is fundamental error for which Defendant did not receive a fair trial, highlighted by defense counsel's failure to object, make a record[23], or even understand the issue. Defendant was denied a fair trial and effective assistance of trial counsel, with this statement cited as yet one more example of the unfettered and fundamentally unfair closing made by ASA Carlin requiring this Court to vacate Defendant's Judgment and Sentence

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23 Bear in mind that ASA Carlin called Defendant a liar, even though defense counsel called no defense witnesses, by referring to Defendant's statements to police twice as lies. Here ASA Carling buttresses the defense lack of evidence to support defense counsel's *anticipated* arguments also as lies because of defense counsel's failure to call defense witnesses to corroborate defense counsel's anticipated arguments. Lastly, defense counsel had not even presented those arguments yet that ASA Carlin anticipated. If fact defense counsel never made those arguments in closing. Yet, ASA Carlin told the Jurors that Defendant could have called witnesses to corroborate defense counsel's arguments, but didn't. ASA Carlin impermissibly shifted the burden of proof to Defendant, without any objection from defense counsel, to Defendant's prejudice, such that Defendant was convicted and sentenced to life in prison.

now.

Although there are many Florida cases in this regard, only one case is cited here. In *Smith v. State*, 843 So. 2d 1010, 1011 (Fla. 1st DCA 2003) the prosecutor argued in closing "Nobody testified he wasn't the guy."; causing the First District to reverse Smith's conviction as reversible error upon timely objection made, permitting the burden of proof to impermissibly shift to Defendant. The Court said:

> "In light of the evidence presented, the statement, "Nobody testified he wasn't the guy," can only be taken as intended to suggest, impermissibly, that appellant had some burden to present evidence refuting the state's identification testimony. See, e.g., *Jackson v. State,* 575 So.2d 181, 188 (Fla.1991) (noting that "the state cannot comment on a defendant's failure to produce evidence ... because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence"); *Jackson v. State*, 832 So.2d 773, 777–78 (Fla. 4th DCA 2002) (concluding that the prosecutor's question during closing argument implying that no evidence had been presented to counter an officer's identification testimony impermissibly shifted the burden of proof); *Shelton v. State*, 654 So.2d 1295, 1296–97 (Fla. 4th DCA 1995) (concluding that the prosecutor's question during closing argument asking whether there was "anything showing that [the defendant] didn't make that sale" impermissibly shifted the burden of proof). It is equally clear that the statement constituted an impermissible comment on appellant's failure to testify. See, e.g., *Rodriguez v. State*, 753 So.2d 29, 37 (Fla.2000) (concluding that a prosecutor's comment that "there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than ... this defendant" constituted an impermissible comment on the defendant's failure to testify); *State v. Marshall*, 476 So.2d 150, 153 (Fla.1985) (noting that "[a]ny comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged"); *Shelton*, 654 So.2d at 1297. Having carefully reviewed the evidence presented at trial, we are unable to accept the state's argument that the error was harmless. See State v. *DiGuilio*, 491 So.2d 1129 (Fla.1986)." *Id.*

CLAIM 6 DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED BY THE CUMULATIVE EFFECTS OF STATE'S CLOSING ARGUMENTS, WITHOUT DEFENSE COUNSEL OBJECTION, REPRESENTING FUNDAMENTAL ERROR OF THE TRIAL COURT, SUCH THAT DEFENDANT DID NOT RECEIVE A FAIR TRIAL

As stated several times above, defense counsel made no objections whatsoever in the State's closing arguments, notwithstanding that ASA John C. Carlin's closing argument was replete with false and misleading facts regarding DNA evidence (not tested), facts not in evidence from witnesses not called, calling Defendant a liar twice, telling the Jury that State witnesses and police officers don't lie, improper comments regarding the roll of dimes being spelled "R-A-P-E" to enrage the Jurors, arguments regarding the roll of dimes that ASA Carlin knew were not taken from the Econo Lodge by Defendant and could not be properly authenticated as such by witness Barbara Doran, comments regarding hearsay evidence not before the court from witnesses never called, golden rule comments, asking the Juror's to "advocate" for ASA Carlin in his absence, shifting the burden of proof to Defendant, and multiple other examples of improper closing arguments. There are at least a dozen objections that should have been made by defense counsel that were not. The trial court did not intercede and stop ASA Carlin's arguments either. [Attachment 5, pps. 56-76, T. 246-266] Defendant cites the cumulative effects of the prosecutor's closing arguments as fundamental error. Defense counsel should have objected and called a sidebar immediately. The Court *sua sponte* should have stopped ASA Carlin early on, but did not. The end result is fundamental error through the cumulative effect of ASA Carlin's closing arguments standing alone, evidencing that Defendant did not receive a fair trial, or affective assistance of counsel in violation of Defendant's rights

