ORIGINAL

No. 20-8266

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC LUCAS — PETITIONER

VS.

STATE OF FLORIDA — RESPONDENT

From The United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC LUCAS #W07313
South Bay Correctional & Rehabilitation Facility
PO Box 7171
South Bay, FL. 33493

QUESTION(S) PRESENTED

Whether Petitioner's Constitutional Rights Under The 5th, 6th And 14th Amendments Were Violated When The State's Motions To Allow Hearsay Evidence To Be Admitted During Petitioner's State Jury Trial Was Granted Over Objection.

Whether The Prosecution Violated Petitioner's Constitutional Rights Under The 5th And 14th Amendments By Multiple Improper Statements Made During Trial Where Those Statements Advised, Encouraged And Led The Jury To Convict Petitioner Based Upon Proof Less Than That Beyond A Reasonable Doubt

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Failing To Consult And/Or Hire An Expert Witness In The Area Of Eye Injuries (Ophthalmologist) To Rebut The State's Claim Of Permanent Damage As An Element Of Aggravated Battery.

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Allowing The Prosecution To Present An Out-Of-Court Statement Without Objection As To The Authentication Of The Identity Of The Speakers?

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Failing To Utilize A Police Report To Impeach The Victim Regarding Inconsistent Statements On A Critical Issue In The Case, The Defendant's Identity.

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Failing To Present A Available Viable Alibi Defense.

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

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

[X] The opinion of the highest state court, the Florida Supreme Court, Case Number SC14-1925, to review the merits is reported at, *State v. Lucas*, 183 So.3d 1027 (Fla. 2016) was denied, on December 6, 2017, and appears at Appendix A.

JURISDICTION

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

[X] The date on which the United States District Court for the Southern District, denied the Petition for Writ of Habeas Corpus on the following date: October 8th, 2019, and Denial of Issuance of a Certificate of Appealability a copy of the order denying the Petition appears at Appendix B.

[X] A timely Certificate of Appealability was issued, on May 8, 2020, by the US Eleventh Circuit a copy of the order is attached at Appendix C.

[X] The US Eleventh Circuit a copy of the order denying the claim, on January 8, 2021 is attached at Appendix D,

[X] A timely petition of rehearing was, thereafter, denied on the following date: on March 5, 2021, and a copy of the order denying rehearing appears at Appendix E.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except 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 offence 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 deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to 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.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States 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 the law; nor deny any person with its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Petitioner, Eric Lucas, was charged and arrested per warrant, in Broward County, Florida, by Information, with Count 1, Burglary of a Dwelling with Battery § 810.02 Fla. Stat., and Count 2, Aggravated Battery § 784.045, Fla. Stat. (R. 107).

Petitioner was represented by counsel, John Cotrone, Esq., for pre-trial and at trial by Fred Haddad, Esq.

Thereafter, the case proceeded to trial. A jury found Petitioner guilty as charged of Burglary of a Dwelling with Battery and Aggravated Battery, in violation of § 810.02 and § 784.045, Fla. Stats. He was adjudicated guilty and sentence was pronounced for Life imprisonment, as a Prison Releasee Re-Offender.

On appeal, Petitioner raised two arguments: (1) The Trial Court erred by allowing the State to introduce Lauren Glushko's out of court statements, and (2) The Trial Court erred by denying a motion for mistrial based on improper prosecutorial comments. Petitioner's judgment of conviction was affirmed in a decision with a written opinion. *Lucas v. State*, 67 So. 3d 332 (Fla. 4th DCA 2011). Rehearing was denied and on March 29, 2012, the Florida Supreme Court declined Discretionary Review. *Lucas v. State*, 90 So 3d 271 (Fla. 2012). Thus, Appellant's conviction became final on June 27, 2012, when the 90 day period for seeking certiorari review with the Supreme Court of United States expired.

On January 22, 2013, Petitioner filed his Fla. R. Crim. P., Rule 3.850 motion for post conviction relief. Petitioner argued that he received ineffective assistance of counsel, as follows: (1) Counsel failed to consult an ophthalmologist as an expert

witness to rebut the State's case; (2) Counsel failed to object to the introduction of recordings of jail telephone calls purportedly between Lauren Glusko and Petitioner, because the State failed to identify Glushko's voice as the one on the recording; (3) Counsel failed to impeach the victim, Ms. Freeman, with a police report and deposition; and (4) Counsel failed to move to dismiss the Aggravated Battery charge on Double Jeopardy grounds. The Trial Court struck the motion with leave to amend, finding Petitioner's "expert witness" claim, raised as Ground One in the motion, to be insufficiently pled. Petitioner appealed and the Fourth District Court of Appeal (4th DCA) reversed, holding Petitioner "sufficiently explained the relevance and substance of the expected testimony [of the expert witness] and alleged that the outcome of the proceedings would have been different." *Lucas v. State*, 147 So. 3d 611, 612 (Fla. 4th DCA 2014). The Florida Supreme Court approved the 4th DCA's opinion on appeal. *State v. Lucas*, 183 So. 3d 1027 (Fla. 2016).

Then, on remand, the Trial Court granted an evidentiary hearing, on Petitioner's expert witness claim and denied Petitioner's remaining claims based on the State's written response, without a hearing. The Trial Court later vacated that denial order, based on the motion of Petitioner's post conviction counsel for an opportunity to respond. Then counsel filed a reply to the State's written response and amendment/supplement to the Fla. R. Crim. P., Rule 3.850 motion, raising a 5th claim...(5) Trial Counsel was ineffective for failing to object to the introduction of the jail calls on the grounds that the State failed to establish Petitioner's identity as

the voice on the recording. After additional motions, the Trial Court summarily denied all five of Petitioner's claims, without ever holding the evidentiary hearing that was mandated by both the 4th DCA and S. Ct. of Florida, on claim one. The denial was all based, solely, on the State's written pleadings. That denial was subsequently, *per curium affirmed*, on appeal. See *Lucas v. State*, 230 So. 3d 1219 (Fla. 4th DCA 2017). On December 6, 2017, the Florida Supreme Court dismissed Petitioner's petition for writ of certiorari, for lack of jurisdiction.

