NO. 20-6982

IN THE

SUPREME COURT OF THE UNITED STATES

MISTY ROSE WEED - PETITIONER

v.

STATE OF FLORIDA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIRST DISTRICT COURT OF APPEALS

AMENDED PETITION FOR WRIT OF CERTIORARI

MISTY ROSE WEED, DC#G14060
Homestead Correctional Institution
19000 S.W. 377th Street
Florida City, Florida 33034

QUESTIONS PRESENTED

I. DID THE FIRST DISTRICT COURT OF APPEAL CREATE A MANIFEST INJUSTICE WHEN IT EXPRESSLY AND DIRECTLY RULED IN CONFLICT WITH DECISIONS OF FELLOW DISTRICT COURT OF APPEAL'S ON THE SAME QUESTION OF LAW, VIOLATING THE PETITIONER'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS?

II. DID TRIAL COURT CREATE A MANIFEST INJUSTICE BY ABUSING ITS DISCRETION IN FAILING TO APPOINT CONFLICT FREE COUNSEL PRIOR TO SENTENCING AND BY DISMISSING THE PETITIONER'S MOTION TO WITHDRAW HER PLEA WITHOUT A HEARING, VIOLATING THE PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS?

III. DID COUNSEL'S INEFFECTIVE PERFORMANCE PREJUDICE THE PETITIONER BY LEADING HER TO BELIEVE SHE WOULD NOT RECEIVE A SENTENCE OVER FIVE (5) YEARS; BY FAILING TO ARGUE THE COMBINED TIME SERVED IN RELATION TO THE NEW SENTENCE WOULD EXCEED STATUTORY MAXIMUM; AND BY FAILING TO ARGUE TRIAL COURT LACKED AUTHORITY TO RE-SENTENCE; THUS, VIOLATING THE PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS?

LIST OF PARTIES

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

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district of appeals appears at Appendix ____ to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix ____ to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the **First District Court of Appeal** appears at **Appendix A1** to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was _____.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

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

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

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

The date on which the highest state court decided my case was **July 23, 2020**. A copy of that decision is appears at **Appendix A1**.

[x] A timely petition for rehearing was thereafter denied on the following date: **September 10, 2020**, and a copy of the order denying rehearing appears at **Appendix A2**.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT FIVE -
An individual's right to protection against double jeopardy.

UNITED STATES CONSTITUTION AMENDMENT SIX -
An individual's right to assistance of counsel.

UNITED STATES CONSTITUTION AMENDMENT EIGHT -
An individual's right from cruel and punishment.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN -
An individual's right to due process of law.

STATEMENT OF CASE

On November 16, 2006, the Petitioner was convicted of Robbery, and subsequently sentenced to a "probationary split sentence" of ten (10) years, with four (4) years to be served in the Florida Department of Corrections and the remaining six (6) years on probation (Appendix J).

After serving the four (4) years of incarceration, the Petitioner was released and commenced her probationary period. However, in June of 2010, the Petitioner violated her probation with a technical violation, and as a result was arrested on July 20, 2010 for said violation. On August 24, 2010, the Petitioner's original probationary split sentence was modified to a "true-split sentence" when the Honorable Judge Peter K. Sieg modified the next two (2) years of the Petitioner's probation to reflect community control with electronic monitoring, while suspending and staying the remaining period of her probation which would be reduced by the period of time spent on community control (Appendix I).

In February of 2015, the Petitioner once again violated her probation with a technical violation, and was duly arrested on March 2, 2015 as a result. On March 17, 2015, the Honorable Judge Mark Moseley resentenced the Petitioner to additional two (2) years drug offender probation (Appendix G).

The Petitioner violated her probation for a third time by technical violation in May of 2015, and was arrested June 2, 2016. On August 16, 2016, the Petitioner was yet again resentenced to fifteen (15) years in the Florida Department of Corrections (Appendix F).

The Petitioner filed a direct appeal which was per curium affirmed on July 12, 2017, with mandate issued August 9, 2017 (Appendix C).