afforded by the United States and Florida constitutions.

It is a well settled principle of Florida law that a court must address the cumulative impact of all improper comments or actions by the prosecutor in determining their impact on the fairness of the trial. In *Defreitas v. State*, 701 So. 2d 593 (Fla. 4th DCA 1997) the Fourth District stated:

> "Measuring the prosecuting attorney's conduct in the instant case by the aforementioned well settled standard, we are persuaded that appellant has been denied one of his most precious constitutional rights, the right to a fair criminal trial, by the cumulative effect of one prosecutorial impropriety after another one. Furthermore, we are equally persuaded that the cumulative effect of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate appellants entire trial. In addition, we are likewise persuaded beyond question that the cumulative effect of the numerous acts were of such a character that neither rebuke nor retraction could have or would have destroyed there sinister influence. The prosecutorial misconduct, taken in its entirety and viewed in its proper context, is of such a prejudicial magnitude that it enjoys no safe harbor anywhere in the criminal jurisprudence of this state. Accordingly, we find fundamental error." *Defreitas*, 701 So.2d at 600 (emphasis added).

Other Florida cases also hold that the cumulative effect of the prosecutor's comments or actions must be viewed in determining whether a defendant was denied a fair trial. See *Brown v. State*, 593 So.2d 1210 (Fla. 2nd DCA 1992)(holding that a combination of improper comments made by the prosecutor in closing argument amounted to fundamental error); *Kelley v. State*, 761 So.2d 409 (Fla. 2nd DCA 2000)(holding that the cumulative effect of the prosecutor's improper comments and questions deprived Kelley of a fair trial); *Garron v. State*, 528 So.2d 353 (Fla. 1988); *Ryan v. State*, 509 So.2d 953 (Fla. 4th DCA 1984)(holding that prosecutorial misconduct amounts to fundamental error and is excepted from the contemporaneous objection/motion for mistrial rule, when the prosecutors remarks, when taken as a whole are of such character that its

sinister influence could not be overcome or retracted); *Freeman v. State*, 717 So.2d 105 (Fla. 5th DCA 1998); *Pacifico v. State*, 642 So.2d 1178 (Fla. 5th DCA 1994)(holding that the cumulative effect of prosecutorial misconduct during closing argument amounted to fundamental error); *Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1994); *Carabella v. State*, 762 So.2d 542 (Fla. 5th DCA 2000)(holding that the cumulative effect of improper prosecutorial comments during closing argument was so inflammatory as to amount to fundamental error); *Pollard v. State* , 444 So.2d 561 (Fla. 2nd DCA 1984)(holding that the court may look to the "cumulative effect" of non-objected to errors in determining "whether substantial rights have been affected").

The above case law establishes that the trial court erred in failing to assess the cumulative effect of the prosecutor's misconduct in this case. This is a legal error that is afforded no presumption of correctness and is subject to de-novo review by this Court. In conducting the de-novo review this Court should assess the cumulative effect of the prosecutorial misconduct in accordance with the law contained in the cases cited above.

