No: 21-7605 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

LWANE A. MANSELL — *PETITIONER*

vs.

SECRETARY, FLORIDA DEPT. OF CORRECTIONS,
STATE OF FLORIDA— *RESPONDENT(S)*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

LWANE A. MANSELL,
Petitioner, *pro se*
DC# T60254
Bay Correctional Facility
5400 Bayline Drive
Panama City, Florida 32404

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DENYING CLAIM ONE OF THE PETITIONER'S 28 U.S.C. § 2254 AS PROCEDURALLY BARRED WHEN THE STATE COURT VIOLATED HIS 5TH, 6TH, AND 14TH, AMENDMENT RIGHTS WHERE A DISCOVERY VIOLATION HAD TAKEN PLACE PURSUANT TO *BRADY v. MARYLAND*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)?

II. WHETHER THE DISTRICT COURT ERRED IN DENYING THE PETITIONER'S CLAIMS REGARDING THE SUFFICIENCY OF EVIDENCE OF THE PETITIONER'S 28 U.S.C. § 2254 PURSUANT TO *JACKSON V. VIRGINIA*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979) AND IN DOING SO VIOLATED HIS 5TH, 6TH, AND 14TH, AMENDMENT RIGHTS?

III. WHETHER THE DISTRICT COURT ERRED IN DENYING CLAIMS SIX THROUGH ELEVEN OF THE PETITIONER'S 28 U.S.C. § 2254 FOR THE INEFFECTIVE ASSISTANCE OF COURT APPOINTED COUNSEL WHERE THE STATE COURT DECISIONS WERE CONTRARY TO OR AN UNREASONABLE APPLICATION OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)?

LIST OF PARTIES

[X] All parties involved are identified in the style of the case.

RELATED CASES

Mansell v. Secretary, Department of Corrections, 8:18-cv-01307-CFH-SPF

Lwane A. Mansell v. Secretary, Dept. of Corrections, 2021 U.S. Dist. LEXIS 181908, September 23, 2021

Mansell v. State, 44 So. 3d 589 (Fla. 2d DCA 2010)

Mansell v. State, 242 So. 3d 357 (Fla. 2d DCA 2018)

Mansell v. State, 923 So. 2d 502 (Fla. 2d DCA 2006)

Thirteenth Judicial Circuit, Hillsborough County, FL Case No.: 07-CF-000504

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases

Statutes and Rules

Constitutional Provisions

CITATIONS TO OPINIONS BELOW

[X] For cases from **Federal Courts:**

The opinion of the United States Court of Appeal appears at Appendix (A-6) to the petition and is:

[X] is unpublished

The opinion of the United States District Court appears at Appendix (A-4) to the petition and is:

[X] reported at: *Lwane A. Mansell v. Secretary, Dept. of Corrections,* 2021 U.S. Dist. LEXIS 181908, September 23, 2021

[X] For cases from **State Courts:**

The Opinion of the Second District Court of Appeals, highest State Court to review the merits appears at:

[X] reported at

Mansell v. State, 44 So. 3d 589 (Fla. 2d DCA 2010) (A-7).

Mansell v. State, 242 So. 3d 357 (Fla. 2d DCA 2018) (A-10).

Mansell v. State, 923 So. 2d 502 (Fla. 2d DCA 2006).

JURISDICTION

[X] For cases from **Federal Courts:**

The date on which the United States Court of Appeals decided my case was February 28, 2022. In Appeal Number 21-13665.

[X] No motion for reconsideration was filed in my case.

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 decided January 31, 2021; *Mansell v. State,* 242 So. 3d 357 (Fla. 2d DCA 2018).

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner will rely on the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution: and the following Statutory Authorities:

28 U.S.C. § 2253(c)(2) and 28 U.S.C. § 2254.

U.S. Const. Amendment V provides:

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. Amendment VI provides:

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

U.S. Const. Amendment XIV provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

On May 29, 2018, the Petitioner, Lwane A. Mansell, a prisoner in the custody of the Florida Department of Corrections, proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to U.S.C. 28 § 2254. (A-1). On November 21, 2018, the Respondent filed an answer brief. (A-2). On February 11, 2019 the Petitioner filed a reply brief. (A-3). The United States District Court of Florida, Middle District, Tampa Division, denied Petitioner Mansell's U.S.C. 28 § 2254. (A-4). On October 19, 2021, the Petitioner filed an application for Certificate of Appealability (COA) in the United State Court of Appeals for the Eleventh Circuit. (A-5). On February 28, 2022, the Eleventh Circuit denied the Petitioner's COA, citing to U.S.C. 28 § 2253(c)(2) and *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). (A-6).

Mr. Mansell is seeking review of the district court's order denying his 28 U.S.C. 28 § 2254 petition. In his Petition for Writ of Habeas Corpus Mr. Mansell asserted that he is entitled to relief based on the violations of the Florida State Courts that deprived him of his constitutional rights as afforded under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution.

