No. 20-6896 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

PHILLIP A. BENJAMIN,

Petitioner

vs.

SECRETARY, DEPT. OF CORR., et al.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI

FROM THE

STATE OF FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

PHILLIP A. BENJAMIN, DC# P23536
Petitioner, *pro se*
Century Correctional Institution
400 Tedder Road
Century, Florida 32535

QUESTIONS PRESENTED

1. Did the Trial Court err when limiting the testimonies of the defense witness from testifying of vital information, therefore, hindering the Defendant from defending himself thus depriving the Defendant of a fair trial and due process that guaranteed in the Sixth and Fourteenth Amendments to the U.S. Constitution.

2. Did the Trial Court err in allowing an indigent Defendant to be convicted of a non-existent and non-statutory charge in the body of the information depriving the Defendant due process of being aware of the correct charges, a clear violation of his Sixth and Fourteenth Amendment rights of the U.S. Constitution.

3. Did the Trial Court err in allowing the striking of a particular cognizable group of people from the jury depriving the Defendant of an impartial jury of a cross section of his community violating his due process and equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

LIST OF PARTIES

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

RELATED CASES

Benjamin v. State, 44 Fla.L.Weekly D2108a (Fla. 1st DCA 2019)

Benjamin v. State, App. LEXIS 13020 (August 23, 2019)

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No. _____

SUPREME COURT OF THE UNITED STATES

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_____/

PETITION FOR A WRIT OF CERTIORARI

Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court, the Florida Supreme Court, to review the merits appears at Appendix A to the Petition and was unpublished.

The opinion of the First District Court of Appeals appears at Appendix A to the Petition and was unpublished.

JURISDICTION

This Court has jurisdiction to entertain this cause where the instant Petition is filed within ninety (90) days of the date the opinion of the Supreme Court of the State of Florida sought to be reviewed was rendered, to wit:

The opinion of the Supreme Court of the State of Florida sought to be reviewed was rendered on June 29, 2020. A copy thereof appears at Appendix A.

An Extension of Time to file the Petition for a Writ of Certiorari was granted to and including November 25, 2020.

Therefore, this Court may exercise its discretionary jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless of a presentment or indictment of a Grand Jury, expect in cases arising in the land or naval forces, or in the militia. When in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprives of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NOTE:

This Amendment contains important protections for people accused of crimes. One of the protections is that government may not deprive any person of

life, liberty, or property without due process of law. This means that the government must follow proper constitutional procedures in trials and in other actions it takes against individuals.

Amendment VI provides:

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

NOTE:

A basic protection is the right to a speedy, public trial. The jury must hear witnesses and evidence on both sides before deciding the guilt or innocence of a person charged with a crime. There is also a basic right of effective assistance of counsel. (*U.S. v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984)).

Amendment XIV provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

NOTE:

The 14th Amendment (1868) originally was intended to protect the legal rights of the freed slaves. Today it protects the rights of citizenship in general by prohibiting a State from depriving any person of life, liberty, or property without "due process of law." In addition, it states that all citizens have the right to "equal protection of the law" in all States.

STATEMENT OF THE CASE

The Defendant, Phillip A. Benjamin, on July 31, 2017, Amended Information in Escambia County, Case No.: 2016-CF-6651, charged Defendant with Lewd or Lascivious Battery (Victim Over 12 But Under 16). It alleged in Count 1 that the Defendant: "On one or more occasions between October 23-24, 2016, being then eighteen (18) years of age, to wit: 56 years of age did unlawfully engage in sexual activity with a person twelve (12) years of age or older but less than sixteen (16) years of age, Victim, 13 years of age ... by intentionally touching in a lewd or lascivious manner the child's genitals, genital area, or the clothing covering them, and by penetrating the child's vagina with his finger, in violation of

Section 800.04(4)(a)1, 800.04(4)(b), 800.04(5)(a) and 800.04(5)(c)2. The Defendant was only charged with one count.

Defendant was found guilty by jury of the charges of lewd or lascivious battery and was sentenced on September 20, 2017 to 226.5 months in prison but this was reduced to fifteen (15) years (per Fla. Stat. 921.0024(1)(b) as Appellate Counsel successfully filed a Rule 3.800(b)(2), Fla.R.Crim.P. while on direct appeal and granted by the Trial Court).

The Defendant contends that the judgment and sentence, for which he is in custody for, is illegal detention based on a conviction for a non-existent offense/crime as described in the body of the amended information. This is in violation of the Sixth Amendment to the U.S. Constitution and Article I, §16 of the Florida Constitution, which grants the Defendant of the right to be informed of the correct nature and information charged against him. (See Argument(s)).