On February 15, 2018, Petitioner filed his Petition for Writ of Habeas Corpus, to the U.S. District Court for the Southern District of Florida. Petitioner filed a Reply, addressing procedural bars and the merits of Petitioner's claims. On July 23, 2019, the federal magistrate issued a Report and Recommendation, recommending the denial of all Petitioner's claims and dismissal of the petition. Petitioner filed timely objections to the magistrate's R & R. On October 8, 2019, the U.S. District Judge Hon. Beth Bloom entered an order accepting the magistrate's R & R and a judgment was entered, denying the petition and COA. On October 30, 2019, Petitioner filed a timely Notice of Appeal and filed Application for COA to the U.S. Circuit Court for the 11th Circuit. On May 8, 2020, the 11th Circuit granted Petitioner COA. On March 5, 2021, the U.S. Circuit denial of the appeal became final.

No other motions or petitions are pending at this time.

This Petition follows.

REASONS FOR GRANTING THE PETITION

Court should grant certiorari because the U.S. 11th Circuit, the Federal District Court and the Florida Courts, by their denial of relief, are violating Appellant's right to confront the witness against him, accord *Crawford* Six Amendment rights to effective assistance of trial counsel, accord *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and the Fourteenth Amendment, which conflict with decisions in Florida courts of last resort, another U.S. court of appeals and this Court.

The U.S. Eleventh Circuit Court of Appeals, the Federal District Court and the Florida state courts, all, decided 6 questions on issues of ineffective assistance, in a way that conflicts with decisions of the State's high courts, other U.S. Circuit Courts and this Court. It improperly determined that the questions below did not provide that Petitioner's rights were violated.

Ground One

Whether Petitioner's Constitutional Rights Under The 5th, 6th And 14th Amendments Were Violated When The State's Motions To Allow Hearsay Evidence To Be Admitted During Petitioner's State Jury Trial Was Granted Over Objection.

The U.S. Eleventh Circuit determination that a hearsay exception to the testimony of Ofc. Thomas Stenger regarding what he alleged Lauren Glushko told him at the scene was improperly determined, because there was no predicate foundation laid to establish the exception, under the excited utterance, because no one but Stenger can substantiate the remarks or other wrongdoing, because there was no factual basis to establish that Petitioner or Glushko were the actual parties on the call.

Therefore, Florida's use of statements from non-testifying party violated dictates of *Crawford v. Washington*, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) and was not harmless where the statements were a lynch pin in the conviction.

Petitioner moved pretrial for motion *in limine,* was denied and contemporaneously objected, when Florida introduced statements through law enforcement of non-testifying party. Petitioner made an inadequate pre-trial motion and contemporaneous objection.

The U.S. 11th Circuit made an erroneous finding that the Trial Court correctly admitted hearsay evidence, based on a determination the evidence was admissible under exceptions--forfeiture-by-wrongdoing and the excited utterance. All of the lower courts found that Glushko did not have an opportunity to contrive and fabricate the remarks to Ofc. Thomas Stenger. However, the record does not support this finding. Again, the content of the remarks is only verified by the officer alleging them. Thus, only Ofc. Thomas Stenger can verify either exception. Additionally, the Eleventh's determination that Glushko did not have an opportunity to invent remarks prior to Stenger's arrival is contrary to the record. As well, the Eleventh's finding the remarks were spontaneous is also unsupported by the record.

Moreover, the Eleventh's assertions are also unsupported in that the record is unclear as to whether Glushko's alleged comments were truly and actually

spontaneous and made in answer to Stenger's questioning Glushko or if she came out and made an unprompted narrative statement.

Without these record findings, the 11th Circuit presumes too much, and the finding is error. It is worth noting that although Stenger alleges she made these extremely damaging comments about Petitioner's guilt, the record reveals that she refused to file any charges against Petitioner, that night or ever, a factor that directly refutes Glushko's having made such damaging commentary to Stenger.

After Petitioner's arrest, Lauren Glushko maintained her refusal to press charges. Additionally, Glushko refused to cooperate in the case, claiming she had no memory of the events from that date.

The State sought exception, in pertinent part, to the hearsay via forfeiture-by-wrongdoing, where they claimed that conversations between the witness and Petitioner during recorded jail calls met the exception to hearsay. The forfeiture-by-wrongdoing exception is a codification of the common law rule that one who wrongfully procures the absence of a witness from court cannot complain of the admission of the hearsay statement of the witness. Under the common law, the forfeiture-by-wrongdoing doctrine permits the introduction of out of court statements of a witness, where the witness is kept away from trial by the means or procurement of the defendant. For the exception to apply, Petitioner must have engaged in conduct designed to prevent the witness from testifying, a factor that cannot be established. § 90.804(2)(f), Fla. Stat. (2016), references that admissibility under the forfeiture-by-wrongdoing exception depends on two evidentiary showings:

(1) the statement was made by a witness who is unavailable to testify at trial, and (2) the party against whom the statement is being used intentionally caused or intentionally acquiesced in wrongfully causing the unavailability of the witness.

The Trial Court allowed the admissions based on the States' presentation of the content of the calls, which they provided, were made by Petitioner to Glushko. The State argued that because of the things said to her, Glushko refused to participate and testify, notwithstanding the fact that she always refused to pursue any charges against Petitioner. Instead, the State was allowed to present her substantial accusatory remarks through law enforcement agents' testimony, whereby Petitioner had no opportunity to cross-examine them. The content of this testimony formed the very basis for the convictions, which should not be allowed to stand.

Petitioner was subjected to the inculpating remarks of the alleged declarant, Glushko, by and through Ofc. Thomas Stenger, numerous times throughout his testimony. Glushko's remarks were only relayed to the jury by Ofc. Thomas Stenger.