On August 9, 2019, the Petitioner filed a Motion for Post Conviction Relief, pursuant to Florida Rules of Criminal Procedure 3.850, and an Amended Motion for Post Conviction Relief on September 10, 2019. This motion was later denied by the lower court, the Eighth Judicial Circuit, in and for Baker County, Florida, on November 14, 2019 (Appendix B).

The Petitioner filed an appeal on the denial of her Motion for Post Conviction Relief with the First District Court of Appeal, which per curium affirmed its' decision on July 23, 2020 (Appendix A1).

The Petitioner filed a Motion for Rehearing and Written Opinion on August 7, 2020 which is the subject of this foregoing petition. The First District Court of Appeal denied rehearing on September 10, 2020 (Appendix A2).

A Petition for Writ of Certiorari was originally filed December 9, 2020, and was returned to the Petitioner for failure

to attach the decision of the United States Court of Appeals or the highest state court of whose opinion is being reviewed. The Petitioner herein files an Amended Petition for Writ of Certiorari with the attached decision designated as Appendix A1.

This Amended Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

The Petitioner avers she was denied her constitutional right to due process of law, effective assistance of counsel, and the right to be free from double jeopardy. The State courts have failed to grant the Petitioner just relief. The Honorable Court should issue a Writ of Certiorari where her questions concern matters in which the First District Court of Appeal is in conflict with other Florida District Court of Appeal courts. The questions are asserted as follows:

I. DID THE FIRST DISTRICT COURT OF APPEAL CREATE A MANIFEST INJUSTICE WHEN IT EXPRESSLY AND DIRECTLY RULED IN CONFLICT WITH DECISIONS OF FELLOW DISTRICT COURT OF APPEAL'S ON THE SAME QUESTION OF LAW, VIOLATING THE PETITIONER'S FIFTH AND EIGHTH AMENDMENT RIGHTS?

On November 16, 2006, the Petitioner entered into a negotiated plea agreement where all parties agreed upon a sentencing cap of ten (10) years for the charge of Robbery. The Petitioner was in turn sentenced to ten (10) years. However, the sentence was broken down further to include the first four (4) of those years to be spent incarcerated with the remaining

six (6) years on probation. Thus, the Petitioner was sentenced to a "probationary split sentence" or a sentence consisting of a period of confinement, none of which suspended, followed by a period of probation. The Petitioner contends that the imposition of this sentence was both valid and legal.

Upon completion of the confinement term of her sentence, the Petitioner was released to begin serving her probation. She was arrested for a technical violation in July of 2010, and the record indicates that on August 24, 2010, pursuant to another negotiated plea. Per this agreement, the Court **modified** the Petitioner's original probationary split sentence to include the next two (2) years of the Petitioner's probation to reflect community control with electronic monitoring, while also suspending and staying the remaining period of her probation which would be reduced by the period of time spent on community control per transcript as follows.

MS. JOHNSON:	Yes, sir. We have no objection to the Court revoking and resentencing Ms. Weed if that's what the Court needs to do.
THE COURT:	I don't think it will necessary to do that. I can just place you on community control for the next two years.
MS. JOHNSON:	Yes, sir.
THE COURT:	With electronic monitoring. And then modify your present probation -- it will be sort of suspended or stayed. And then once the community control is up, your remaining period of probation will be reduced by the period of time

you're on community control. So your termination date will stay the same.

[Appendix H; See transcript 8/9, lines 21-25, lines 1-12]

By the words "suspended or stayed", the Court effectively modified the Petitioner's original probationary split sentence to a "true split sentence". This resulted in another valid and legal sentence where Florida Statutes § 948.06(1) permits a sentencing judge to impose any sentence he or she originally might have imposed upon a violation of probation when the original sentence is either a probationary split sentence, a *Villery* sentence, or straight probation. However, once a defendant has been sentenced in accordance with a true split sentence a sentencing judge legally cannot impose another sentence upon a violation of probation because to do so would violate double jeopardy.