PROCEDURAL HISTORY

A. The Crimes Alleged

The Petitioner was charged via Information on January 29, 2007 in Count I, Luring or Enticing a Child; Count II, Lewd and Lascivious Conduct (Touching); and Count III, Lewd and Lascivious Conduct (Soliciting). At the time of the alleged offense, the alleged victim was an eleven-year-old (female) minor (referred to hereinafter as J.G.). The alleged crime took place in Hillsborough County, Florida on December 27, 2006.

B. The Jury Trial

On Mach 7, 2008, a jury trial was held in which the alleged victim J.G testified against the Petitioner. J.G. testified that she was 11-years-old and that she had moved to Florida with her mother, brother, and aunt. J.G. stated she had first met the Petitioner when he drove up to her family's home sometime after December 18, 2006, saying that he was picking up kids to go to Sunday school and then to see horses. With her mother's permission, J.G. went with the Petitioner as he drove her to his house, and, once there, J.G. saw children's toys in the yard and a doll in the back of the Petitioner 's Jeep. She stated that the Petitioner then went to the closet to get feed for the horses. J.G. petted, fed, and rode a horse while the Petitioner kept giving her a "kind of creepy" grin. J.G. later asked the Petitioner to take her home, and he did so.

J.G. testified that the next day, the Petitioner returned to her home and after J.G.'s mother talked to him, she asked J.G. if she wanted to go play with the horses.

J.G. went with Mr. Mansell to his house and played with a horse; then, they went to another location where there were several horses and then the Petitioner drove her home. On December 25, 2006, the Petitioner had Christmas dinner with J.G. and her family at their home.

On December 27, 2006, J.G. testified that the Petitioner again came to her home and said that they were going to see the horses. The Petitioner drove J.G. to his house and told her to follow him inside to which J.G. obeyed, The Petitioner told her to go into his bedroom, and she did so. J.G. sat on the bed and the Petitioner gave her a toy and while she played with the toy, he sat down on the bed close to her. J.G. stated she started to move away from the Petitioner, but he put his arm around her and on her shoulder while he put his other hand on her thigh and started to inch his hand closer to her "private area." When the Petitioner touched the "crotch area" of her pants; she felt very uncomfortable and started to move away. Then she stated the Petitioner moved his hand toward J.G.'s "breast area" and touched her breast and at that point she jumped up and said, "no."

On the way back to J.G.'s home, the Petitioner said that he would pay her $50 for helping with the horses, and $10 "if she would let him touch" her. J.G. looked away and did not respond, and the Petitioner "said for her to not tell anyone else." After the Petitioner dropped her off at her home, she told her mother what happened. The next day, on December 28, 2006, the Petitioner came back to her house and her mother talked to him. After he left, J.G.'s mother then called the police. J.G. gave a statement to Deputy Kathleen Pettit. (TT-291-347).

The Petitioner also gave a statement to Deputy Pettit in which he said that he would tell her some things, but not everything. The Petitioner stated that he hugged J.G. but did not fondle her.

During cross-examination, J.G. admitted that she had written out a statement for Deputy Petit on December 28, 2006, and agreed that in the written statement she never mentioned that the Petitioner had ever touched her. In fact, she testified at trial that the Petitioner did in fact touch her breast, but admitted that in her written statement to police she said that she told Deputy Pettit the Petitioner [t]ried to touch her breast. While at trial she testified that what she meant by that was that the Petitioner did not touch her nipple. During her deposition (permitted in Florida criminal proceedings), when J.G. was asked if the Petitioner ever touched her breast, she answered that *he did not* because she took his hand off her shoulder; however, she also stated that she was sure the Petitioner did touch the upper portion of her breast. (TT-367-70) (Emphasis added). She also testified at trial that the Petitioner had put his hand on the upper portion of her right thigh and that he was moving toward her vagina, however, during cross-examination she admitted that in her deposition, she said he put his hand on her leg, her right thigh, but she did not mention anything about moving his hands towards her vagina area or touching her crotch area. She also admitted she failed to mention this to Deputy Pettit or in her written statement. (TT-373-74). It was also brought out during cross examination that during her deposition on October 23, 2007, she did not mention anything about an offer of money by the Petitioner to be allowed to touch her. (TT-375)

The State's next witness was Deputy Pettit (TT-405). Deputy Pettit testified that she was summoned to J.G.'s home on December 28, 2006 to investigate the alleged incident that had occurred the day before. The deputy testified that J.G. seemed scared but admitted that she had no specialized training to deal with victims of sexual abuse. Deputy Pettit testified that J.G. told her the Petitioner had offered her money to groom the horses, and ten dollars if he could touch her. The Deputy admitted that the ten dollars "was not in J.G.'s written statement." (TT-412-13). Deputy Pettit admitted that J.G. had told her that the Petitioner **had not touched her breast,** but that he tried to touch her. (TT-440). She also testified that she interviewed the Petitioner at his home the same day and after reading him his Miranda rights, he told her I hugged her but did not fondle her. (TT-418). At the conclusion of Deputy Pettit's testimony, the State rested and the Defense moved for a Judgment of Acquittal (JOA). (TT-448).