No process existed for Petitioner to determine if in fact Glushko made these accusatory comments. The only evidence of the statements was what the law enforcement witness, himself, claimed that Glushko allegedly said to him. Petitioner argues that admitting the evidence violated his Sixth Amendment right to be confronted with the witnesses against him. Under *Ohio v Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears

adequate 'indicia of reliability,' a test met when the evidence either falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. Id., at 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531. Petitioner's Trial Court admitted the statement without proper consideration of the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable.

The law enforcement witnesses' recounting of Glushko's alleged statements were presented in such a manner that the jury could determine only that Glushko believed Petitioner was guilty of the Counts in the information. This is plain error. Police officers cannot, through their trial testimony, refer to the substance of statements given to them by non-testifying witnesses in the course of their investigation, when those statements inculpate the defendant. See, *Taylor v. Cain*, 545 F.3d 327 (5th Cir. 2008). The officer's testimony leads to a clear and logical conclusion that the out-of-court declarant believed and said Petitioner was guilty of the crime charged, wherefore, the Confrontation Clause protections are triggered. See *U.S. v. Kizzee*, 877 F. 3d 650 (5th Cir. 2017).

The State did not substantially qualify their claim of the legal hearsay exceptions for law enforcement witnesses' testimonial hearsay. The State argued that Petitioner did something, resulting in Glushko's refusal to testify. However, the predicate foundation for the exception was not laid, because the State lacked substantial proof that Petitioner was the determining factor which caused Glushko's absence for trial. Further, the content of this impermissible testimony formed the very basis of factors for the jury to convict, which should not be allowed

to stand. See *Giles v. California*, 554 U.S. 353, 358, 128 S. Ct. 2678 (2008). Petitioner argues the only testimonial source for the alleged comments of Glushko is Ofc. Thomas Stenger, in violation of testimonial hearsay, pursuant to Section 90.804. (2) (c) Fla. Stat., *Crawford* supra; *Lily v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887 (1999); *Antunes-Salgado v. State*, 987 So. 2d 222 (Fla. 2nd DCA 2008); *Williamson v. U.S.*, 512 U.S. 594, 114 S. Ct. 2431 (1994).

Crawford was violated when Ofc. Thomas Stenger was permitted to testify a narrative he alone could substantiate. As introduced, this narrative testimony only served to exacerbate the hearsay recitation of the non-testifying witness' inflammatory statements of Petitioner's guilt. See C*edillo v. State*, 949 So. 2d 339, 340–341 (Fla. 4th DCA 2007). The jury inferred that the non-testifying witness made the accusatory statements or gave the police information about the Petitioner's guilt.

The Trial Court's determination to admit the testimony, is in opposition to what this Court's premised in the ruling of C*rawford*, that where testimonial evidence is at issue, the Sixth Amendment demands, what the common law required, testimonial hearsay that is introduced against a defendant violates the Confrontation Clause unless the declarant is unavailable *and the defendant had a prior meaningful opportunity to cross-examine that witness.*" *State v. Johnson*, 982 So. 2d 672, 675 (Fla. 2008). The Sixth Amendment to the United States Constitution was made applicable to the States, via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), which

provides that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. In *Crawford*, after reviewing the Clause's historical underpinnings, this Court held that it guarantees a defendant's right to confront those who bear testimony against him. 541 U.S., at 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177.

Additionally, Glushko's testimony against Petitioner was inadmissible because she did not appear at trial, nor was she unavailable. Rather, she refused to testify and Petitioner had no prior opportunity for cross-examination. See § 90.804(1)(b) Fla. Stat. Ms. Glushko persisted in avoiding responding to the State's requests that she testify concerning the subject matter of the her alleged statement, despite a subpoena. Section 90.804(2)(a), provides that the former testimony of an unavailable witness is admissible at a subsequent proceeding, provided the former testimony will have been subjected to cross-exam by the opposing party. Here, Glushko's alleged comments to Ofc. Thomas Stenger were subjected to no prior test for veracity and were thus not admissible under this hearsay exception. For the exception to apply, Petitioner must have engaged in conduct designed to prevent the witness from testifying.

The State never established that the remarks on the jail calls were made by Petitioner. The only support for this claim that it was actually him on the calls is that the telephone number belonged to Glushko and the investigating Det. Moody's testimony that he believed the voice was Petitioner's [although no evidence from the State can establish that Moody is either an expert or suitably familiar with

Petitioner]. Absent any evidence which would prove Petitioner directly or indirectly engaged in conduct or facilitated conduct that would cause Glushko to be unavailable for trial, the State would be required to prove that Petitioner intentionally acquiesced in wrongful conduct which caused her to be unavailable. The record and the evidence considered by the trial court do not reveal any proof that Petitioner acquiesced in making Ms. Glushko unavailable for trial. See *Joseph v. State*, 250 So. 3d 113, 2018 Fla. App. LEXIS 9094 (Fla. 4th DCA 2018).

The Trial Court also admitted Glushko's statements to the police, finding that Petitioner had procured Glushko's absence from trial and that the statements were admissible under the excited utterance exception to the hearsay rule. As the supreme court has explained: In order for a statement to qualify as an excited utterance exception to the hearsay rule pursuant to § 90.803(2), Fla. Stat. (2007), the statement must be made (1) regarding an event startling enough to cause nervous excitement; (2) before there was time to contrive or misrepresent; and (3) while the person was under the stress or excitement caused by the event. See *Hayward v. State*, 24 So. 3d 17, 29 (Fla. 2009) (citation and internal quotation marks omitted). The only support for the circumstances qualifying for the hearsay exception is Ofc. Thomas Stenger's testimony. No further records exist.

Therefore there were not proper grounds for the denial of the Petition in the state or federal courts. Reversal is required.

Ground Two

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Failing To Present An Available Viable Alibi Defense.