The Petitioner violated her true split sentence in February of 2015 with a technical violation, and was arrested as a result. On March 17, 2015, the Honorable Judge Mark Moseley resentenced the Petitioner to additional two (2) years drug offender probation. Furthermore, the Petitioner violated her probation once again by technical violation in May of 2015; and on August 16, 2016, the Petitioner was yet again resentenced, this time to fifteen (15) years in the Florida Department of Corrections. The Petitioner contends that both the March 2015 and August 2016 resentencing was illegal, where her Fifth

Amendment right to protection from double jeopardy and her Fourteenth Amendment right to due process were violated.

A court may not increase a "legal" sentence once the defendant has begun to serve the sentence, **Evans v. State**, 675 So. 2d 1012 (Fla. 4th DCA 1996). In **Ashley v. State**, 850 So. 2d 1265 (Fla. 2003), the Florida Supreme Court held that: "Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles. To do so is a clear violation of the Double Jeopardy Clause, which prohibits multiple punishments for the same offense."

The only time a defendant can constitutionally be sentenced a second time for the "same offense" is only after a prior invalid sentenced has been vacated and set aside, **N.C. v. Pearce**, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed 2d 656 (1969); **Roberson v. State**, 258 So. 2d 257 (Fla. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 112, 34 L. Ed. 2d 141 (1972). This was not the instant in the Petitioner's case, where the imposition of the true split sentence was definitely legal.

In **Poore v. State**, 503 So. 2d 1282 (Fla. 5th DCA 1987), the defendant was originally sentenced to a term of four and one-half (4 1/2) years confinement. The sentence provided that after completion of two and one-half (2 1/2) years incarceration, the defendant would be released from

incarceration and placed on probation for the remaining period of two (2) years. After commencing his probationary period, Poore violated his probation and elected to be sentenced under the sentencing guidelines. On appeal, the Fifth District Court of Appeal found that the original sentence imposed on the defendant was a true split sentence. The District Court ruled that the trial court needed only to direct the clerk to issue a new uniform commitment form and to deliver it, together with a certified copy of the probation violation adjudication, and of the original judgment and sentence, to the sheriff:

> **In a split sentence case only one valid sentence is ever imposed. It is for incarceration; it is imposed at the original sentence hearing; and it is for a specific total period or term of incarceration that a defendant will, under any turn of events, ever have to lawfully serve in confinement for the offense for which he is being sentenced. However, instead of leaving the sentence to be executed and served in one continuous unbroken period of time, as in the usual sentence of confinement, in a split sentence, at the original sentencing a sentencing court goes further and provides that after the defendant has completed actual service of some specified portion of the total specified term of confinement, the execution and actual service of the remainder of the total specific sentence of confinement already imposed is *stayed and withheld* and it is directed that the defendant then be released from actual confinement and placed on probation or in a community control program...However, *if after the defendant has served the initial specified portion of his sentence of confinement and has been released on probation or community control and violates a condition of such probation or community control, the trial court merely finds and adjudicates the***

> ***fact that the probation or community control has been violated and recommits the defendant to confinement to serve the remainder of the sentence originally imposed. The trial judge does not resentence the defendant or impose a new, or second, or different, sentence at all.*** **When the defendant violates a condition of probation or community control which is part of a split sentence, that violation is not the basis for an original sentencing, as it is when a defendant is originally placed on probation or community control in lieu of confinement. The subsequent violation of probation or community control in a split sentence serves only to eliminate the condition under which defendant was released from confinement under the original sentence and the defendant is not resentenced but is recommitted to the Department of Corrections for service of the remainder of that original sentence. (Emphases added)**

The Fifth District Court of Appeal was explicit in their ruling of **Poore** that: "There is no authority or necessity to impose a second sentence following a valid prior split sentence for the same conviction or offense and to do so invites serious constitutional double jeopardy and due process problems."

Nevertheless, the District Court's decision was placed before the Florida Supreme Court upon application for review where it was in direct conflict with another decision, **Poore v. State**, 531 So. 2d 161 (Fla. 1988). The Court addressed basic sentencing alternatives as:

> **(1) a period of confinement; (2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement suspended and the defendant placed on probation for that suspended portion; (3) a "probationary split sentence" consisting of a period of**

confinement, none of which is suspended, followed by a period of probation; (4) a *Villery* sentence, consisting of a period of probation preceded by a period of confinement imposed as a special condition; and (5) straight probation.