The basis for the JOA was with respect to Count One, Luring and Enticing, § 787.025(2)(a), Fla. Stat. (2007). The defense argued that the State had not established a prima facie case that the Petitioner intentionally lured or enticed or even attempted to lure or entice the child into a dwelling for something other than a lawful purpose. (TT448-49). The second basis for the JOA was that a prima facie case was not established in Count Two, and that the State had not shown that the Petitioner had touched her in a Lewd and Lascivious Manner. (TT-456). The defense further argued that in Count Three, the JOA should be granted because the only testimony offered about the ten dollars [allegedly offered to J.G. by Petitioner and testified to by her

but never mentioned prior to trial in either her written statements or her deposition testimony] never established where the Petitioner [a]llegedly wanted to touch her. Therefore, the defense argued that a prima facie case had not been established by the State for Lewd and Lascivious conduct (Solicit) for Count Three. (TT-462).

The Court then conducted a colloquy with the Petitioner regarding his right to testify in which he stated that he did not want to testify on his behalf. (TT-470). The defense then renewed all objections and motions before the court which denied them all. The court then concluded the proceedings for the day, opting for closing arguments to be presented the next day on March 5, 2008. (TT-520-606). After closing arguments were presented, the court then instructed the jury and they were excused to deliberate. The jury returned a short time later with a verdict, finding the Petitioner guilty as charged on all Counts. (TT-612-30).

C. The Sentencing

The Petitioner's sentencing was held the following day on March 6, 2008; the defense made a motion to set aside the verdict which was denied. The victim, J.G. made a statement about the effects of the incident had on her and how she and her family have suffered because of the incident. (TT-653-67). The Petitioner offered in his statement before the court that he should be given a departure and given house arrest for two reasons. The first was that he suffered from encephalitis that he had contracted the disease after volunteering and serving two tours of duty for the United States in the Vietnam war. The second reason he gave was that because of the care he provides for his elderly and disabled mother. (TT-678). The defense asked the

Court to impose the bottom of the guideline sentence and asserted that fifty (50) months in state prison was the appropriate sentence. (TT-681). Whereas the State had asked the Court to sentence the Petitioner to a term of incarceration for thirty-five (35) years in prison. (TT-667).

The Court imposed the sentence on the Petitioner, finding him to be "terribly, terribly dangerous," and that "there is nothing that we as a society can do as far as I know except to lock you up." (TT-681-83). The Court further opined that "and as far as I know the only thing I can do to protect [the child] is to lock you up for as long as I can, and that is what I intend to do, because I don't think there is a bit of protection. The first child that comes your way, I believe you will do the exact same thing." (TT-683). The Court then sentenced the Petitioner to five (5) years on Count One, to run consecutive to both Counts Two and Three. The Court sentenced the Petitioner to fifteen (15) years on Count Two, to be run consecutive to fifteen (15) years on Count Three with credit for one hundred and eighty-six days credit for jail time served. (TT-684). The Petitioner timely filed for appeal through counsel who also served as his trial counsel, Cynthia Lakeman, Esquire.

Petitioner Mansell raised five issues on direct appeal before the Second District Court of Appeals.

> 1. The court's admission of the statement that was deemed a discovery violation resulted in fundamental error.
>
> 2. Persuasive and persistent prosecutorial misconduct irreparably impaired the jury's ability to render an impartial verdict and gave rise to fundamental error reversible error.

3. The trial court erred in finding that the State had proven a prima facie case in Count One, Luring and Enticing a child.

4. The trial court erred in finding that the State had proven a prima facie case in Count Two, Lewd and Lascivious Conduct (touch), an intentional touching.

5. The trial court erred in finding that the State had proven a prima facie case in Count Two, Lewd and Lascivious Conduct (solicit) charge, through the Petitioner's alleged offer to pay ten dollars ($10) to touch the alleged victim.

On August 4, 2010, the Second District Court of Appeal affirmed the Petitioner's judgment and sentence without opinion. *See Mansell v. State,* 44 So. 3d 589 (Fla. 2d DCA 2010). (A-7).

On April 12, 2011, Petitioner Mansell filed a filed a Motion for Postconviction Relief pursuant to Florida Rules of Criminal Procedure 3.850 in the trial court raising the following claims for ineffective assistance and postconviction relief. (A-8).

1. Trial counsel rendered ineffective assistance by failing to conduct an adequate pretrial investigation in order to raise a viable defense in violation of the defendant's 6th and 14th amendment rights.