Petitioner presents exhaustion of his ground and in the alternative should the Honorable Court determine that the ground was not sufficiently exhausted, he offers *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

Prior to Petitioner's arrest, his girlfriend, Lauren Glushko, contacted Detective Moody, the investigating detective on the case, and informed him that Petitioner was not the assailant of the victim, Ms. Freemen or herself. On December 2, 2007, Petitioner was arrested and charged by information with Burglary with Battery and Aggravated Battery. On December 10, 2007, Glushko signed a waiver of prosecution at attorney John Cotrone's office. On July 31, 2008, Defense Attorney Cotrone, at the behest of Petitioner, filed a Category 1 Witness List, pursuant to discovery rules, Fla. R. Crim. P., Rule 3.220, listing Ms. Alisa Catoggio as his alibi witness. On August 22, 2008, Catoggio is deposed by the State, A.S.A. Anita White. Attorney Cotrone waived his appearance, without notifying Petitioner. No one from the defense was present at the deposition, in violation of Rule 3.220 (c) (2) (A-F) and 6th Amendment guarantees to effective assistance. Then 3 days later, on August 25, 2008, based on recorded remarks allegedly with Glushko and Petitioner during the jail telephone calls, it is disclosed that Attorney Cotrone had been making sexual advances toward Glushko, when she came to his office, on December 10, 2007. When the State notified Cotrone of the content of the calls and Glushko's

allegations, Cotrone immediately filed a motion to withdraw as Petitioner's counsel. On August 29, 2008, a hearing on the motion to withdraw was held and the motion granted. On September 5, 2008, Petitioner with the assistance of Attorney Cotrone was able to hire Attorney Fred Haddad to represent him for trial. On October 1, 2008, the State received the transcription on the deposition of Catoggio (See Appendix F), stamped in their office as "RECEIVED." The State failed to remit a copy to Petitioner or his counsel, Haddad. Further, the State does not enter the deposition transcripts into the Court record, with the Clerk of the Trial Court, until March 4, 2009 (See Appendix G, a copy of the Trial Court's docket), in violation of Rule 3.220 (b) (j). See *Banks v. Dretke*, 540 U.S. 668, 696 (2004), see also, *Public Health Trust of Miami-Dade Cnty v. Acanda*, 71 So 3d 782, 785, 786 (Fla. 2011).

From the onset, Petitioner informed his counsels that when the crime in question took place, he had an alibi. He was somewhere else, with a witness Catoggio. Petitioner also made certain his counsels were aware that Cataggio was prepared to testify to the fact that he was with her at the other location at the time of the incident. Petitioner made, what must be considered, a strenuous effort to place before the U.S. District, evidence of a State discovery violation which concealed the deposition testimony of Catoggio.

Petitioner's failure to include any trial alibi argument was the result of his counsel's failure to investigate and prepare his alibi defense, coupled with the discovery violation.

As described, Petitioner's counsels both erred in their trial prep regarding witness Catoggio. The most competent lawyer in the world cannot render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts, which might have afforded his client a legitimate defense. See *Harris v. Blodgett*, 852 F. Supp. 1239 (W.D. Wash. 1994) [citing *U.S. v. Tucker*, 716 F.2d 576, 583, n. 16 (9th Cir. 1983), and *McQueen v. Swenson*, 498 F.2d 207, 217 (8th Cir. 1994)].

Moreover, Petitioner asserts that the State's concerted efforts to conceal the evidence were only possible because his own counsel waived appearance for the deposition of Petitioner's primary witness, Catoggio. The matter was exponentially compounded because the State carefully withheld the transcript of the deposition which Attorney Cotrone failed to attend, in a manner that ensured that the defense would never see the content of Catoggio's testimony prior to trial. The deposition transcript was hidden in such a way that it became a *Brady* [*v. Maryland*, 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963)] violation. That violation was not discovered until ***after*** the Petition was filed to the U.S. District Court, when it appeared on the docket in the A.G's response to the Petition in the Appendix from their Answer. A comparison of the exhibits demonstrates that 7 months of entries were omitted from the body of the docket provided in Appendix G. (See Appendices G & H, case docket provided to Petitioner via the Trial Court; and case docket provided to Petitioner in the Attorney General's Answer to the Petition). Previous to that, Petitioner was never aware it existed, although Attorney Haddad filed a

Demand For Discovery prior to the State Attorney submitting the deposition of Catoggio into the Clerk's docket. The docket Petitioner was provided in July, 2012 is wholly different then the docket in the AG's appendix, April 6, 2018. This should have been a clear indication that an evidentiary hearing is required for this issue.

The U.S. Circuit Court furthered the error of the U.S. District Judge when, both, determined that the decision of counsel was "strategic." Such a finding is a legal impossibility, because of the failure to hold an evidentiary hearing. Without review through the process of an evidentiary hearing, it is impossible to decide if counsel was constitutionally effective. No court weighed the credibility of the non-testifying alibi witness. Therefore, no measure was legitimately made to discern counsels' errors of being unaware of the evidence. Petitioner argues that an evidentiary hearing would demonstrate counsels' errors, in that Catoggio would have directly refuted the victim's testimony and be the only true support for the theory of defense. Catoggio has no criminal history and is a well educated, highly credible person. Her testimony needed to be heard in its entirety in order to make a fair and adequate determination of counsels' *allegedly strategic* decision not to call her, thus, the Courts erred in failing to hold an evidentiary hearing.

Ultimately, the U.S. District Court asserted a lack of jurisdiction, when a procedural quagmire was created by Petitioner's attempts to place Catoggio's testimony before that Court, e.g., a motion to stay and abate this matter, in the U.S. District Court, after the Title 28 § 2254 Petition had been filed, in order to place it

before the lower courts; which lead to an appeal from a denial of the stay, etc. However, all of his efforts were summarily denied.

Petitioner appealed, to the U.S. 11th Circuit Court, the denial of this issue by the U.S. District, without an evidentiary hearing, or, issuance of a writ of habeas corpus. Petitioner disclosed to the U.S. 11th Circuit, the U.S. District violated the *Clispy* Rule. On October 8, 2021, the U.S. District Court denied this claim without conducting the required evidentiary hearing.