CLAIM 7 THIS COURT HAS JURISDICTION TO ADJUDICATE DEFENDANT'S PREVIOUSLY FILED, AUGUST 5, 1998 AND AUGUST 24, 1998, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, PREVIOUSLY DENIED AS UNTIMELY FILED, BECAUSE THIS COURT DID NOT ADJUDICATE THOSE CLAIMS ON THE MERITS, PURSUANT TO MANIFEST INJUSTICE GROUNDS

On April 21, 1999 [Attachment 18] this Court entered an Order Denying Defendant's August 5, 1998 supplemental ineffective assistance of counsel claims, and August 24, 1998 additional *Brady* violation claim, notwithstanding that an evidentiary hearing had never been conducted in the interim regarding the alibi defense claim of Defendant's initial 3.850 Motion

filed on November 1, 1991. In other words, there was a seven (7) year lapse with no evidentiary hearing. The trial court's April 21, 1999 spells out in great detail the failures of post-conviction counsel Tom Copeland regarding this extended time lapse, pro se filings made by Defendant, and Copeland's preparedness to go forward with claims made anyway at the time of the hearing. [Attachments 13-18, inclusive] The flavor of this Court's Denial of Defendant's August 5 and August 24, 1998 additional post-conviction claims made, just prior to the evidentiary hearing conducted, was that these claims were outside the 3.850 two-year time limitation, and/or did not constitute valid "supplements", per se, but rather were new claims made. *Id.*

Then, on December 19, 2008, the Honorable Frederick D. Smith, in Case No. 01-2008-CA-1969 Denied [Attachment 21, pps. 197-200] "Defendant's Writ Of Habeas Corpus For Leave to File A Belated Supplement to His Initial Post-Conviction Motion" [Attachment 20, pps. 174-196[24]], filed through counsel Marcia J. Silvers, Esquire. Again, the Court was most concerned regarding the strict two-year 3.850 time limit, and reasons why the court did not have any legal reason to permit the supplements, notwithstanding that Defendant's three (3) post-conviction counsel in the period 1991-1998 in no way evidenced that they were competent post-conviction counsels. [Attachment 18]

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[24] The habeas corpus evidentiary hearing transcript in Case No. 01-2008-CA-1969 was filed and is available online at the Clerk's Website; but is not attached here. The sole issue and concern of the court was to determine that Defendant could not prove he told post conviction counsel to file supplements to his initial 1991 post conviction motion; again, concerned about the strict 2 year time limit at that time. Noteworthy is that Tom Copeland from 1993 forward never filed a motion with the court to amend Defendant's initial 1991 filing. Although that is common practice for post conviction counsel in this State, it was not done by Copeland. In so many words, all of Defendant's post conviction counsel appointed from 1991-1998 failed miserably. Likewise, in 2008 Marcia J. Silvers, Esquire, presented to the Court in [Attachment 20] that the *only way* the Court had jurisdiction to grant Defendant the relief requested was to find that Defendant advised post conviction counsel to file supplements. Jurisdiction is no longer a concern of this Court pursuant to more recent caselaw describing *manifest injustice* jurisdiction of this Court now. There is no longer a strict 2 year requirement, and quite frankly, no strict time limit whatsoever for Defendant to bring new claims, provided that new claims brought now, were never adjudicated on the merits in the past.

The flavor of both Orders, April 21, 1999 and December 19, 2008, was that the Court is not obligated to permit any diversion of the 3.850 two-year time limitation; therefore, the Court ruled that it would not permit those supplemental filings. These are precisely the types of claims that have never been adjudicated on the merits that fit squarely within this Court's jurisdiction under *manifest injustice* grounds. Since the claims raised in Defendant's August 5 and August 24, 1998 supplements have never been adjudicated by this Court, this Court does have jurisdiction to finally adjudicate those claims if it were so inclined at this time. [Attachments 13-14]

For reasons described below, this Court also has authority to consider these old claims made by Defendant either *in toto*, or under a *cumulative effect of errors made* by defense counsel prejudicing the outcome of Defendant's case.

Defendant's August 5, 1998 and August 24, 1998 claims are cited here as a composite Claim 7, as delineated in [Attachment 13, pps. 131-138] to this Petition/Motion, and Defendant remains cautiously optimistic that this Court will take jurisdiction to adjudicate these claims now on the merits together with new claims made in the instant Petition/Motion based upon *manifest injustice* jurisdiction of this Court and in the interests of justice.