In conclusion, the district court's decision was affirmed where it revoked the petitioner's sentence because in a true split sentence only the remainder of the original sentence could be imposed upon the finding of a probation violation, stating: **"A defendant sentenced to a true split sentence, incarceration with the remainder of the sentence suspended while defendant was on probation, could only be sentenced to serve the remainder of the sentence for a probation violation."**

Similarly, the Petitioner's case mirrors **Poore** in the following respects:

a) Like Poore, the Petitioner was serving a legal true split sentence at the time of her first probation violation in 2015;

b) Upon violating his true split sentence, Poore was re-sentenced under sentencing guidelines, whereas the Petitioner was re-sentenced to two (2) additional years drug offender probation (2015 violation) and upon violating a second time (2016 violation) was re-sentenced to fifteen (15) years imprisonment.

c) Double jeopardy attached in both cases when the court resentenced both Poore and the Petitioner to any other sentence

besides recommitment for the suspended portion of the original true split sentence.

The Petitioner avers that there is no question as to the legality of the court modifying her original 2006 probationary split sentence of ten (10) years to the agreed upon true split sentence it imposed in 2010. However, the court had no discretion legally to keep continuously re-sentencing the Petitioner in what amounts to multiple double jeopardy violations. In **Johnson v. State**, 574 So. 2d 222 (Fla. 5th 1991), the court held:

> **A defendant cannot be constitutionally resentenced after a violation of probation in a true split sentence...The double jeopardy clause of the federal constitution applies to the imposition of sentence as well as the determination of guilt and prohibits the imposition of a second or subsequent sentence after imposition of a valid sentence as to "the same offense." Once a defendant has commenced the service of a valid sentence the court cannot, constitutionally, again sentence him for "the same offense", or make the original sentence more onerous.**

That being said, the Petitioner's subsequent 2015 and 2016 re-sentences violated the double jeopardy clause due to the Petitioner having already commenced the original sentence and the subsequent sentences were imposed for the same offense.

Furthermore, the Petitioner's sentence was capped at ten (10) years per the original 2006 plea agreement. When the court modified the original probationary split sentence to show as a

true split sentence, the judge stated he was simply going to modify the present probation she was already serving to reflect suspended or stayed with termination date staying the same; thereby, allowing for the maintaining of the agreed upon ten (10) year cap. Yet, the Petitioner has been deprived of any reasonable expectation of finality of the original sentence.

The Petitioner's total sentence was ten years, or 3652 days. She served 1207 days on her initial four (4) year prison sentence, served 318 days of jail time credit in connection with both violations of probation, completed 2056 days probation and community control, and at the time of filing the instant petitioner has served another 1695 days since returning to the Department of Corrections. That totals 5276 days, or 1624 days (nearly 4 1/2 years) more than her sentence should legally be had she been recommitted to Florida Department of Corrections upon her 2015 probation violation. The Petitioner has already served more than her sentence which was contemplated by the 2010 negotiated plea agreement, and is entitled to immediate release.

In conclusion, the Petitioner has suffered a grave miscarriage of justice and her rights to be free of double jeopardy and right to enjoy due process are being evidently violated.

The Petitioner deserves just relief in this cause.

II. DID TRIAL COURT CREATE A MANIFEST INJUSTICE BY ABUSING ITS DISCRETION IN FAILING TO APPOINT CONFLICT FREE COUNSEL PRIOR TO SENTENCING AND BY DISMISSING THE PETITIONER'S MOTION TO WITHDRAW HER PLEA WITHOUT A HEARING, VIOLATING THE PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS?

"An abuse of discretion occurs if the district court applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous," **United States v. Crawford**, 2020 U.S. App. LEXIS 4770 (11th Cir. 2020). The Petitioner contends that the trial court abused its' discretion on two grounds: 1) by not appointing her conflict free counsel prior to her 2015 and 2016 re-sentencings; and, 2) by dismissing her motion to withdraw her 2016 plea without a hearing.