Petitioner's argument for ineffectiveness of counsels is based on the doctrine that his alibi would establish his actual innocence.

Additionally, that procedural default is based on comity, not jurisdiction, and federal courts retain the power to consider the merits of even procedurally defaulted claims. See *Reed v. Ross*, 468 U.S. 1, 9, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). Petitioner realizes, accord *Martinez v. Ryan*, 132 S. Ct. 1309, 1312 (2012), that he may have made an excusable procedural error in the method by which he sought relief on this issue. The operative habeas corpus claim of ineffective assistance of counsel was not set out on appeal or in state post conviction, but was first advanced in the § 2254 Petition to the U.S. District. Though it would appear, Petitioner should have filed a motion for post conviction relief, in the State Court and *then* requested the stay and abeyance from the Federal Court(s). However, this Court can still grant relief. The problem then became, the federal court will not consider the merits of a procedurally defaulted claim, unless he can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and

actual prejudice. See *Schlup v. Delo*, 513 U.S. 298, 321, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Pursuant to the "cause and prejudice" test, Petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim. Cause is an external impediment such as government interference or reasonable unavailability of a claim's factual basis. See *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004). Here, the error is attributable to his counsels, John Cotrone and Fred Haddad, who failed to investigate, neglecting to ever even speak to Catoggio, knowingly waiving appearance for Catoggio's deposition. As well as, Trial Attorney Haddad failing to object during the Trial Court's ruling on the motion to suppress, filed by pre-trial Attorney Cotrone. See Rule 3.220, and *Banks v. Dretke*, 540 U.S. 668, 696 (2004). The duty to investigate and prepare the defense is fundamental to the right to assistance of counsel. See *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

Attorney Haddad erred in coercing Petitioner to not list or call Cataggio as a trial alibi witness. Resulting in Petitioner's inability to reliably demonstrate his alibi and establish his innocence. The basis for the coercion was that Petitioner, in the recorded jail telephone calls, was accused of influencing Lauren Glushko not to cooperate with the State, as discussed in Ground Four, above. The State indicated, in pretrial, they intended to introduce the call recordings under the hearsay

exceptions and to introduce Glushko's alleged comments to Ofc. Thomas Stenger, at the scene.

Counsel informed Petitioner that the State would argue a hearsay exception under wrongful acts, then expounding that his intimidation of Glushko amounted to an admission, *whereby he would be legally precluded from presenting the evidence of his alibi.*

However, in pre-trial, Attorney Haddad indicated, not only were the telephone recordings and Glushko's remarks to Ofc. Thomas Stenger, all, suppressible, counsel *guaranteed* Petitioner that he would get them all suppressed.

Later, counsel Haddad indicated he had reached an agreement with the State, which was, if Petitioner would not seek to utilize the alibi, the State would not seek admission of the jail calls or the hearsay through Ofc. Thomas Stenger's testimony. Further, counsel explained that if Petitioner moved for the suppression, he would waive his rights to challenge the recordings and Ofc. Thomas Stenger's testimony.

However, in pre-trial, Attorney Haddad had already motioned to suppress the evidence, the recordings and testimony. Although later, the Defense and the State allegedly made a handshake agreement, as described above, the Trial Court ruled, on the morning of trial, that suppression of the evidence and testimony was denied. Then, the State decided, the door was opened to the presentation of all this evidence, *ignoring the handshake agreement.* However, the defense was caught totally unprepared and did not call Catoggio or otherwise present the alibi.

Regarding the miscarriage of justice, the Supreme Court has made clear, a fundamental miscarriage of justice exists when a constitutional violation has resulted in the conviction of one who is actually innocent. See *Murray*, 477 U.S. at 495-96. See also, *Lombardo v. Shinn, et al.*, 2020 US Dist LEXIS 67585, CV 19-02288-PHX-NVW (MHB) (2020). When it can and will be established that Petitioner can prove that he was with a witness in another location, and that presentation of that evidence has been denied him, then a miscarriage of justice has occurred.

Therefore, counsel's failure to investigate and prepare, caused a miscarriage of justice. The State Court decisions' exposition of the applicable federal constitutional standard was "contrary to" *Strickland* or any other "clearly established" Supreme Court precedents, as outlined, thus qualifying for the Court's issuance of the writ.

Petitioner attempted to present this claim to the Federal courts, by referring to "ineffective assistance of counsel" and citing several authorities that evaluate the effectiveness of an attorney's performance, in terms reminiscent of the constitutional standard under *Strickland*. As well as, the presentation of the evidence that the State committed a discovery violation, concealing the deposition from Petitioner and his counsel, Haddad. Therefore, Petitioner submits that the courts all erred in denying the expected relief, a new trial. These circumstances require the issuance of the Writ of Certiorari by this Honorable Court.

Ground Three

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Failing To Consult And/Or Hire An Expert Witness In The Area Of Eye Injuries (Ophthalmologist) To Rebut The State's Claim Of Permanent Damage As An Element Of Aggravated Battery.

Petitioner presents exhaustion of his ground and in the alternative should the Honorable Court determine that the ground was not sufficiently exhausted, he offers *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

Failure To Call An Expert Witness

The failure to consult an expert witness in some circumstances can constitute ineffective assistance of counsel. *Ellison v. Acevedo*, 593 F.3d 625, 634 (7th Cir. 2010) (citing *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001)).

Trial counsel's failure to investigate and hire experts to impeach the prosecution's theory of case, resulted in the erroneous finding of the element of *Aggravated* Battery, that Ms. Freeman's injuries met the actual standard for the charge.

Petitioner asserts that counsel was ineffective for failing to investigate, hire, and call a medical and forensic expert, and to locate, interview, and call hospital personnel to testify at trial. These witnesses would have bolstered the defense, regarding the element of permanent damage or injury not being applicable to the injuries to the victim, Ms. Freeman.