ARGUMENTS

ISSUE ONE

INEFFECTIVE ASSISTANCE OF COUNSEL

The constitutional rights of an indigent defendant to effective assistance of counsel includes the right to an attorney who performs with sufficient competency to fulfill the proper role of an advocate. But in the instant case, trial court did not furnish Defendant with such a counsel acting in the role of an advocate nor did it

provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity. The necessity for counsel so acting is highlighted by the deficient and prejudice which disadvantaged the Defendant to suffer due to an accumulation of plain errors that are outlined below. (*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). These errors hindered the Defendant from receiving a full and fair trial and due process guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States.

COUNSEL WAS DEFICIENT BECAUSE HE MADE A BOILERPLATE MOTION OF JUDGMENT OF ACQUITTAL WITHOUT SETTING FORTH THE SPECIFIC GROUNDS UPON WHICH THE MOTION WAS BASED.

Counsel knew that Victim had testified, in the video interview, to describing her private area of which the Defendant had allegedly penetrated with his finger, which she uses "to pee." During direct exam, Victim stated in describing her private area, "you go to the bathroom, to pee." (T.T. pg. 224, lines 1-3). Both descriptions Counsel knew Victim was describing her "urethra" canal and not her vaginal canal of which the Defendant was charged. Counsel knew the "urethra" is the canal that carries off urine in females while the "vagina" is the canal between the vulva and uterus that leads to the external opening of the female sex organs.

Counsel prejudiced the Defendant and his trial for judgment of acquittal for not setting forth these specific facts and grounds upon which the motion was

based, knowing that the prosecution failed to provide legally sufficient evidence that the Defendant's finger penetrated Victim's vagina. After the prosecution rested its case (T.T. pg. 318), Trial Court asked Counsel, "Do you want to make a motion just for the record?" Counsel replied, "Sure, Judge, the defense would make a motion for JOA of insufficient evidence. There ... just leave it at that." (T.T. pg. 322-323). The Trial Court then asked the prosecution do they need to say anything, of which the prosecution responded, "Do I need to say anything?" The Trail Court replied, "I don't think so. But I did want Counsel to put it in the record."

COUNSEL FAILED TO OBJECT ON SEVERAL OCCASIONS

The prosecution mislead the jury about facts not in evidence (T.T. pg. 405, lines 6-9; pg. 387, lines 12-15). There was no evidence that anyone had too much to drink. Counsel failed to object to speculation about DNA (T.T. pg. 308, line 23; pg. 309, line 25).

COUNSEL FAILED TO IMPEACH VICTIM TESTIMONIES

Counsel failed to impeach victim testimony from Deposition and Trial Transcripts conflicting testimonies. (Deposition Transcript, pg. 21, line 12-14). (Question: At some point, Victim, you woke up? Answer: Yes. Question: Do you have any idea? Answer: I don't really know.) (T.T., pg. 269-274) was the same identical questions, but different answers. The same thing happened in her

Deposition Testimonies, pg. 26, line 11. Victim stated she got up out of bed, peeked around the corner, and saw Bo and her Dad on the couch. Now, (T.T. pg. 364, lines 12-20) Victim stated she never got back out of bed. These are to show that Victim's testimony was so inconsistent, there are several of these like: (Deposition Transcript, pg. 22, lines 5-11) Question: The person touch your private part in the front or back. Answer: Front. Now (T.T., pg. 269, line 14-16) Question: When the hand touch your private parts, did it come from the front of your pajamas? Answer: I don't remember. There were so many inconsistencies in Victim's testimony that Counsel prejudiced Defendant by not impeaching her testimony. Inconsistent with the testimony and was given under oath is subject to the penalty of perjury at a trial, hearing, or other proceeding or deposition. Fla. Stat. 90.801(2)(a).

COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO THE AMENDED INFORMATION WHICH CHARGED THE DEFENDANT WITH A NON-EXISTENT OFFENSE/CRIME VIOLATING THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Trial Counsel did not object nor file a motion to dismiss the amended information. Therefore, Counsel was deficient because he knew that the amended information charged the Defendant with a non-existent offense in the language of its body. Was the offense with which the Defendant was charged. The Defendant's amended information charged Lewd and Lascivious Battery alleging

he "did unlawfully engage in sexual activity" by "intentionally touching in a lewd or lascivious manner" "and" "by penetrating the ... vagina with his finger." The insertion of the conjunction "and" in the language of the body between the phrased elements, made both phrases facts/essential elements of the crimes. Thus created and charged a non-existent offense/crime. See §800.04(4)(a) and §800.04(5)(a) for definition of Lewd and Lascivious Battery and Lewd and Lascivious Molestation.