The Sixth Amendment of the United States Constitution allows a criminal defendant the right to the effective assistance of trial counsel; this right includes having counsel whose work is not hampered by a conflict of interest, **United States v. Williams**, 2020 U.S. App. LEXIS 5181 (11th Cir. 2020).

On November 23, 2004, when the Petitioner was charged with the original offenses, she was appointed representation by the Baker County Public Defender's Office, specifically John Maguire. However, due to the existence of her co-defendant who was simultaneously being represented by the same public defender's office, the Petitioner was appointed a conflict

attorney, Maria Rogers. Rogers continued to represent the Petitioner until October 3, 2005 when George Nelson (herein "Nelson"), another conflict attorney, was appointed. Nelson was the Petitioner's attorney at the time of her 2006 sentencing on November 16, 2006 when she received the ten (10) year probationary split sentence.

Upon her probation violation in 2010, the Petitioner was again appointed Nelson; however, by this time, Nelson was no longer slated as conflict counsel but rather worked for the Baker County Public Defender's Office. When the Petitioner's probationary split sentence was modified to that of a true split sentence, Nelson's co-counsel, another public defender out of the same office and by the name of Julie Johnson, represented the Petitioner due to Nelson himself having prior engagements.

Furthermore, when the Petitioner violated her true split sentence in 2015 and 2016, the trial court once again appointed Nelson to represent her on both occasions, even though he was still working as a public defender in the county office.

Upon her arrest in Duval County in June 2016 and awaiting transportation to Baker County, the Petitioner wrote Julie Johnson (herein "Johnson"), Nelson's co-counsel who represented her at the 2010 sentencing; however, Johnson wrote the Petitioner back stating it would be in conflict for Johnson to

advise the Petitioner as she was co-counsel for Nelson, who was already representing the Petitioner.

The Petitioner avers she should have been afforded conflict free counsel upon her 2010, 2015 and 2016 probation violations where a conflict still remained opposed to simply being reassigned the same attorney who represented her in 2006. This Honorable Court held in **United States v. Almeida**, 341 F.3d 1318, 1323 (11th Cir. 2003):

> **The Sixth Amendment right to have the effective assistance of counsel encompasses the right to have counsel untainted by conflicts of interest...In deciding whether the actual or potential conflict warrants disqualification, we examine whether the subject matter of the first representation is substantially related to that of the second, in order to determine whether the potential defense counsel has "divided loyalties that prevent him from effectively representing the defendant.**

Additionally, the Eleventh Circuit has stated: "The rule of law in this circuit is (and will continue to be) that once the former client proves that the subject matters of the present and prior representations are 'substantially related,' the court will irrebutably presume that relevant confidential information was disclosed during the former period of representation," **Freund v. Butterworth**, 165 F.3d 839, 859 (11th Cir. 1999).

In the instant case, the Petitioner was originally appointed conflict counsel in 2006 strictly because her co-defendant was too represented by the public defender's office.

When she subsequently violated in 2010, 2015 and 2016, the violations were still in regard to the original charges and sentence, and Nelson was working as a public defender whose office represented the Petitioner's co-defendant. Therefore, actual conflict still existed and warranted disqualification where the subject matter of the 2006 representation substantially related to the succeeding representations, as in accordance with **United States v. Almeida**.

In **State v. Dougan**, 202 So. 3d 363, 384 (Fla. 2016), the Court ruled: "Claims of an attorney's conflict of interest are a subset of ineffective assistance of counsel claims under Strickland because the [Sixth Amendment] right to effective assistance of counsel encompasses the right to representation free from actual conflict." **Cuyler v. Sullivan**, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) established the standard of review that applies to Strickland claims based upon an alleged conflict of counsel as such:

> **[I]n order to establish an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance"...A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests"...To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised.**

However, the United States Supreme Court has long agreed that "unlike a standard claim of ineffective assistance of counsel which requires proving both deficient performance and prejudice under *Strickland's* reasonable probability standard [o]nce a defendant satisfies the *Cuyler* test [by proving an actual conflict exists], prejudice is presumed and the defendant is entitled to relief," **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; **Cuyler**, 446 U.S. at 349-50.