2. Trial counsel rendered ineffective assistance by failing to raise the defendant's competency due to mental impairment due to his encephalitis.

3. Trial counsel rendered ineffective assistance by failing properly advise the defendant that it was his right to have lesser included offenses in his jury instructions which vested the jury with pardoning power.

4. Trial counsel rendered ineffective assistance by failing to object to "Golden Rule" violations from the prosecution.

5. Trial counsel rendered ineffective assistance by failing to object to the State Attorney's comment that the defendant confessed to the charges.

6. Trial counsel rendered ineffective assistance by failing to properly argue the motion for judgment of acquittal.

7. The trial court committed fundamental error when it failed to give lesser included offenses when the defendant was not aware he was waiving his right to lesser included offenses.

On August 29, 2016, after an evidentiary hearing, the postconviction court denied the Petitioner's Rule 3.850 Motion. (A-9).

On January 13, 2018, the Second District Court of Appeal denied the Petitioner's appeal issuing a per curiam affirmed opinion, the mandate issue on March 27, 2018. *See Mansell v. State,* 242 So. 3d 357 (Fla. 2d DCA 2018). (A-10).

On May 29, 2018, Petitioner Mansell filed a Petition for Writ of Habeas Corpus pursuant to § 2254 in the United States District Court, Middle Division of Florida. (A-1). The Petitioner raised the following Grounds for relief from constitutional violations from the State Court proceedings.

1. The Court's admission of the statement that was deemed a discovery violation resulted in fundamental error.

2. Persuasive and persistent misconduct irreparably impaired the jury's ability to render an impartial verdict and gave rise to fundamental reversible error.

3. The trial court erred in finding that the State had proven a prima facie case in Count One, Luring and Enticing a child.

4. The trial court erred in finding that the State had proven a prima facie case in Count Two, Lewd and Lascivious Conduct (touch), an intentional touching.

5. The trial court erred in finding that the State had proven a prima facie case in Count Two, Lewd and Lascivious Conduct (solicit) charge,

through the Petitioner's alleged offer to pay ten dollars ($10) to touch the alleged victim.

6. Trial counsel rendered ineffective assistance by failing to conduct an adequate pretrial investigation in order to raise a viable defense in violation of the defendant's 6th and 14th amendment rights.

7. Trial counsel rendered ineffective assistance by failing to raise the defendant's competency due to mental impairment due to his encephalitis.

8. Trial counsel rendered ineffective assistance by failing properly advise the defendant that it was his right to have lesser included offenses in his jury instructions which vested the jury with pardoning power.

9. Trial counsel rendered ineffective assistance by failing to object to "Golden Rule" violations from the prosecution.

10. Trial counsel rendered ineffective assistance by failing to object to the State Attorney's comment that the defendant confessed to the charges in violation of the defendant's 6th and 14th amendment rights.

11. Trial counsel rendered ineffective assistance by failing to properly argue the motion for judgment of acquittal allowing the defendant to be convicted on a charge that the elements were not proven at trial.

12. The trial court committed fundamental error when it failed to give lesser included offenses when the defendant was not aware he was waiving his right to lesser included offenses.

On November 21, 2018 the State filed a response to Petitioner Mansell's petition. (A-2).

On February 11, 2019, the Petitioner filed a Reply to the State's Response. (A-3).

On September 23, 2021, The United States District Court issued its order denying the Petitioner's U.S.C. 28 § 2254. (A-4).

On October 19, 2021, the Petitioner filed an application for Certificate of Appealability (COA) in the United State Court of Appeals for the Eleventh Circuit. (A-5).

On February 28, 2022, the Eleventh Circuit denied the Petitioner's COA, citing to 28 U.S.C. § 2253(c)(2) and *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). (A-6).

REASONS FOR GRANTING THE WRIT

The questions presented herein are important that the Petitioner has made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

> I. WHETHER THE DISTRICT COURT ERRED IN DENYING CLAIM ONE OF THE PETITIONER'S 28 U.S.C. § 2254 AS PROCEDURALLY BARRED WHEN THE STATE COURT VIOLATED HIS 5TH, 6TH, AND 14TH, AMENDMENT RIGHTS WHERE A DISCOVERY VIOLATION HAD TAKEN PLACE PURSUANT TO *BRADY v. MARYLAND*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)?