Petitioner suggested that, under Florida law, he need not identify the expert he would have called to testify. He instead, explains what the witness would have

established: that the injuries were not conclusively supportive of the injury to Ms. Freeman's eye qualifying as *permanently* disfiguring and/or damaging, such that they amounted to Aggravated Battery. According to Petitioner, the expert would have testified regarding the amount of damage done to the victim's eye.

In his original Petition he offered evidence to show what any expert would have testified. As well, in the Petition, he did provide the name of the doctor who treated the victim in the hospital and contradictory evidence that the doctor would have provided, based on hospital records.

Federal habeas corpus petitioners asserting claims of ineffective assistance based on counsel's failure to call a witness (either a lay witness or an expert witness) satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) by only naming the witness, demonstrating the witness was available to testify and would have done so, setting out the content of the witness' proposed testimony, and showing the testimony would have been favorable to a particular defense. *Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010); *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

Under Florida law, when claiming that counsel failed to call an expert, a petitioner was not required to identify the witness and allege that the particular witness would have been available to testify at trial. See *State v. Lucas*, 183 So.3d 1027 (Fla. 2016).

Where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing

Petitioner's release, counsel's inaction constitutes negligence, not trial strategy. See *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992) (quoting *United States ex rel. Cosey v. Wolff*, 727 F.2d 656, 658 n.3 (7th Cir. 1984)).

Of course, Petitioner cannot maintain an ineffective assistance of counsel claim simply by pointing to additional evidence that could have been presented. See *Van Poyck v. Fla. Dep't of Corr's*, 290 F.3d 1318, 1324 (11th Cir. 2002).

Procedural Misconduct/Denial Of Due Process

Further, procedurally, this ground was mishandled in the State courts as follows:

a. Error number one, the State Trial Court denied the motion without holding an evidentiary hearing;

b. Error number two, on September 10, 2014, the Florida 4th District Court of Appeal, in case #4D-0172, issued as written opinion, reversing and remanding the case back to the Trial Court, for an evidentiary hearing on this ground. Which, on January 28, 2016, on appeal by the State Attorney, the Florida Supreme Court, affirmed the reverse and remand by the 4th DCA, in a written opinion. However, the error occurred on September 7, 2016, when, on remand, the Trial Court denied the ground, based on an amended argument of the State, which the Trial Court adopted, *without holding the evidentiary hearing* in conflict with the (2) mandates of, both, the 4th DCA and the Fla. S. Ct.;

c. Error number three occurred when Petitioner appealed the denial, and the Florida 4th DCA affirmed the Trial Court's decision *determined without ever having the State answer the claims*;

d. Error number four occurred, on December 6, 2017, when the Fla. S. Ct. dismissed Petitioner's petition for writ of certiorari, appealing the 4th DCA's affirmance of the Trial Court's denial;

e. Error number five occurred when the Federal District denied the ground in his Title 28 Section 2254 Petition.

The fact is the State Court's failure to address the issue in the evidentiary hearing that the Florida 4th DCA ordered violated Petitioner's right to due process. The federal court's decisions to uphold this denial, again, without an evidentiary hearing, is a further error.

Albeit, some judges prefer to fully explain their decisions on the record and in orders, while other judges do not. Petitioner imparts, the idea of the former approach is that explanation of decisions is appreciated by the parties and attorneys, because it helps review at the appellate level, which is why findings are required, as was ordered here, by, both, the 4th DCA and the Fla. S. Ct. However none of the courts below, state and federal, made a proper review a part of the record, purposely, to interfere with the review of their decisions and reasoning. This sort of unfair practice is usurping the very concept of the justice seeking process.

The absolute *minimal* approach was chosen by the lower courts. The *less said in the order the better*, because findings or conclusions may unnecessarily disclose a misunderstanding or mistake that will result in reversal. As indicated above, the attempt is being made to avoid exposing a mistake which was made in a finding or conclusion of law, or in the decisions made, for the wrong reason(s).

Although a hearing on the initial denial was *mandated*, by, both, the Florida 4th DCA and the Florida Supreme Court, no proper evidentiary review of this ground was ever given below, nor was Petitioner afforded his right to present his argument before any court. And, on appeal of the improperly handled remand, the

State Appellate Courts 'rubber-stamped' the Trial Court's denial *without any court ever holding the evidentiary hearing.*

If counsel had done as suggested and first investigated, deposed and then called these witnesses, as demonstrated, the witness would have bolstered his defense, resulting in an acquittal of the charges. Thus, Petitioner has demonstrated deficient performance and prejudice under *Strickland.* The claim demonstrates here that, but for counsel's deficiency, the outcome of his trial would have been different, resulting in an acquittal of the charges. As a result this Court must reverse the decisions of the lower courts, granting a writ and remanding the case for an evidentiary hearing, appointing Petitioner post conviction counsel and ordering he be allowed to be present in the courtroom for an evidentiary hearing. As well as another relief the Court deems fit and proper.

Ground Four

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Allowing The Prosecution To Present An Out-Of-Court Statement Without Objection As To The Authentication Of The Identity Of The Speakers?

Petitioner presents exhaustion of his ground and in the alternative should the Honorable Court determine that the ground was not sufficiently exhausted, he offers *Martinez v. Ryan,* 132 S. Ct. 1309 (2012) and *Trevino v. Thaler,* 133 S. Ct. 1911 (2013).

This ground encapsulates the separate grounds, for the individuals in the recording, Lauren Glushko and Petitioner, made in the State and Federal Courts.

Counsel violated Petitioner's constitutional rights under the 5th, 6th And 14th Amendments, when he failed to object to the State's introduction of what purports to be, State's witness, Lauren Glushko's hearsay and Petitioner's voices, without presenting any proper evidentiary foundation that the speakers in the jail call, which amounted to approx. two and one half hours of time from ten phone calls, when presented to the jury, were in fact the witness and/or Petitioner.