The Petitioner is entitled to relief where Nelson's actual conflict of interest adversely affected his performance, thereby violating the Sixth Amendment of the United States Constitution, **Larzelere v. State**, 676 So. 2d 394, 403 (Fla. 1996).

Nelson cannot claim ignorance as he himself represented her at the original 2006 sentencing, knew his continuous representation to her as a public defender was unethical and in conflict (if any public defender could not represent her at the original sentencing why would they be able at subsequent sentencing imposed on the same case), and knew she has a right to conflict free counsel where she'd been awarded in previous proceedings relating to the case. The Petitioner's argument is only assisted by the fact that her attempted correspondence with Johnson in 2016 proved fruitless where Johnson herself said to speak with the Petitioner would be in conflict where the

Petitioner was already being represented by Johnson's co-counsel, Nelson.

"An actual conflict of interest can impair the performance of a lawyer and ultimately result in a finding that the defendant did not receive the effective assistance of counsel...the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the defendant's right to the effective assistance of counsel or appoint separate counsel," **Rutledge v. State**, 150 So. 3d 830 (Fla. 4th DCA 2014). The Court was fully aware of a conflict between that of the Petitioner and the Public Defender's Office due to the fact it had previously appointed her conflict counsel and was therefore enclosed in the record.

In addition, the Petitioner contends the trial court abused its discretion when it dismissed the Petitioner's motion to withdraw her 2016 plea without a hearing. The denial of a motion to withdraw plea is reviewed under the abuse of discretion standard, **Griffin v. State**, 114 So. 3d 890 (2013); **White v. State**, 15 So. 3d 833, 835 (Fla. 2nd DCA 2009); **State v. Wiita**, 744 So. 2d 1232, 1234 (Fla. 4th DCA 1999).

When a defendant files a motion to withdraw a plea post-sentencing, they have the burden of proving that a manifest injustice occurred, **LeDuc v. State**, 415 So. 2d 721, 722 (Fla.

1982); **Wiita**; **Hamil v. State**, 106 So. 3d 495, 497 (Fla. 4th DCA 2013); **Woodly v. State**, 937 So. 2d 193, 196 (Fla. 4th DCA 2006).

On August 16, 2016, the Petitioner entered an open plea of guilty to violation of probation. After a disposition hearing, the trial court revoked Petitioner's probation and resentenced her to fifteen (15) years imprisonment in the Department of Corrections. Nelson, the Petitioner's attorney at sentencing, filed a Motion to Withdraw Plea on August 25, 2016, which was later denied on August 29, 2016. In denying the motion, the trial court also discharged the Office of the Public Defender from any further representation due to an existing conflict.

The Petitioner filed her own facially sufficient and timely pro se Motion to Withdraw Plea on September 8, 2016, submitting that defense counsel was dismissed post sentence by the sentencing judge due to a conflict of interest as grounds to support her motion. Since the Petitioner has a right to conflict free counsel as granted her by the Sixth Amendment and the fact the trial court had already acknowledged a conflict existed, the Petitioner proved that a manifest injustice had indeed occurred and withdrawal of the plea was only necessary to correct this injustice. However, no evidentiary hearing was ordered and the Petitioner's Motion to Withdraw Plea was summarily denied by the trial court.

While Florida Rule of Criminal Procedure 3.170(*l*) does not require a trial court to hold an evidentiary hearing, in **Simeton v. State**, 734 So. 2d 446, 447 (Fla. 4th DCA 1999), the court ruled that: "due process requires a hearing unless the record conclusively shows the defendant is entitled to no relief."

The Petitioner contends that the trial court abused its discretion where as the trial court had previously conceded a conflict existed she was entitled to relief.