The issue presented falls under 28 U.S.C. § 2254(d) subsection (1) where the State court's erred in denying the Petitioner's claim that the State committed a discovery which in turn constituted a violation *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This decision was contrary to, and involved an unreasonable application of clearly established federal law pursuant to 28 U.S.C. § 2254(d) which states as follows:

28 U.S.C. § 2254(d)

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Petitioner Mansell submits that the District Court erred when it denied his claim that the state court's failure to grant a new trial resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. When the prosecution introduced a statement ("make sure you don't tell anybody about this") (allegedly made by the victim for the first time that morning) during opening statements it violated the Petitioner's 5th, 6th, and 14th, Amendment rights to a fair trial. This violation deprived the Petitioner of the opportunity to prepare a defense for it before trial commenced, and resultingly, damaged the whole theory of defense was pursuing. When the State introduced the statement defense counsel objected to the discovery violation seeking an immediate mistrial; the trial court denied the objection and categorized the violation as [in]advertant. (Emphasis added). The court stated that the discovery violation did not affect the strategy and preparation of the defense, and more importantly, the court shifted the burden to the defense asking counsel to show how the defense strategy or preparation was effected.

In doing so, the trial court committed a fundamental reversible error by allowing the discovery (*Brady*) violation to stand. This new [alleged] statement made by the victim completely took defense counsel by surprise undermining her whole theory of defense. The denial of the mistrial and allowance of the violation resulted in procedural prejudice against the Petitioner as it was a material change in the victim's depositional statements. Here, if the defense had known that the witness was not going to testify consistent with her deposition, the defense would have devised a different trial strategy altogether. Thus, the trial court erred in denying the defense's motion for a mistrial due to the discovery violation because the defense was procedurally prejudiced by the discovery violation and that error was not harmless. *See Smith v. State,* 7 So. 3d 473 (Fla. 2009).

Defense Counsel presented argument that the [new] statement was not in the alleged victim's deposition, not in the police report, nor was it anywhere else in the State's discovery and was a blatant misstatement of the facts. Moreover, the prosecutor even admitted that when she had spoken to the alleged victim earlier that day, it was the first time she (the victim) said that the Petitioner had told her not to tell anybody. (TT-233). The court did find that the statement had been made the morning of trial to the prosecutor [and] that it had not been revealed to defense counsel prior to the beginning of the proceedings. The court even agreed with defense counsel that the State should have disclosed the statement to the defense as soon as the parties came into the courtroom that morning. (TT-238). However, the court still allowed the discovery violation to go on without a proper remedy to the violation.

Defense Counsel further argued that there were several things she would have done differently had she known of the [alleged] statement, including seeking the court instructing the State to not mention it in their opening statements. It should be noted that the court did allow defense counsel to take a break of about thirty minutes to review the victim's deposition transcript again (approximately one hundred pages) (TT-239) but that did nothing to remedy the constitutional injury suffered by the Petitioner after the jury had already heard the statement. The discovery violation was material as it was dispositive to the outcome of the proceedings as it went directly to establishing the Petitioner's guilt and punishment.

A. Clearly Established Federal Law:

To be certain, *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) is clearly established federal law. In *Brady,* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the Supreme Court set out the three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S. at 281-82. With regard to the prejudice component, "favorable evidence is material, and constitutional error results from its

suppression by the government, if there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). The prejudice standards under *Brady* and *Strickland* are basically the same. *See Tanzi v. Sec'y, Fla. Dep't of Corr.,* 772 F.3d 644, 2014 WL 6462903, at *15 (11th Cir. Nov. 19, 2014).

Pursuant to *Brady* the prosecution violated a constitutional duty to disclose evidence favorable to the Petitioner when that evidence was material to his guilt and punishment. *See United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001). *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). In this instance, while the evidence went directly to the guilt of the Petitioner and it most assuredly was material in the *Brady* context because it was determinative to the end result and its suppression undermined confidence in the outcome of the trial. The failure to disclose the statement adversely affected the defense strategy and [a]ny subsequent ability to prepare a defense to it. The prosecution was the beneficiary of the new statement and by alleging that the victim had only told them the morning of the trial, concealed it from the defense. More importantly, the disclosure of the statement to the defense would have to be considered favorable as counsel for the defense would have had the ability to counteract it and would have decided on a different defense strategy. Furthermore, counsel would have been able to research the allegation's truthfulness and [then] advise the Petitioner on whether or not to proceed to trial or take a plea agreement. As previously stated, the defense was

procedurally prejudiced because there is a reasonable probability that the Petitioner's trial preparation and strategy would have been different had the violation not occurred. Here, the State's discovery violation greatly hindered the Petitioner's trial preparation and strategy.

A federal habeas court may overturn a state court's application of federal law only if it is so erroneous that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter,* 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). ("Under 2254(d), a habeas court must determine what arguments or theories supported or, . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.").

Petitioner Mansell submits that he has demonstrated that the state court's application of the "suppression" component of the *Brady* standard was so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedent for discovery violations. The same is true of the "materiality" component of *Brady* because the evidence was *material* to what the jury had to consider and there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Defense counsel would have been able to prepare for and introduce evidence that would have impeached the alleged statement, moreover, it would have placed the Petitioner in a different mindset as he would have testified to refute the allegation

now being levied against him. Therefore, the Petitioner has satisfied both the *"suppression"* and the *"materiality"* elements of the *Brady* violation.