Counsel prejudiced the Defendant and his trial as a point of law that one cannot be punished based on a judgment of guilt of a purported crime, when the offense charged in the body of the information does not exist. Nor can one by indicted for one non-offense and convicted and sentenced for another (even if void by citation).

Counsel knew a fundamental matter of due process only allows the State (and Courts) to punish one who has been charged clearly with an offense defined by the legislative authority, through published laws. Counsel prejudiced the Defendant because it's axiomatic that conviction be based on statutes defining crimes not extended by intendment as there can be no constructive offense.

TRIAL COUNSEL COMMITTED ADDITIONAL INEFFECTIVENESS BY CONCEDING GUILT OF THE DEFENDANT TO THE JURY AND INVITING ERROR WHEN QUESTIONING VICTIM ON AN ELEMENT CHARGED

Counsel asked Victim: "Okay. Now when the hand touched your vaginal area, did it come from the top of your pajamas." (T.T. pg. 269). The term vaginal

area was never used by the State nor the Victim and Counsel did not inform the Defendant he would use the term to associate with the language in the element charge against him. The Defendant testified he did not commit alleged crime, yet Counsel invited error and conceded guilt when he used the term "vaginal area" during questioning of the victim. This violated Defendant's Fifth Amendment right against self-incrimination and unfairly prejudiced his trial. Furthermore, the victim never used the "vaginal area," only private parts and private part area.

COUNSEL FAILED TO HOLD PROSECUTION TO HER COMMENT

The Prosecutor conceded that the Defendant did not penetrate the victim in her hearsay transcript (Pg. 154, lines 5-7). Victim said that she was not digitally penetrated she saying he put his finger inside my private area. This information was very vital due to the fact that "penetration" is one of the essential elements of the charge of Lewd or Lascivious Battery. Prosecution stated in her closing argument (T.T. pg. 409, lines 3-10): "To prove the crime of Lewd or Lascivious Battery, the prosecution must prove the following two elements beyond a reasonable doubt: (1) Victim was 12 years of age or older but under the age of 16 years; and (2) Mr. Benjamin committed an act in which the vagina of Victim was penetrated by an object; an object includes a finger." The prosecution stated also in her (hearsay transcript pg. 154, lines 5-7) that Victim said in her own words "she was not digitally penetrated" she saying he put finger inside my private area. (T.T.

pg. 249, line 24). When you say inside your private area what do you mean? (Line 26). Hand inside my drawers. (T.T. pg. 250, line 8) Question: "When you say your private area what do you use this part of your body for?" Answer: "Go to the bathroom and pee!" Now that part of a female body cannot be penetrated. So this is not her vagina because pee does not come out of the vagina. Therefore, this portion of the second element for the charge of Lewd or Lascivious Battery has not been proven beyond a reasonable doubt. And for the prosecution to even charge the Defendant with information when she knew it was false. The prosecution was required to prove that Defendant penetrated the Victim's vagina with his finger and since the record failed to establish that "key element," the Court held that the Trial Court erred in denying Defendant's motion on the acquittal on the Count. See *Furlow v. State*, 529 So. 2d 804 (Fla. 1st DCA 1988).

COUNSEL'S FAILURE TO OBJECT TO THE USE OF ENHANCEMENT BEING CALCULATED ON THE SCORESHEET FOR ADULT-ON-MINOR OFFENSE MULTIPLIER

Counsel was ineffective for failure to object to the adult-on-minor multiplier at sentencing being considered/used for qualification (on scoresheet) and thus waived the court's discretion to sentence the Defendant to the lowest permissible sentence under a correct scoresheet. This violated the Defendant's right to a full and fair sentencing proceeding and due process under the Sixth and Fourteenth Amendments to the U. S. Constitution.

Trial counsel is presumed to know the law and should have known that the Defendant did not qualify for the adult-on-minor multiplier. Fla. Stat. §921.0024(1)(b) (2016). (Adult-on-minor multiplier) in pertinent part, set forth the following criteria for application:

> Adult-on-minor sex offense: If the offender was 18 years of age or older and the victim was younger than 18 years of age at the time the offender committed the primary offense, and if the primary offense was an offense committed on or after October 1, 2014, and is a violation of s. 787.01(2) or s. 787.02(2), if the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed a sexual battery under chapter 794 or a lewd act under s. 800.04 or s. 847.0135(5) against the minor; s. 787.01(3)(a)2. or 3.; s. 787.02(3)(a)2. or 3.; s. 794.011, excluding s. 794.011(10); s. 800.04; or s. 847.0135(5), the subtotal sentence points are multiplied by 2.0.