Furthermore, according to Florida Rules of Appellate Procedure 9.140(b)(2)(A)(ii), a defendant who pleads guilty or nolo contendere may motion to withdraw a plea after sentencing if: "**a. the lower tribunal's lack of subject matter jurisdiction; b. a violation of the plea agreement, if preserved by a motion to withdraw plea; c. an involuntary plea, if preserved by a motion to withdraw plea; d. a sentencing error, if preserved; or, e. as otherwise provided by law.**" As discussed in Ground I of the instant petition, the Petitioner was serving a true split sentence as of 2010; and, therefore, upon her 2015 and 2016 violations the only recourse the trial court had was to recommit her to the Department of Corrections for the remainder of her probation minus time already served. The trial court lacked jurisdiction and authority to re-sentence the Petitioner, and her plea should have been withdrawn because of the sentences legality alone. The Petitioner should have

been afforded conflict free counsel where sentencing counsel's effectiveness was in question to even allow the Petitioner to plea to an illegal sentence, and allow conflict-free counsel an opportunity to file an amended motion, as was the case in **Ingraham v. State**, 248 So. 3d 153 (Fla. 4th DCA 2018).

The Petitioner deserves just relief in this cause.

III. DID COUNSEL'S INEFFECTIVE PERFORMANCE PREJUDICE THE PETITIONER BY LEADING HER TO BELIEVE SHE WOULD NOT RECEIVE A SENTENCE OVER FIVE (5) YEARS; BY FAILING TO ARGUE THE COMBINED TIME SERVED IN RELATION TO THE NEW SENTENCE WOULD EXCEED STATUTORY MAXIMUM; AND BY FAILING TO ARGUE TRIAL COURT LACKED AUTHORITY TO RE-SENTENCE; THUS, VIOLATING THE PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS?

With the Supreme Court's decision in **Strickland**, a two-part test was established to measure the effective assistance of defense counsel as:

> **(1) that counsel's performance was deficient, which requires a showing that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and, (2) that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable...The benchmark for judging any claim of the effectiveness of counsel is whether 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 Petitioner avers that counsel was ineffective in three (3) aspects by: 1) leading her to believe that her open plea on

August 16, 2016 would not result in a sentence over five (5) years; 2) failing to argue that the fifteen (15) year sentence imposed would exceed statutory maximum once her combined jail, prison and probationary time served was credited; and, 3) failing to argue the trial court lacked jurisdiction and authority to re-sentence in 2015 and 2016.

It has long since been the Petitioner's argument that she was serving a valid and legal true split sentence as of her 2010 sentencing. In **Morency v. State**, 994 So. 2d 386 (Fla. 3rd DCA 2008), it was decided that the logic behind the Courts rationale in **Poore** was that:

> **In a true split sentence, the judge has sentenced in advance for the contingency of a probation violation, and will not be permitted to later change his or her mind on the question. In essence, the occurrence of a violation was a fact that the original sentencing court had already considered; therefore, resentencing a defendant who had already received a "true split sentence" would violate double jeopardy by sentencing him twice based on the same underlying facts.**

The Petitioner's 2015 sentence resulted from an open plea of an additional two (2) years drug offender probation; whereas, her 2016 sentence resulted in another open plea, this time to fifteen (15) years' incarceration. Both open pleas were at the advice of George Nelson, the Petitioner's public defender. The Petitioner believed this to be true because of the ten (10) years cap agreed upon at her 2006 sentencing. Nelson erred in

advising the Petitioner to open plea where to do so violated her right against double jeopardy which resulted in two (2) illegal sentences. It has been found that "counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render adequate legal assistance," **Strickland**. Nelson was ineffective in his representation where he provided no kind of legal assistance to the Petitioner in allowing her to be illegally re-sentenced.

At her 2016 re-sentencing, the Petitioner was awarded credit for time served while incarcerated, a total of 3220 days. However, she was not awarded for any time she served while on probation and community control even though the law is clear that:

> **Where the defendant originally receives a split sentence of prison time and probation, and then is sentenced to community control following a revocation of probation, a court must take into account all time previously served in prison and on probation, so that the total term of probation, community control and jail time imposed does not exceed the statutory maximum,** **Gardner v. State**, 670 So. 2d 1185 (Fla. 5th DCA 1996).