On August 5, 1998, Johnson filed a Pro Se Supplement to Motion for Post-Conviction Relief. [Attachment 13, pps. 131-132] [DE 172] This *Supplement* listed additional ineffective assistance of counsel claims: 1.) Failure of defense counsel to advise Defendant of his right to: i.) testify at trial in his own defense, ii.) to participate decision making regarding evidence to present to the jury, or iii.) to participate in formulation of a defense strategy; 2.) Failure of

defense counsel to present defense witnesses regarding: i.) the source of the coins, ii.) the source of the trash can, iii.) a witness who saw a different suspect in the area, iv.) a witness saw a female clerk in the office at the time of the offense, v.) regarding victim's examination where no serological or hair evidence of sexual battery was found, vi.) whether a trash can was missing from Econo Lodge Room 213, vii.) whether Red Carpet Inn used the same type of trash can as Econo Lodge, viii.) that defendant was not "well spoken" as described by the victim, and ix.) that defendant had [6] gold teeth and tattoos on the date of the offense; 3.) Failure of defense counsel to request a forensic examination of the clothing of both the victim and Defendant, which were both in police evidence; 4.) Failure of defense counsel to take depositions from and present testimony regarding: i.) the officer whose notes included victim's description of the assailant, conflicting with the written police report, ii.) the officer who talked with a witness who saw another potential suspect in the area at the time of the offense, and iii.) the officer who talked with a witness who saw a female clerk in the office at the time of the offenses.

On August 24, 1998, Johnson filed a *Pro Se* "Motion for Post-Conviction Relief-*Brady* Violation". [Attachment 13, pps. 133-138] [DE 174] The *Brady* violation claim[25] related to the failure of the prosecution to disclose evidence favorable to Defendant, including, Detective Fern Nix's notes that the victim could not identify the assailant's clothing; portions of Nix's notes related thereto given to the defense were incomplete, as favorable to Defendant.

These 1998 claims never adjudicated on the merits by this court remain valid claims under *manifest injustice* jurisdiction of this Court, especially in consideration of the cumulative

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[25] This was a different *Brady* violation claim than the *Brady* violation claimed above, regarding loss or destruction of D.P.'s sexual assault kit prior to Defendant's trial, supra, Claim 2. See also Attachments 1 & 12.

effect of all other errors cited herein, for purposes of the instant Petition/Motion. The State cannot aver in good faith that any of the post-conviction counsel appointed to Defendant's case by this Court in 1991-1998 were competent post-conviction counsel. Although there is no Florida claim for ineffective post-conviction counsel, it still had a grave impact on Defendant, such that this Court should consider that fact in taking jurisdiction now under manifest injustice grounds to adjudicate all of these claims on the merits.

Additionally, the passage of time has proven Defendant right on many of these issues. It appears from a review of the record as a whole that certain peculiar occurrences through the years support a logical conclusion that the State is more concerned about protecting Defendant's Judgment and Sentence in this case than service justice in this case.

February 15, 1989 Motion for Release Of [Trial] Evidence and Order Granting Release, effectively removed the State's trial evidence in this case and sent it back to the Gainesville Police Department, while Defendant's direct appeal pending. Defendant was convicted on January 27, 1989. There is no valid reason why the evidence was released, and released *ex parte*. This "Release" would have included the Florida Motel "roll of dimes" that is material to the instant Petition/Motion.

Defendant's fairly innocuous 1997 Motion to Preserve Evidence [Attachment 14, pps. 139-141] filed by Tom Copeland on December 23, 1997, was Denied by this Court on May 11, 1998. [Attachment 15, p. 133] Essentially the Court via this Order sent a message to the Gainesville PD that it was okay to destroy the evidence in Defendant's case, at a time when Defendant was specifically requesting that it be preserved. It is unknown if or when the

Gainesville PD intentionally destroyed other forensically testable articles of evidence in this case, or whether those articles are still available here 22 years later.