The plain language of the statute and rule statutory construction lists the qualifying criteria for the Defendant to qualify as:

1. The age of the defendant and victim initially at the time offender committed the primary offense;
2. Primary offense was committed on or after October 1, 2014;
3. Is a violation of 787.01(2) (kidnapping) or 787.02(2) (false imprisonment) if the violation involved a minor "and" in the course of committing that violation; and
4. The defendant committed … lewd act under s. 800.04.

… the sub-total sentence points are multiplied by 2.0.

The Defendant did not commit the third element (kidnapping or false imprisonment) of the qualifying violation nor was in the course of committing either one of the qualifying violations when he was alleged to have committed the

charged offense of Lewd and Lascivious Battery. Counsel further prejudiced the Defendant to a full and fair sentencing proceeding and due process because the Defendant was sentenced with an incorrect scoresheet which allowed the State to misapply the law when they prepared the scoresheet without objection. (See Rule 3.704(d)(1), Fla.R.Crim.P.) The prosecution must prepare the scoresheet and present them to the Defense Counsel for review as to accuracy. Counsel involuntarily waived the discretion of the Court to sentence the Defendant under a correct scoresheet with a lower permissible sentence of 8.56 years in prison. This was the correct calculation absent the multiplier.

ISSUE TWO

TRIAL ERROR

TRIAL ERROR/ABUSE OF DISCRETION

There are factors as to spontaneous of the statement for safeguards of reliability in a child statement. The State made the Court think that the victim immediately called her mother (T.T. pg. 380, line 5) which is not the truth. The record states the mother, Katina Henderson, testified (see T.T. pg. 166, lines 17-23) that when she was talking with Victim on one phone while Leon Benjamin (stepfather) was engaged in a conversation with the Defendant on another phone which she could hear in the background noise over the phone. Therefore, Victim had already informed the stepfather or they had this already planned. It goes to

show that Victim had already discussed the incident with Leon, and lied when she stated in trial (T.T. pg. 258, lines 5-9) and (Deposition page 28, line 2-18) that she did not tell him because she felt more comfortable telling her mom. The Judge's decision was made under false pretences considering the Judge's statement from the (Hearsay Transcript, page 157, line 2) "The child statement is spontaneous. It's immediately given in time." For a hearsay statement to be admitted under Fla. Stat. §90.803(23), the statement must meet two specific reliability requirements: (1) The source of the information through which the statement was reported must indicate trustworthiness; and (2) (emphasis added) "Timing," content, and circumstance of the statement must reflect that the statement provided sufficient of reliability. The trial court judge must determine whether the hearsay statement is reliable and from a trustworthy source and not let the "State" determine trustworthiness of the victim. A factual analysis test of the victim to determine trustworthiness. Fla. Stat. §90.803(c). Failure to comply with some or all of the notice requirement that will hold the trial court had failed to make the required specific finding of fact where it did not indicate what circumstance it relied upon. But instead indicated that statements were based upon "person experience and intuition." (T.T. pg. 116-118). The Court's factual analysis test consisted of asking the victim what her first and last name and how old are you, what grade are you in, and do you know the difference between lying and telling the truth. The

trial court never asked was she under any pressure from anyone to come in today and say these things or any question to determine had she ever not been honest or asked her some of the questions from off the deposition to determine if she is being consistent and trial court should have made specific findings of fact on the record setting for the reason why the Court determined that the statement was reliable and why the reason indicating lack of reliability were discounted. The first requirement was added to ensure a careful examination of the source. Particularity as in the instant case, the circumstances involve a domestic altercation between the victim's stepfather and Defendant which gave a reason for the victim to be biased to the Defendant.

TRIAL COURT/ABUSE OF DISCRETION

By admitting irrelevant testimony evidence when Katina Henderson (the mother) only testified to a statement that was given to her over the telephone. But limited the testimony of Douglas Benjamin (the grandfather) of relevant evidence that was given to him when he spoke to Victim when she was being interviewed at the Gulf Coast Kid's House. Substantiated evidence must be known to the Court and provide that all relevant evidence is admissible. Fla. Stat. §90.402 (2018). Douglas Benjamin is the father of Leon Benjamin and the grandfather of Victim and was a relevant hearsay witness. By limiting his testimony by the Court constituted bias to the Defendant by refusing to allow him to defend himself. The