B. Procedural Default:

In the denial by the District Court, it relied on the State's assertion that this claim should be procedurally defaulted because the Petitioner's court appointed attorney failed to [a]lert the State court of the federal violation. Petitioner Mansell submits that he should not be penalized by counsel's ineptitude for the omission, because in essence, his counsel was working as an agent for the State. The Petitioner submits that he has demonstrated that good cause for the procedural default has been presented and failure to grant relief in this instance would result in a fundamental miscarriage of justice.

To overcome a procedural default such that the federal habeas court may consider the merits of a claim, the petitioner must show cause for the default and prejudice resulting therefrom or a fundamental miscarriage of justice. T*ower v. Phillips,* 7 F.3d 206, 210 (11th Cir. 1993); *Parker v. Dugger,* 876 F.2d 1470 (11th Cir. 1990), *rev'd on other grounds,* 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991). "For cause to exist, an external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim." *McCleskey v. Zant,* 499 U.S. 467, 497, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517 (1991) (quoting *Murray v. Carrier,* 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986)).

In the case at bar, the external impediment [w]as based on government interference as the court appointed counsel (a state employee) [f]ailed to raise the issue in a federal constitutional violation context. This is happening more and more within the Florida judicial system, whereas court appointed appellate counsel, either through inexperience, neglect, or outright nefarious reasoning, have omitted the basis to establish federal claims. Thus, the State Attorney Generals are then able to come back with the good old refusal of "failure to alert the state courts" of federal constitutional violations and therefore the claims won't be able to receive habeas relief. As is the situation with the Petitioner *sub judice*, he was prevented from raising the claim because of the ineptitude of a government employee: his own appellate attorney.

The above argued federal constitutional claim does constitute 5th, 6th, and 14th, Amendment violations as the discovery (*Brady)* violation [d]id materially hinder the Petitioner's trial preparation and strategy. The defense would have altered the questioning of law enforcement pertaining to the interviews with the victim. Additional other alternatives include preparation time for counsel to refute the victim's new allegation or to vigorously pursue favorable pre-trial plea negotiations in which the State most assuredly would have offered a significantly lesser sentence. However, none of that happened because the trial court failed to give the defense the opportunity to prepare for or change its trial preparation and strategy. Furthermore, the defense would have differed in the questioning [o]f the alleged victim in her pretrial deposition but was precluded from doing so. Because the State violated the

rules for discovery, and the State Court buried the issue without correction, the constitutional violation of the Petitioner's due process and the right to a fair trial before an impartial jury was left un-corrected. This then became a classic case of a *trial by ambush* when as previously stated, the error complained of herein should have resulted in a new trial for the Petitioner.

Accordingly, the State Court's determination that there was no discovery violation was contrary to, and involved an unreasonable application of clearly established Federal law as determined by this Supreme Court of the United States.

II. WHETHER THE DISTRICT COURT ERRED IN DENYING THE PETITIONER'S CLAIMS REGARDING THE SUFFICIENCY OF THE EVIDENCE IN THE PETITIONER'S 28 U.S.C. § 2254 PURSUANT TO *JACKSON V. VIRGINIA,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979) AND IN DOING SO VIOLATED HIS 5TH, 6TH, AND 14TH, AMENDMENT RIGHTS?

The issue presented falls under 28 U.S.C. § 2254(d) subsection (1) where the State court's erred in denying the Petitioner's claim that the sufficiency of the evidence used to convict was a violation of *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979). This decision was contrary to and involved an unreasonable application of clearly established federal law.

The issue here is whether the District Court erred in denying the Petitioner's claim regarding the sufficiency of the evidence used to obtain the conviction against him. As discussed in Issue One, the Petitioner was materially prejudiced by the Trial Court's error in allowing the State's discovery violation to continue unabated and in doing so tainted the jury against him allowing them to infer guilt before the

presentation of evidence had even begun. Additionally, the evidence produced at trial did not equate to the Petitioner's guilt based on the instructions presented to the jury. The constitutional injury complained of herein was left un-remedied by the State Courts. There was insufficient evidence presented that warrants the conviction.

In the deposition of the alleged victim taken on October 23, 2007, when questioned by the Petitioner's female defense attorney, J.G. did not testify that the Petitioner had [act]ually touched either her breast of her vagina and only said that he took his hand off her shoulders and started putting it down [t]owards her "boob"-her breast. (TT-376)(Emphasis added) When J.G. was questioned by the prosecutor, he put his own words in her mouth.