Upon her 2016 sentencing, the Petitioner had a total of 2056 days served on probation and community control. As of sentencing, this time combined with previous time served while incarcerated, totaled 3581 days. To date, the Petitioner has served 5276 days inclusive of incarceration, probation and

community control. 5276 days is approximately fourteen (14) years and six (6) months.

Yet, Florida Statutes § 775.082(3)(d) only allows for the statutory maximum for Robbery, the underlying offense and a second-degree felony, is fifteen (15) years. However, when imposing the new fifteen (15) year sentence, the court failed to take into account and credit her prison sentence with the time the Petitioner had already served, resulting in a sentence exceeding the statutory maximum in violation of **Waters v. State**, 662 So. 2d 332 (Fla. 1995) and **State v. Summers**, 642 So. 2d 742 (Fla. 1994).

Furthermore, trial court lacked the jurisdiction and authority to sanction the fifteen (15) year sentence. As the Petitioner has argued, she was serving a valid true split sentence. In **Eldridge v. Moore**, 760 So. 2d 888 (Fla. 2000), the Florida Supreme Court has explicitly held:

> **[A] true split sentence is a prison term of a number of years with part of that prison term suspended, contingent upon completion on probation of the suspended term of years. When a defendant violates a true split sentence, the most severe sentence the trial court may impose on resentencing is to "unsuspend" the previously suspended prison term. That is, that the defendant is reincarcerated and must actually serve the previously suspended term of years in prison.**

Therefore, the **only** recourse any judge had upon her violation was to recommit her for the suspended or stayed

portion of the August 24, 2010 sentence, or specifically four (4) years, in accordance with **Eldridge** and **Poore**. Counsel's ineffectiveness when he failed to argue trial court's authority to re-sentence the Petitioner not once, but twice illegally.

Nelson represented the Petitioner at three (3) separate sentencings: in 2006, 2015 and 2016. Therefore, Nelson was well aware of the Petitioner's plight and abstract history involving this case. Nelson's responsibility was to his client, the Petitioner, and in ensuring that the total amount of time she completed while incarceration and probation as part of her 2006 sentencing, together with the time completed on the subsequently ordered community control in 2010, and additional drug offender probation ordered in 2015 did not exceed the statutory maximum for her underlying offense. Nelson failed his client, and there is absolutely no excuse for the Petitioner to even now be incarcerated when she has clearly done the time.

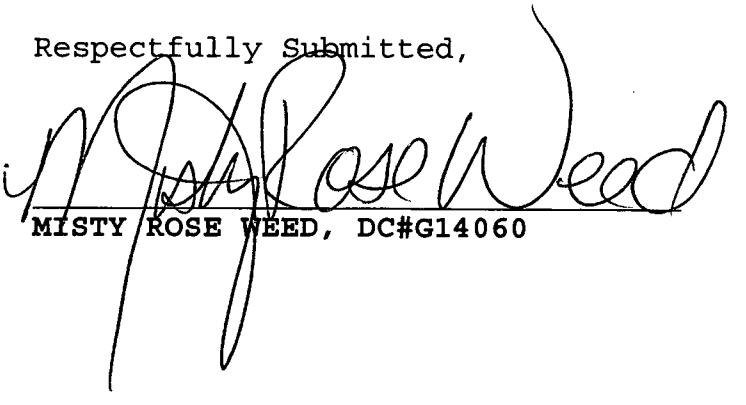
Not only has the Petitioner been subjected to ineffective assistance of counsel in this regard (the right to effective counsel being her Sixth Amendment right), she is also being excessively and cruelly punished, thus violating her Eighth Amendment right. But for counsel's errors, the Petitioner's plea would never have been accepted, the fifteen (15) year sentence never imposed, and she would currently be home with her five (5) children.

The Petitioner deserves just relief in this cause.

CONCLUSION

The Petitioner has asserted sufficient grounds demonstrating that her Fifth, Sixth, Eighth, and Fourteenth Amendment constitutional rights were indeed violated. This Petition for Writ of Certiorari should be granted as the claims therein are of great public importance and involve multiple manifest injustices which deprived her of the specific constitutional rights above.

Respectfully Submitted,



MISTY ROSE WEED, DC#G14060