Court was informed of the testimonies that Douglas Benjamin was about to testify, knowing the function of the family and was at the home the day of the alleged crime and was at the Gulf Coast Kid's House to show his support to Victim as a grandfather. The prosecution (during a side-bar conference) informed the Court that Douglas Benjamin stated in his deposition that Leon Benjamin (his son) was acting suspiciously and nervously, once Victim entered the room from being interviewed. Leon ran over to her and immediately asked her what did they ask her about him. The prosecution knowing his testimony was vital to the case (see T.T. pg. 327, line 18), also earlier during a side-bar, the prosecution mentioned to the Trail Court Judge before Douglas Benjamin took the witness stand that he was going to testify from his deposition stating (see T.T. pg. 172, line 21). The Trial Court Judge was also informed by the prosecution that Douglas Benjamin said "that he took Victim off to the side and had a conversation with her privately about these allegations and she told him that she was never touched." The Trial Court Judge was aware of this vital information and knew that this information was vital to the Defendant in defending himself and this information was withheld from the jury. Florida law provides that "all relevant evidence is admissible." Fla. Stat. §90.402 (2018). Also, "relevant evidence is evidence tending to prove or disprove a material fact." Fla. Stat. §90.401 (2018). The Trial Court Judge was prejudicial when Douglas Benjamin's testimony was denied and the prosecution's witness,

Katina Henderson's testimony was admitted as relevant evidence. When the Trial Court Judge caught Katina Henderson adding words that were not said in her testimony. (See Hearsay Transcript, pg. 150, line 4-17). She said that Victim told her "he stuck his finger in her vagina." Which was not true; those were her words. Therefore, her testimony was fabricated also. This type of testimony is covered in Fla. Stat. §90.403. If the evidence confuses or misleads the jury of the issues, it is considered irrelevant. Also the Trial Court informs the jury during the closing arguments that the attorneys are allowed to say things that are not evidence of fact. (T.T. pg. 376, line 6). This was the green light that the prosecution needed to say all the things that were not fact and not in evidence to influence the jury decision on comments made that were not true and improper expressions of personal opinion, commenting on facts not in evidence, appealing to the jury's emotion and sympathy.

ABUSE OF DISCRETION/ALLOWING IRRELEVANT EVIDENCE DNA THAT DID NOT MATCH THE DEFENDANT

Per Justice Farmer, in the world of trial evidence, DNA may well be at the top of the chart. It is the single most formidable evidence in proving many sexual offenses. Because of DNA evidence is well and truly laid before the jury, a guilty verdict is all but a downhill slide for a defendant. An abuse of discretion to allow DNA evidence that did not match the Defendant into evidence was very crucial to the Defendant's case. The Defendant's DNA is on file with the Florida

Department of Law Enforcement DNA CORDIS computer files. This means that his DNA is on file just like one's fingerprints. If there is no match between the alleged suspect from the evidence DNA, potential suspect is generally ruled out as the source of the evidence. (*Butler v. State*, 842 So. 2d 817 (Fla. 2003)). Dr. Shannon Elliott, FDLE Crime Lab Analyst, analyzed two (2) swabs collected from Victim external and internal vaginal area and testified that she found no DNA from the swabs; but a trace amount of male DNA was found on another sample collected from Victim's underwear but there was not enough DNA for further testing or to determine who's DNA it was. There were other male members that were present and were not tested for a match; only the Defendant was tested. (*Hyre v. State*, 240 So. 3d 47 (Fla. 2nd DCA 2018). The prosecution failed to test alleged victim's brother that was in bed with her. Therefore, where there was not clear and convincing evidence that the Defendant committed the act (§90.404(2)(b)1, Fla. Stat.) and the evidence should not have been admitted in as relevant evidence due to the fact, like the prosecution did use this evidence in closing argument, to say that the Defendant committed the crime just because DNA evidence was found. This evidence only prejudiced the Defendant.

ISSUE THREE

PROSECUTORIAL MISCONDUCT

The prosecutor is to abide to strict guidelines as to court procedure and should not use any personal prejudice bias tactics to convict a defendant. Their focus should not be about winning the case by any means necessary, but to seek justice and the truth, that the guilty should not escape and the innocent not suffer undue punishment which has been done in this case and is fundamentally unfair and overzealousness and improperly conducted by this prosecutor which is about to be outlined in following argument.

PROSECUTOR SOLICITED COMMENT FROM VENIRE TO DISCREDIT DEFENDANT

The beginning of jury selection, Juror #55, Ms. Stacy White, informed the Court that she is currently employed at Escambia County Jail (T.T. pg. 11, line 1-2). During opening remarks to venire was a solicited question by the prosecutor asking if anyone "knew" her or defense counsel. (T.T. pg. 32, line 15). Immediately afterward, instead of asking the same question if anyone "knew" the Defendant, the prosecutor asked does anyone "recognize" the Defendant (T.T. pg. 33, line 5), which changed the question and the outcome. Immediately, Juror #12, Mr. Brown responded, I think that I know him from jail (T.T. pg. 33, line 16) and Juror #55, Ms. White that works at the Escambia County Jail recognized the

Defendant and several other jurors also. This solicited comment by the prosecution was a miscarriage of justice by tainting the venire.