Then on or about January 24, 2005, this Court found that the sexual assault kit, evidencing whether or not D.P. was actually raped or not, was lost or destroyed by the State on or after January 18, 1989, the week before Defendant's trial commenced on January 26, 1989. [Attachment 19, p. 171] Then on March 2, 2006 this Court Denied Defendant's Motion for Post-Conviction Relief DNA Testing. [Attachment 19]

Defendant claims that the DNA evidence never tested would have conclusively proved that Defendant was not D.P.'s rapist, if in fact D.P. was raped at all by some other unknown assailant, in consideration that D.P. showed no signs of vaginal trauma when immediately examined by a doctor. [Attachment 1, p. 4]

CLAIM 8 DEFENSE COUNSEL WAS INEFFECTIVE PRE-TRIAL, IN TRIAL, AND POST TRIAL, AS DEFENDANT'S CONVICTION BASED UPON PURELY CIRCUMSTANTIAL EVIDENCE SHOULD NOT HAVE OCCURRED, SUCH DEFENDANT DID NOT RECEIVE A FAIR TRIAL

The State in Johnson's case did not present a shred of corroborating evidence that linked Johnson to the Econo Lodge robbery and rape of D.P. other than a roll of dimes that should not have been admitted into evidence, and an in court identification by D.P. coached by the State to identify Defendant, the only black male sitting in the courtroom.

The State's entire case was based on evidence that crimes were committed, coupled with an in-court identifications by D.P. that Defendant was the assailant, with no prior identification of Defendant by D.P. prior to her testimony in trial. The State's evidence used to convict Defendant was circumstantial at best, coins and a generic Rubbermaid trash can found in a car

driven by Defendant, but not owned by Defendant. There is a heightened sufficiency of evidence standard where evidence used to convict a putative defendant is wholly circumstantial. Defense counsel never moved the trial court to suppress anything pre-trial, did not voir dire State's witnesses to authenticate State's evidence, did not move for judgment of acquittal based upon sufficiency of the evidence, and did not file a motion for new trial after conviction. Defense counsel did absolutely nothing in defense of this case.

The Fifth District Court of Appeals stated in *Knight v. State*, regarding the sufficiency of evidence necessary to convict a defendant in a purely circumstantial evidence case:

> "The "special standard of review of the sufficiency of the evidence" which "applies where a conviction is wholly based on circumstantial evidence" is most often articulated by Florida's appellate court's as follows: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *Law*, 559 So. 2d at 188." *Knight v. State*, 107 So. 3d 449, 457 (Fla. 5th DCA 2013)

In the instant case, the pinnacle issue was misidentification of Defendant by D.P., or even worse, forced identification of Defendant by D.P. for the first time in court while testifying, where Defendant had an *alibi defense* constituting a reasonable hypothesis of innocence to these heinous acts. The alibi defense remained unrefuted because it was not investigated by police. In closing ASA Carlin told the Jury that Defendant was a 'liar'.

The State *did not provide one concrete piece of evidence* that linked Johnson to these crimes. The State emphasized that the victim D.P. identified Johnson as the one who committed these acts. Her testimony early on is "different than the actual description of Johnson . . . [and] her description is not as complete as it should be or as it becomes later." (T. 227). "The

description included a person wearing a red shirt, possibly a yellow shirt, T-shirt-type." (T. 229). At no one's surprise, there was no evidence which pointed to Johnson ever wearing a yellow or red t-shirt. Additionally, the description of the vehicle given by the victim did not match or come close to the description of Johnson's vehicle, a green Cadillac verses a blue Hyundai.

Moreover, the victim testified that the rape occurred on a bed in the motel, yet there was no evidence of semen or hair samples on the sheets, carpet, or on the clothes of the victim linking Johnson to this crime. There were plenty of finger prints taken from the scene of the crime and none of them matched Johnson's either. Aside from the mistaken identification of Johnson by the victim, the jury was not presented any concrete evidence connecting Johnson to this case or this act. Jurors were not permitted to hear that Johnson's arms are covered with tattoos, yet the assailant described by D.P. had no arm tattoos and she was able to clearly see the assailant's arms.

The State did not come close to meeting their burden of proving that Johnson committed these crimes beyond a reasonable doubt, based upon an acute examination of circumstantial evidence resulting in Defendant's convictions, due to improper arguments by ASA Carlin, coupled with ineffective assistance of Defendant's trial counsel, who did not prepare any defense case whatsoever, when he could have. For instance, defense counsel could have called the medical expert examining D.P. to testify that there was no evidence of vaginal trauma indicated in their examination. [Attachment 1, p. 4] Defense counsel rested immediately following the end of the State's case; calling no witnesses and having no defense case prepared. An evidentiary hearing and a new trial is required based on *manifest injustice* grounds.