Improper Authentication/Crawford Violation/Inadequate Argument

In the pre-trial suppression hearing for the issue, it was revealed that the assigned Personal Identification Number for the jail telephone system, used to place the calls, was NOT the Petitioner's, and there was no voice identification software system being utilized to identify callers. In that same hearing, the State argued that the testimonies of the Jail's Records Custodian, Ms. Kathleen Casey and Detective Justin Moody, were enough evidence for identification of the "callers." Detective Moody, in particular, had only spent a very short period of time (less than 5 minutes) with Petitioner. And Det. Moody never met Glushko. The testimony was coupled with the evidence that the phone number belonged to Lauren Glushko.

Counsel failed to argue that the State never verified if any other pre-trial detainee in the jail knew and may've called Glushko. Further, counsel failed to argue that though the Jail's Records Custodian, Casey, might have been able to verify Petitioner by his jail PIN for the telephone system, Petitioner's PIN was not used. So, counsel also erred, not pointing out that the Jail's Records Custodian, Casey's testimony was superfluous for the issue. And counsel failed to dispute the

identification of Petitioner by Det. Moody, because he barely knew him, in general, much less his voice. What's more, counsel also failed to point out that the State had no person who had known Lauren Glushko or Petitioner long enough to accurately identify either of their voices.

As a result of counsel's error, the evidentiary hearsay, the content of the multiple jail calls (some two and one half hours of recordings) was presented during trial, with, so-called, *voice authentification* through the testimonies of Detective Justin Moody and the Jail's Records Custodian, Ms. Kathleen Casey. However, according to the rules for authentication, *under these particular circumstances*, those individuals were not qualified to make such an evidentiary conclusion and, therefore, the Trial Court's reliance on them for the admission of this highly prejudicial evidence, was error. Neither witness is a qualified expert, nor were they sufficiently familiar with the parties to make such conclusory determinations.

Therefore, counsel's failure to properly object allowed the jury to become tainted by an abundance of impermissible evidence, in the numerous jail calls. The State Court decision's exposition of the applicable federal constitutional standard was "contrary to" *Strickland* or any other "clearly established" Supreme Court precedents, as outlined below, thus qualifying for issuance of the Court's issuance of the writ. Petitioner fairly presented this claim to the state courts, by referring to "ineffective assistance of counsel" and citing several state court cases that evaluate the effectiveness of an attorney's performance in terms reminiscent of the federal

constitutional standard under *Strickland*. Therefore, Petitioner submits that the courts all erred in denying the expected relief, a new trial.

Where the implication, from in-court testimony, is that a non-testifying witness has made an out-of-court statement, offered to prove a defendant's guilt, the testimony is not admissible and counsel's failure to properly object is reversible error.

This evidence was also not admissible to simply describe the series of events during the course of the investigation. This Court clearly instructed in *Baird*, reaffirmed in *Conley*, and confirmed in *Wilding*, an alleged sequence of events leading to an investigation and an arrest is not a material issue in this type of case. Therefore, there is no relevancy for such testimony to prove or establish such a nonissue. When the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label.

In accord with *Crawford* supra, and the concept of the Confrontation Clause, Petitioner had the constitutional right to have counsel properly object that the defense was unable to fairly test the veracity of any witness(es). However, when the proponent seeks to elicit the substance of an alleged conversation, of non-testifying parties who the State and Trial Court never properly proved the identity of, and further, counsel didn't direct the witness' attention to the time, place, and (unknown) parties present, informing the witness, and the Petitioner, as to the

particular conversation involved, counsel's actions violate *Strickland*, because, the failure to lay such a foundation rendered the admission of the hearsay too broad and general. See *Andrews v. State*, 261 So. 2d 497 (Fla. 1972) (holding that proponent's failure to lay a foundation for otherwise admissible evidence converted it into hearsay and that objection couched in "hearsay" terms preserved the defect). Counsel erred, in that the hearsay statement was inadmissible, because the witness, Lauren Glushko, did not vouch for its accuracy or correctness. Except as provided by statute, hearsay evidence is inadmissible. See § 90.802, Fla. Stat. (2011). Where no proper foundation is laid, a recording cannot be admitted under an exception to the hearsay rule.

The admission of the testimony, without counsel's objection, was plain error. A defendant may claim error in a court's ruling to admit or exclude evidence only if the error affects a substantial right of the defendant and:

(1) if the ruling admits evidence, and the defendant, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground for the objection, unless it was apparent from the context.

As described above, Petitioner was unable to properly test the admission of the recordings. No objection to the lack of foundation was properly made by counsel. The authentication was improper. Counsel's only objection on the ground that the admission violated § 90.403-404 Fla. Stat. was improper and inadequate.

No witness legally authenticated either Glushko's or Petitioner's voices for admission. Counsel's improper objection allowed extremely damaging material to be improperly placed before the jury.

Conclusion

Counsel's improper argument allowed the Trial Court to permit the State to introduce the audio recording without sufficient authentication. See § 90.901, Fla. Stat. (2011). Authentication of recorded evidence is required as a condition precedent to its admissibility. Thus, because no proper authentication was made, the admission of the recorded calls was, further, inappropriate.

The improper testimonial identification of Glushko's and Petitioner's voices on the recording was helpful to the State's case, but authentication would also require other predicate evidence, other than two unqualified witnesses' opinions. See *D.D.B. v. State*, 109 So 3d 1184 (Fla. 2nd DCA 2013).

The Court cannot treat this error as harmless, under the circumstances in this case. The numerous audio recordings of the multiple calls were a critical element to establish the theory of the State's case, an essential component of the proof required to establish that Petitioner committed the crime. See *Heck v Humphrey*, 114 S. Ct 2364, 512 US 477, 129 L Ed 2d 383, 385 n. 3a, 3b (1994).

Petitioner has demonstrated deficient performance and prejudice under *Strickland*. The claim delineated here that, but for counsel's deficiency, the outcome of his trial would have been different, resulting in an acquittal of the charges. As a result this Court must reverse the decisions of the lower courts, granting a writ and

remanding the case for an evidentiary hearing, appointing Petitioner post conviction counsel and ordering he be allowed to be present in the courtroom for an evidentiary hearing. As well as another relief the Court deems fit and proper.