PROSECUTION VIOLATED THE EQUAL PROTECTION CLAUSE BY DELIBERATELY STRIKING BLACK JURORS AND MALE JURORS

The State's purposeful denial of black and men from sitting on the Defendant's jury trial in the administration of justice violated the equal protection clause of the Fourteenth Amendment. *Swain v. Alabama*, 380 U.S. 203, 204, 13 L.Ed.2d 759, 85 S.Ct. 824 (1964). During selection of the jury, there were two (2) prospective jurors, #13 and #20, (T.T. pg. 91 line 19), that were struck by the prosecution. Defense requested a race neutral reason and noted the jurors were black. State Attorney explained that it was striking Juror #13 because he did not complete the top portion of the questionnaire (T.T. pg. 92-95); which the Defense argued that the prosecution did not give a race neutral reason for the strike. Now for Juror #20 (T.T. pg. 97, line 9), the prosecution struck her because she was a witness for both the State and Defense in a case back in 2003, 15 years ago. The Court accepted the reason as both genuine and race neutral which was not race neutral or was it absent the remarks that Mr. Lyon was illiterate or insinuated that he was when he only said that he had a hard time reading the small print without his glasses. Secondly, Juror #20, Ms. Cheatum (T.T. pg. 97, line 11-16), the State recalling only that she was a black female when referred to. The State only referred to particular jurors as black jurors, the State never insinuated that a certain

juror was Latino or Asian or White; only when she referred to Blacks. She made sure that the judge was aware that particular juror was of African-American descendant (T.T. pg. 91, line 22 and page 97, line 11). The need to protect against bias is particularly pressing in the selection of a jury and is a matter of great public interest because the Equal Protection Clause guarantees criminal defendants that the prosecution will not exclude members of their race or gender from the jury venire on account of race on the false assumption the member of their race as a group are not qualified to serve as a juror. (*Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986)). The very idea of a jury is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine: this is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. In the instant case, the prosecution was able to surgically insert a heterogeneous white male to masquerade the jury that was 7 out of 8 white female jurors not including the prosecution and judge. These charges alleged against the Defendant are violent against females and a child which would be extremely prejudicial against the Defendant. Therefore, having a courtroom of judge, jury, and prosecution of all females is not coincidental but was a matter of prejudice and not wanted the Defendant to have a fighting chance of defending himself which you see throughout these arguments.

The prosecution has a sworn duty to correct testimony he or she knows to be false. *Giglio v. U.S.*, 405 U.S. 150, 154, 31 L.Ed.2d 104, 90 S.Ct. 763 (1972). The presiding prosecutor in the instant case, not only knew of false testimony but manipulated the testimony of the victim to change her original deposition taken at the Gulf Coast Kid's House, 3401 North 12th Avenue, Pensacola, Florida on May 19, 2017 at 10:30 a.m. (Appendix F). The prosecution may strike hard blows, but are not at liberty to strike foul ones. Consequently, improper suggestions, insinuations, and especially assertion of personal knowledge are apt to carry such weight against the accused when they should properly carry none. (Fla.R.Bar. 4-8.4(c); U.S. Const. Amend. XIV; and a Giglio Violation). During the trial recess, the prosecutor approached the bench and informed the Judge that she had acquired some information that the defendant was to shout out that "all his felony convictions were due to driving with suspended license." (T.T. pg. 321, line 11). Which the Defendant admits that this information was only mentioned to his girlfriend on the phone in the Escambia County Jail. The prosecutor would listen to inmate conversation and use the evidence to obtain convictions. The prosecutor did listen to Defendant's conversations with his girlfriend and obtained the plans that he had discussed to have the victim's statements impeached due to inconsistencies in her testimony in the original Deposition and the Trial Transcripts, which is about to be outlined in these statements. "**Coaching the**

Victim" The prosecution, knowing that the Defendant had gathered several inconsistencies in Victim's Deposition, coached the victim to change her original Deposition statement like: (Deposition, pg. 11, line 18; pg. 12, line 6) Victim stated that the Defendant and her uncle Bo was at her house the entire day and did not leave at all until midnight. Now at trial, Victim changed her statement once prosecutor realized that another witness, "Bo," had testified that the Defendant and himself and Leon had left to visit Bo's parents (T.T. pg. 198, line 8). So Victim changed her statement to say: "Yes, they left to go to the store or something." (T.T. pg. 265, line 10-15). **"Inconsistency"** Now, while the Defendant was on the witness stand he was asked: (T.T. pg. 346, line 12) "Did Victim come out of her room at any point?" (Answer) "I think she walked out and went in the kitchen and got something." Now, during re-direct examination (T.T. pg. 364, line 12-18) Victim was asked: "Did you ever get back out of bed to get something from kitchen." Victim answered: "No." Now in Victim's Deposition she stated: (Pg. 26, line 11) "When I woke up, I got up and peeked around the corner and my Uncle Bo was on the couch." Also she said: "After he walked out of the room, I got out of bed." (Pg. 26, line 20). **"Coaching"** During Victim's original Deposition, she stated that she had fallen asleep and her brother and sister was awake when she felt someone touching on her. (Deposition, pg. 19, line 19). Which she also explained that this was not unusual because her brother does it