Q. "And earlier you described a little bit about him touching your upper thigh, and I want to get into a little bit more detail about that. Okay? Do you feel–Did you feel him going towards your private area when he was touching your thigh?"
A. "Yes."
Q. "He was going towards your crotch area?"
A. "Yes."
Q. "All right. And did he have his arm also around your shoulder?"
A. "Yes."
Q. "Did he ever touch your upper breast area?"
A. "When I told him to get his hand off my thigh, he had brought his hand up and like, put it right there."
Q. "You are touching the upper portion of your breast area, is that correct?"
A. "Yes."
Q. "Okay. But did he ever touch your–he never touched your nipple right?
A. "No."
Q. "Just the upper portion of your breast?"
A. "Yes."
Q. "All right. And you are sure that he touched your breast?"
A. "Yes."

(Testimony taken during the deposition of the alleged victim held on October 23, 2007, page 72 through page 73.).

At trial during direct examination of J.G., she testified that while sitting on the bed next to her, the Petitioner put his left arm around her, close to her shoulder, then started moving his hand closer to her breast area. (TT-332-35). She pointed to her chest area, upon the State's prompting, the State asked that the record reflect that the witness touched her upper middle section of her breast, and upon the Court's questioning, stated that the Petitioner touched her on the breast. (TT-335-37). On re-direct examination, the State attempted to rehabilitate J.G. by reading the above quoted deposition transcript at trial. The Prosecutor asked J.G. again during re-direct if the Petitioner had touched her breast and she [now] indicated that he did. (TT-380).

The leading of the alleged victim by the State did not go un-noticed by the trial court and its suspicions which prompted the court to comment that the prosecutor had led the alleged victim during her deposition. (TT-553). It was readily apparent that the prosecutor's leading of the witness was necessary to obtain the conviction because the sufficiency of the evidence was not there to begin with. Couple this with the discovery violation in Issue One; the State was able to garner a conviction of the Petitioner through subterfuge and trickery. All of which, the trial court allowed to transpire. Here, during the victim's testimony, the Prosecutor was actually the one testifying before the jury by continually asking leading questions and by putting the words he wanted into her mouth. On several occasions, the court had to rebuke the State for its actions, as defense counsel objected to the misgivings fifty-one (51) times

during the State's case, prompting numerous motions for mistrials. The court sustained twenty-eight (28) of those objections and denied every single one of the motions for mistrial. More disturbingly, the vast majority of the objections by the defense required a bench conference or the removal of the jury from the courtroom further prejudicing the Petitioner's right to a fair trial. Each time, the focus of the trial was directed away from the facts in evidence to defense counsel because she was the person making the objections. The cumulative effect of the prosecutions deceptions combined to deny the Petitioner of a fair trial before an impartial jury as required by the Sixth Amendment. Because the prosecution withheld the [alleged] statement of the [alleged] victim until just before trial from the defense, setting up the ambush, and because the prosecution led J.G. in her deposition, then again later used her to get his own words entered into evidence at trial, the Petitioner was prejudiced to the point as to vitiate the entire trial.

A. Sufficiency of the Evidence:

1. The evidence adduced at trial failed to establish a prima facie case that the State had proven that the Petitioner was in fact guilty of *"luring and enticing a child."* The State argued that J.G.'s testimony of the offer of a "water toy", a "soccer shirt" and petting, feeding and riding the horses constituted "luring and enticing." The State also argued that the Petitioner had told her he was taking her to Sunday School, but when they arrived there was no church or Sunday School, but instead he allowed her to pet, feed and ride the horses. (TT-451-52). However, J.G. admitted that [s]he had asked her mother for permission to go to the Petitioner's home and her

mother consented, with J.G. going willingly to the Petitioner's home. (TT-301-02). She ***was not lured and enticed*** to go there and the evidence and testimony presented does [n]ot support a finding of "luring and enticing." Sufficient evidence *did not exist* to permit a rational trier of fact to find the elements of the crime beyond a reasonable doubt without the suborning of the testimony by the prosecution. Therefore, this count should have never gone to the jury after the Petitioner's judgment for acquittal because there was not sufficient evidence presented to support a conviction on that charge. There is no evidence that the Petitioner invited, persuaded, or attempted to persuade the child to enter his home *with the intent to commit an unlawful sexual act* upon the alleged victim.

2. The evidence adduced at trial failed to establish a prima facie case that the State had proven that the Petitioner was in fact guilty of Lewd and Lascivious Conduct (touch), an intentional touching. Pursuant to Florida Law, the statute for Lewd and Lascivious Conduct (touch), 800.04(6)(a)1 and (b) Fla. Stat. (2000), Count Two of the Petitioner's conviction reads as follows:

> 800.04 Lewd and Lascivious offenses committed upon or in the presence of persons less than 16 years of age,--
> (6) Lewd and Lascivious Conduct, --
> (a) A person who:
> 1. Intentionally touches a person under 16 years of age in a Lewd and Lascivious manner; or
> 2. Solicits a person 16 of age or under 16 years of age to commit a Lewd and Lascivious act commits Lewd and Lascivious conduct.
> (b) An offender 18 years of age or older who commits Lewd and Lascivious Conduct commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statutes § 800.04(6)(a)1 and (b) (2007).