Ground Five

Whether Trial Counsel's Performance Fell Below The Standard Of The Sixth Amendment To The U.S. Constitution For Failing To Utilize A Police Report To Impeach The Victim Regarding Inconsistent Statements On A Critical Issue In The Case, The Defendant's Identity.

Petitioner presents exhaustion of his ground and in the alternative should the Honorable Court determine that the ground was not sufficiently exhausted, he offers *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

There is a clearly established right to impeach the credibility of an adverse witness using the witness's own inconsistent statements. Counsel had available to the defense, the police report from the night of the incident, wherein the victim, Ms. Freeman, did not know the name or the identity of the assailant. It was essential to challenge Ms. Freeman's trial testimony, wherein she alleged that she told the responding police official, Ofc. Thomas Stenger, on the night of the incident, she had identified the assailant, as Petitioner, and had identified him to Stenger by the name, "Eric." Counsel's failure to properly investigate and utilize this available report, to establish the glaring inconsistencies, caused a defective and unreliable verdict to result. This is firmly established by the fact that the jury wrote the Trial Court during their deliberations, on August 5, 2009, requesting to see the particular police report. However, The Trial Court denied the request of the jury, because

counsel Haddad had not placed the report into evidence. (See attached, Appendices I & J, from trial Court (Jury's written request; Trial Court's Denial)). An attorney who makes one error of *Strickland* proportions is unlikely to have turned in a performance adequate in all other respects. The connection, here, between counsel's failure to make an admissibility objection, outlined *supra*, to the jail calls and his inadequate overall preparation and investigation, are clear. The lack of an objection to evidence is relevant to the larger question of the adequacy of counsel's overall preparation and investigation. See *Lockhart v. Fretwella*, 113 S. Ct. 838, 122 L. Ed 2d 180, 506 U.S. 364 (1993).

The State Appellate Court unreasonably applied the clearly established federal law created by the Supreme Court's holding, in *Strickland supra* that an ineffective-assistance claim had two components that an error was committed, as a result of counsel not properly investigating and preparing and, as a result Petitioner was prejudice, as discussed. The lower court's subsequent deference to counsel's failures to present any conceivable defense, despite the fact that counsel had based this alleged choice on an unreasonable investigation, was objectively unreasonable. Therefore, the failure of the court's below to grant Petitioner's writ and the requested relief of a new trial was reversible error. As a result this Court must reverse the decisions of the lower courts, granting a writ and remanding the case for a new trial, or at minimum, an evidentiary hearing, appointing Petitioner post conviction counsel and ordering he be allowed to be present in the courtroom for an evidentiary hearing. As well as another relief the Court deems fit and proper.

Ground Six

Whether The Prosecution Violated Petitioner's Constitutional Rights Under The 5th And 14th Amendments By Multiple Improper Statements Made During Trial Where Those Statements Advised, Encouraged And Led The Jury To Convict Petitioner Based Upon Proof Less Than That Beyond A Reasonable Doubt

This is one of those rare cases where the improper comments in the prosecutor's summation were so numerous and, in combination, so prejudicial that a new trial is required. The cumulative effects of the prosecutor's remarks, which included both inflammatory comments and erroneous statements of law, diverted the jury from the charges on which Petitioner was being tried, and the fundamental principles by which the jury had to discharge its duty. See *Crew v. State*, 146 So. 3d 101 (Fla. 5th DCA 2014).

In the opening argument, the prosecutor told the jury that they could convict Lucas based on less then proof of reasonable doubt and told them they would learn the truth about what Lucas had done and concluded, "I know you will do the right thing."

In concluding the summation, the prosecution made the following request:

"You were here to find out the truth."

"The truth has now extinguished the presumption of innocence which the defendant previously enjoyed."

"I know you will do the right thing."

Counsel objected to these comments and moved for mistrial in opening and closing, based on these comments. All objections and motions were denied by the trial court.

Taken together, the comments were such that they undermined the concept of Petitioner's constitutional right to a presumption of innocence. Thus, Petitioner has a right to a new trial, absent these unconstitutional errors. See *Pacifico v. State*, 642 So. 2d 1178 (Fla. 1st DCA 1994).

The cumulative effects of the prosecutor's remarks, which included both inflammatory comments and erroneous statements of law, and which implicated Petitioner's specific constitutional rights, diverted the jury from the charges on which Petitioner was being tried, and from the fundamental principles by which a jury must discharge its duty. See *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 157 (2d Cir. 1973) (noting defendant's right to be tried on evidence in case and not on extraneous issues); *United States v. Lewis*, 447 F.2d 134 (1971) (same).

While each instance of prosecutorial misconduct, standing alone, might not justify reversal, the effect of all of them requires it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. The 11th Circuit Court of Appeals decision, on March 5, 2021, should be reversed. The Court, in granting certiorari, is requested to hear Petitioner's case on the merits. In the alternative, grant the petition, summarily vacate the judgment of the court of appeals, and remand for further proceedings consistent with the rulings in the writ; summarily reverse lower federal court decisions that have departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the Florida court(s), as to call for an exercise of this Court's supervisory power, ordering the

granting of the Writ of Habeas Corpus and the requested relief. And any other relief the Court deems proper.

Respectfully Submitted,
/s/ Eric Lucas
Eric Lucas #W07313

CERTIFICATE OF SERVICE

I certify that I, Eric Lucas #W07313 placed this *Petition for Writ of Certiorari* in the hands of South Bay Correctional Facility officials for mailing to: Clerk of the US Supreme Court, One First Street NE, Washington, DC 20543; Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., NW, Washington, DC 20530-0001; Office of the Attorney General, 1515 N. Flagler Drive Suite 900, West Palm Beach, FL. 33401 on this 27 day of May, 2021.

/s/ Eric Lucas
Eric Lucas #W07313
South Bay Corr. & Rehab. Facility
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South Bay, FL. 33493