often when he sleeps with them. (Deposition, pg. 20, line 20) "When he goes to sleep he rubs on us." At this time she never said that "he play in their hair." And she stated that she did not see anyone in the room. (Deposition, pg. 20, line 25; pg. 26, line 1-4). Now, during cross-examination, Katrina Henderson (mother), who was the first person Victim explained her statement to when she called her on the phone (T.T. pg. 178, lines 11-21), Victim says she felt a hand on her belly; it went down the front of her pajamas into her private area; all at one time; not two separate events. Now after going to the Gulf Coast Kid's House and explaining her testimony to the CPT Counsel (Ms. McCreary), her story has changed to two separate events. (T.T. pg. 248, line 2 through pg. 250, line 13). Now in this testimony, Victim states that she did not see anyone and no one was in the room and she really thought it was her little brother who had rubbed on her which he always does. It leaves room to think that someone suggested to her that her Uncle Mike was the one who had rubbed her stomach and made her think that there was two separate incidents. **"Coaching"** (T.T. pg. 250, line 13) She stated when you felt the hand inside of her private area, she woke up. Now when Victim was asked did the person's hand touch your private part in the front or the back? Victim answered: "The front" in her Deposition, pg. 22, line 14-16. When asked during trial: "When the hand touched your private part area, did it come from the front of your pajamas?" Victim answered: "I don't remember." (T.T. pg. 269, lines 14-16).

There are some situations here that you can't help but believe that someone is telling Victim what to say like this: (T.T. pg. 269, line 4) Question: I think you said you went to sleep. Do you have any idea how long you were asleep? Answer: 5 or 10 minutes. Question: Now, have you ever said before that you weren't sure that you didn't know how long you were asleep? Answer: Yes, I think so. Question: But today even though you said that before, what you are saying today is, you think it was 5 minutes. Answer: Yes.

Now, four (4) months earlier, Victim said in her Deposition with the same identical questions, (Deposition, pg. 21, line 10): "I think you said you went back to sleep." Answer: "Yes." Question: "Then at some point you woke up later?" Answer: "Yes." Question: "Do you have any idea how much later?" Answer: "I don't really know. It was somewhere around 11:30" Question: "Do you have any idea what time it was you woke up the first time." Answer: "No."

Now, during the Gulf Coast Kid's House visit, the following morning of the alleged incident, a forensic interview was conducted was Victim (T.T. pg. 212, line 9) there was an Escambia County Sheriff Investigator, Heather Kinnard, present and was part of this case as an observer consultant at the Kid's House (T.T. pg. 210, line 23). It was during this interview that Investigator Kinnard observing, the victim from another room, stated in her official report that the Defendant touched the inside of her vagina with his hand, to obtain an arrest warrant report (Appendix

F). Not once in the forensic interview at the Gulf Coast Kid's House did the alleged victim say that the inside of her vagina was touched. And when she was referring to her private area, she would say (T.T. pg. 249, line 25 through pg. 250 line 10) hand inside my drawers, and when you say private area, you use it to go to the bathroom and pee. This description is not her vaginal canal. This is a description of the urethra canal which refuted the elements of Lewd and Lascivious Battery which require the penetration of the vaginal canal. Therefore, Inspector Kinnard falsified the police warrant and the prosecution was aware of the information. The improper application of these actions was not harmless. The prejudicial nature of these statements outweighed their probative value. Therefore, this is a *Giglio* violation