CLAIM 9 DEFENSE COUNSEL WAS INEFFECTIVE PRE-TRIAL, IN TRIAL, AND POST TRIAL, FOR NOT DEMANDING THE DNA TEST RESULTS OF D.P.'S SEXUAL ASSAULT KIT, AND FOR NOT DEMANDING ANY AND ALL OTHER BRADY MATERIALS, FOR WHICH THE STATE SHOULD HAVE FILED BRADY NOTICES, AND WHICH DEFENDANT AFFIRMATIVELY DEMANDS NOW, SUCH THAT DEFENDANT DID NOT RECEIVE A FAIR TRIAL, OR EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS AFFORDED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS

This Court found that D.P.'s sexual assault kit was lost or destroyed "sometime after January 18, 1989" [Attachment 19, p. 171]. Bradley A. West testified in Defendant's trial that none of the articles of clothing taken into evidence, either from D.P. or Defendant, were ever forensically tested. There was no testimony received whatsoever in Defendant's trial regarding D.P.'s sexual assault kit forensic testing or results thereof; notwithstanding that the kit was lost or destroyed before the commencement of Defendant's trial on January 26, 1989. As previously stated, the State filed no *Brady* Notices in Defendant's case whatsoever.

Based on the sheer number of peculiarities surrounding the lack of forensic testing results in this rape case for which Defendant is sentenced to life in prison, coupled with the complete lack of record in Defendant's trial regarding D.P.'s sexual assault kit; Defendant now claims that the State indeed tested D.P.'s sexual assault kit forensically prior to the date alleged that it was lost or destroyed, and later withheld DNA test results from Defendant prior to Defendant's trial, as a separate *Brady* violation.

Defendant now demands that the forensic test results of D.P.'s sexual assault kit, or an affirmative acknowledgment from the State Attorney's Office under oath that D.P.'s sexual

assault kit was not forensically tested, not tested for any DNA profile of an assailant, or not otherwise examined with a summary of test results or findings, prior to it's loss or destruction on or after January 18, 1989, be provided by the State, and that this Court Order the State to produce said test results or verified Denial.

The record does not refute this Claim that the State obtained DNA test results from D.P.'s sexual assault kit and withheld those test results from Defendant, such that an evidentiary hearing is required specifically regarding this separate *Brady* violation.

CLAIM 10 JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARDS TO THE PLEA NEGOTIATIONS PROCESS, SUCH THAT HAD COUNSEL BEEN EFFECTIVE, JOHNSON WOULD HAVE ACCEPTED THE STATE'S PLEA OFFER PRIOR TO TRIAL AND BEFORE IT WAS REVOKED

Due process of law requires that a trial court advise the defendant of all direct consequences of a plea prior to accepting it. Similarly, to be constitutionally effective, defense counsel must advise a defendant of the direct consequences of a plea. See Rule 3.172 Fla. R. Crim. P. A direct consequence of a plea is one that has a definite, immediate, and automatic effect on the range of the defendant's punishment. See *Major v. State*, 814 So.2d 424, 431 (Fla. 2002). Johnson's defense counsel never adequately explained the plea offer to Johnson, the strengths and weaknesses of the State's case, the potential for a life sentence after conviction, or the ramifications of not accepting the State's favorable plea offer to resolve this case in lieu of a trial.

In the case of *Missouri v. Frye*, 132 S.Ct. 1399 (U.S. 2012), the Court held that counsel may also provide ineffective assistance of counsel during the plea-bargaining process. *Frye*, 132

S.Ct. 1399. Johnson claims Frye error occurred that severely prejudiced his case. His counsel never properly explained the plea offer that was proposed by the State, an estimate of actual time that would be served, the likelihood of conviction, or that Johnson was facing life if convicted. Had defense counsel competently advised Johnson of these things, Johnson would have accepted the State's plea offer.