PROSECUTORIAL MISCONDUCT/CLOSING ARGUMENT/FACTS NOT IN EVIDENCE

As was said earlier, the prosecution is to abide to strict guidelines as to court procedure and should not use any personal prejudice, overzealous bias tactic to convict a defendant especially in the presence of the jury which this prosecutor did when she commented about the alleged victim being digitally penetrated. (T.T. pg. 405, lines 8-9). There was no evidence or even the mention of evidence about being penetrated; during closing remarks these was consider to be evidence (T.T. pg. 387, lines 11-18) insinuating the Defendant had too much to drink as to the cause of this crime. There was no evidence to the fact that anyone had too much to

drink. Also during closing remarks, the prosecutor inappropriately insinuated that the DNA collected proves that the Defendant had touched the victim (T.T. pg. 382, lines 23 through pg. 383, line 1) and from Dr. Elliott's testimony, she stated from (T.T. pg. 307, line 14-16) there was no male quantifiable DNA there. So by her protocols, analysis was stopped on that sample. She also stated the exterior swabs indicated a trace of male DNA and could have come from a male brother sleeping in the same bed with the victim. As for the instant case, the victim stated that her brother and sister were all in the same bed the night of the alleged incident. (T.T. pg. 244, line 21-22). Once again, the prosecution prejudiced the Defendant. The *Giglio* violation states: (1) That the State possessed evidence favorable to the Defendant; prosecutor knew that the victim said that she was not saying that she was digitally penetrated. (2) The evidence was suppressed; yes, prosecutor knew and still filed charge of digital penetration. (3) That he did not possess the favorable evidence; this information was not given to the Defendant until after he was convicted.

PROSECUTORIAL MISCONDUCT / SUBMITTING ERRONEOUS SCORESHEET

The prosecution's use of the adult-on-minor offense multiplier to enhance the Defendant's scoresheet. The Defendant's sub-total points on the scoresheet were 165.0. However, that score was doubled due to adult-on-minor multiplier. The prosecution requested that Defendant be sentenced to the LPS of 226.5 months

in prison (Sentencing, pg. 38-40, Appendix E), but Appellate Counsel stated that Fla. Stat. §921.0024(1)(b) does not allow sentencing beyond the statutory maximum for a primary offense, which was 15 years, but the multiplier was not removed to reflect a correct scoresheet. Also this violated the Defendant's right to a full and fair sentencing proceeding and due process. Fla. Stat. §921.0024(1)(b) (2016). (Adult-on-minor multiplier) in pertinent part, set forth the following criteria for application:

> Adult-on-minor sex offense: If the offender was 18 years of age or older and the victim was younger than 18 years of age at the time the offender committed the primary offense, and if the primary offense was an offense committed on or after October 1, 2014, and is a violation of s. 787.01(2) or s. 787.02(2), if the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed a sexual battery under chapter 794 or a lewd act under s. 800.04 or s. 847.0135(5) against the minor; s. 787.01(3)(a)2. or 3.; s. 787.02(3)(a)2. or 3.; s. 794.011, excluding s. 794.011(10); s. 800.04; or s. 847.0135(5), the subtotal sentence points are multiplied by 2.0.

But the Defendant did not commit either one of the qualifying violations, §787.01(2) or §787.02(2), kidnapping or false imprisonment nor was he in the course of committing either one. Note that this prejudiced Defendant and his sentencing proceeding, waiving the discretion of the Court to sentence the Defendant under a correct scoresheet with a LPS of 8.56 years in prison instead of the 15 years Defendant received. Fla.R.Crim.P. 3.704(d)(1). The office of the prosecuting attorney must prepare a correct scoresheet and present them to the

defense for review. The incorrect scoresheet deprived the Defendant from receiving a lowest permissive score of 8.56 years.

REASONS FOR GRANTING THE PETITION

The Defendant did not have a fighting chance at winning this case due to the fact that there was no one in the Courtroom allowing the Defendant to defend himself. Defense Counsel threw the Defendant out to the wolves by making boilerplate Motion of Judgment of Acquittal without setting forth the specific ground upon which the motion was based, and the judge outrageously biased by limiting the defense witness testimony, and the prosecution stacking the jury pool with all white female jurors, coaching the victim, commenting on facts not in evidence at closing argument and submitting erroneous scoresheet to penalize the Defendant to the fullest. These are the reasons why the Court should grant this motion. The United States Constitution guarantees that a defendant should have a fair trial by a jury of his peers and able to present relevant evidence to defend before a jury of a cross-section of his community. Our criminal justice system requires not only freedom from discrimination but Lady Liberty is blindfolded and holding those scale that should be balanced equally.

CONCLUSION

There cannot be equal justice where the kind of trial a defendant gets depends on the money he has. The Defendant understands that the Florida judicial system have their own Florida Constitution and apply it accordingly to their own standards. But Defendant prays that the United States Supreme Court of this great country applies our Constitution to the way our founding fathers wrote it to be. And that an indigent defendant shall have effective assistance of counsel and receive due process of law according to Amendment Six and Fourteen.

Due to an accumulation of plain errors from the face of the record, render the Defendant helpless of a fair trial and find that this Writ of Certiorari should be granted.