In the landmark case of *Missouri v. Frye*, the Court stated:

> "In *Padilla v. Kentucky*, 559 U.S. 356 (2010), where a plea offer was set aside because counsel had misinformed the defendant of its immigration consequences, this Court made clear that "the negotiation of a plea bargain is a critical" stage for ineffective-assistance purposes, Id. at 373, and rejected the argument made by the State in this case that a knowing and voluntary plea supersedes defense counsel's errors." *Frye* at 1405-1407.

To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law. This application of *Strickland* to uncommunicated, lapsed pleas does not alter Hill's standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U. S. 52, 59 (1985). Hill correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel's deficient performance during plea negotiations. *Frye* at 1409-1411.

Further, Johnson's State and Federal Constitutional rights to due process of law and to effective assistance of counsel were violated when his counsel misadvised Johnson on the maximum statutory penalties for the offenses, the strengths and weaknesses of the State's case, the most likely outcome, the probable sentence, and what could be done to mitigate the sentence if Johnson accepted the plea.

Johnson never knew that he was facing a life sentence. The State had initially offered a plea of seventeen (17) years with a six (6) year minimum mandatory. Then, the State offered a plea offer of twelve (12) years with a three (3) year minimum mandatory. Defense Counsel did not relate the plea offers to Johnson in any meaningful manner so that Defendant could make an intelligent and informed decision to accept a States' plea offer in this case.

To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, a defendant must demonstrate a reasonable probability both that he would have accepted the more favorable plea offer had he been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if he had the authority to exercise that discretion under state law. This application of *Strickland* to uncommunicated, lapsed pleas does not alter Hill's standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Hill correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel's deficient performance during plea

negotiations. In *Frye*, the defendant argued that with effective assistance he would have accepted an earlier plea offer as opposed to entering an open plea. Accordingly, *Strickland's* inquiry into whether "the result of the proceeding would have been different," *Strickland*, 466 U. S. at 694, requires looking not at whether the defendant would have proceeded to trial but at whether he would have accepted the earlier plea offer. He must also show that, if the prosecution had the discretion to cancel the plea agreement or the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is particularly important because a defendant has no right to be offered a plea, see *Weatherford v. Bursey*, 429 U. S. 545, 561, nor a federal right that the judge accept it, *Santobello v. New York*, 404 U.S. 257, 262. Missouri, among other States, appears to give the prosecution some discretion to cancel a plea agreement; and the Federal Rules of Criminal Procedure, some state rules, including Missouri's, and this Court's precedents give trial courts some leeway to accept or reject plea agreements. *Frye* at 1409-1411

Had his counsel properly explained the ramifications of the plea or even properly related the plea offers, Johnson would not have left his fate up to chance and would have accepted a reasonable plea offer. Taking the decision out of Johnson's hands illustrates another example of the ineffectiveness of his counsel throughout this case.

> "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to the imposition of a more severe sentence." See *Lafler v. Cooper,* 132 S.Ct. 1376, 1387 (2012).

So, no question exists, pursuant to *Alcorn v. State*, 121 So.3d 419 (Fla. 2013) and United

Sates Supreme Court precedent,

> "... to establish prejudice, the defendant must allege and prove a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. See *Frye*, 132 S. Ct. at 1410; *Alcorn* at 430.

Here, Johnson verily asserts that he would have accepted the 12-year plea offer if the same had been properly and adequately explained to him; the prosecutor would not have withdrawn the offer; the Court would have accepted the offer; and finally, that the sentence would have been less severe than that actually imposed.

It is unreasonable, in consideration of the facts of this case, to believe that Johnson would have turned down a State's Plea Offer of twelve years in prison with a three-year minimum mandatory sentence for these offenses in 1989. Under Florida Department of Corrections rules in effect at that time, Johnson would likely have served the three-year minimum mandatory prison sentence and would have been released in 1991-1992. Instead, Johnson has a life sentence now with no parole. Had Johnson received effective assistance of counsel within the meaning of the 6th and 14th Amendments to the United States and Florida Constitutions, he would have accepted that reasonable plea offer rather than leaving his entire life up to chance. Defense counsel's performance fell markedly below the standard of competent counsel under the standards pronounced in Strickland, for which Defendant was prejudiced and remains in custody of the Department of Corrections now for life.

CLAIM 11 THE SINGULAR AND CUMULATIVE EFFECT OF THE ERRORS SUBSTANTIALLY PREJUDICED ROOSEVELT JOHNSON'S STATE AND FEDERAL CONSTITUTIONALS RIGHTS

The Supreme Court of Florida held that cumulative effect of evidentiary errors and ineffective assistance claims together. *Suggs v. State*, 923 So.2d 419 (Fla. 2005) (citing *State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996)) (granting a new trial on the basis of the combined effect of newly discovered evidence, the erroneous withholding of evidence, and ineffective assistance of counsel). However, a claim of cumulative error will not be successful if a petitioner fails to prove any of the individual errors he alleges. *Bryan v. State*, 748 So.2d 1003, 1008 (Fla. 1999).

Johnson asserts that the singular and cumulative effect of the errors set forth supra substantially prejudiced his rights to a fair trial and to a meaningful adversarial testing of the State's case. Based upon unprofessional errors by defense counsel singularly or coupled with the judge's errors, an evidentiary hearing or a new proceeding is required.

An Evidentiary Hearing Is Required in This Case

A criminal Petitioner is entitled to an evidentiary hearing on ineffectiveness claims raised in a post-conviction motion unless: 1.) the Motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or 2.) the claim is legally insufficient. *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). If the claim is legally insufficient for failure to state a cognizable claim, the court must allow the Petitioner at least one opportunity to correct the deficiency. *Spera v. State*, 971 So.2d 754, 755 (Fla. 2007).

A trial court may only properly deny a motion for post-conviction relief without an

evidentiary hearing only if the allegations are conclusively refuted by the record. *Anderson v. State*, 627 So.2d 1170 (Fla. 1993). A trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. *Id.*

Here, an evidentiary hearing is required to resolve the conflict in the facts surrounding Johnson's claims of ineffective assistance of counsel and his legal contentions that the verdict was in contradiction of the evidence presented and that he was never given the right to accept or deny a plea offer by the State. He was never presented with the offers nor was he ever advised by counsel that he could potentially be facing a life sentence. Johnson has presented sworn evidence concerning his claims.

In light of the fact that Johnson's constitutional rights were violated, this court "must issue" a Writ of Habeas Corpus unless the State gives Johnson a new trial within a reasonable time. *Rogers v. Richmond*, 365 U.S. 534 (1961). *Rogers* sets forth the appropriate procedure to be followed. Here, an evidentiary hearing is required to resolve the conflict in the facts surrounding Johnson's claims of ineffective assistance of counsel, the State's *Brady* violations, and fundamental error of the trial court, as delineated above in the instant Petition/Motion.

CONCLUSION

Based upon the foregoing grounds and authority, the Defendant, Roosevelt Johnson, respectfully requests this Honorable Court to Order the State to Respond to this Petition/Motion, to later conduct an evidentiary hearing to resolve the factual disputes raised by this sworn Petition/Motion, and thereafter to Order a new trial so that Johnson can receive effective assistance of counsel and due process of law under the State and Federal Constitutions.

DECLARATION

I, ROOSEVELT JOHNSON, the Defendant in the above styled case, do hereby declare under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this Motion/Petition is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing Motion/Petition, that the facts contained in the Motion/Petition are true and correct, and that I have a reasonable belief that the Motion/Petition is timely filed. I certify that this Motion/Petition does not duplicate previous motions/petitions that have been disposed of by the Court. I further certify that I understand the English language and have read the foregoing Motion/Petition.

Signed on this 8 **day of** April, **2019.**

ROOSEVELT JOHNSON
DC# 390758

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed via E-Portal Filing with the Clerk of Court and the Alachua County State Attorney's Office (EService@sao8.org) on this 2nd **day of MAY, 2019.**

Respectfully submitted,

LAW OFFICES OF RICHARD ROSENBAUM

/s/ Richard L. Rosenbaum

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Additional material from this filing is available in the Clerk's Office.