In *Pennington v. State,* 219 So. 2d 56 (Fla. 3r DCA 1969) a seven-year-old girl testified that the Appellant had invited her into his home and touched her once on the vagina, on the outside of her clothing, while she was fully clothed. *Id.* The court cited to *Boles v. State,* 158 Fla. 220, 27 So. 2d 293 (1946) and stated: "...the evidence viewed as a whole is insufficient to prove beyond a reasonable doubt that the Appellant is guilty of the crime described in 800.04 Florida Statutes." The court noted that the record was devoid of any evidence of a "wicked, lustful, unchaste, licentious or sensual design on the part of the perpetrator". The Petitioner did not attempt to fondle her, and did not utter any endearments to her. The Florida Supreme Court in its conclusion stated: "Human liberty should not be forfeited under the evidence which is not sufficient to convince a fair minded and impartial mind of the guilt of the accuse to a mortal certainty and beyond a reasonable doubt." *Id.*

Similar to *Pennington,* the record in the Petitioner's case [i]s devoid of any wicked, lustful, unchaste, licentious or sensual design, moreover, there is no evidence of an unlawful indulgence in lust, or eagerness for sexual indulgence on the Petitioner's part. In the written statement J.G. prepared for the police, she never indicated that the Petitioner had actually touched her. (TT-364-65). In her statement, she stated that he **"tried to touch her breast."** (TT-367). (Emphasis added). Additionally, in her deposition, J.G. admitted that he did not touch her breast because she took his hand off her shoulder, and that he touched her but was moving his hand toward that area. (TT-377). Furthermore, in cross-examination, J.G. agreed that in the written statement, she never mentioned that the Petitioner had never touched

her. (TT-364-65). Therefore, if the Petitioner never touched her breast, even if he had attempted to touch her breast as she alleged, he **did not commit** the crime of Lewd and Lascivious Conduct (touch). A conviction for an offense for which there is no evidence is fundamentally erroneous, and as here, the facts do not constitute the offense charged as a matter of law. The conviction for Lewd and Lascivious Conduct (touch) is not supported by the evidence and a rational trier of fact could not find the elements of the crime beyond a reasonable doubt. The evidence presented was not sufficient to sustain a conviction.

3. The evidence adduced at trial failed to establish a prima facie case that the State had proven that the Petitioner was in fact guilty of Lewd and Lascivious Conduct (solicit), charge. The State charged the Petitioner in Count Three with Lewd and Lascivious Conduct (Solicit) under 800.04(6)(a)2 and (b) Fla. Stat. (2000), Count Two of the Petitioner's conviction reads as follows:

> 800.04 Lewd and Lascivious offenses committed upon or in the presence of persons less than 16 years of age,--
> (6) Lewd and Lascivious Conduct, --
> (a) A person who:
> 1. Intentionally touches a person under 16 years of age in a Lewd and Lascivious manner; or
> 2. Solicits a person 16 of age or under 16 years of age to commit a Lewd and Lascivious act commits Lewd and Lascivious conduct.
> (b) An offender 18 years of age or older who commits Lewd and Lascivious Conduct commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statutes § 800.04(6)(a)1 and (b) (2007).

The defense had asked the court to dismiss count three because the State had not established a prima facie case for that charge. Assuming arguendo if the

Petitioner [h]ad offered money to J.G. to touch as she alleged, stating "I'll give you ten bucks if you let me touch you," it was never proven [w]here he wanted to touch her. (TT-460) (Emphasis added). For instance, if he had touched her forearm, foot head, whatnot, those elements would support a battery charge, but did not satisfy the elements of Lewd and Lascivious Conduct (Solicitation). There is no proof of the Petitioner's intentions, only speculation and that is insufficient evidence to support a conviction for the crime he was charged with. More importantly, this again centers around the statement made in Issue One ("make sure you don't tell anybody about this") where it invaded the province of the jury and tainted their decision against the Petitioner because if he said that, he must be guilty of the other charges. The jury was allowed to infer the Petitioner's guilt right from the start and once that bell was rung, it could not be undone. However, impermissible inferences [d]o [n]ot establish the elements of the crime the Petitioner was charged and convicted of. A conviction as a matter of law cannot stand on inferences, therefore, these inferences cannot for the basis for the Lewd and Lascivious Conduct (Solicit) conviction. The sufficiency of the evidence was nowhere as there was no evidence presented that the Petitioner offered money to perform a [s]pecific sexual act on the alleged victim. The conviction for Lewd and Lascivious Conduct (Solicit) is not supported by the evidence and a rational trier of fact could not find the elements of the crime beyond a reasonable doubt. The evidence presented here was not sufficient to sustain a conviction.

The constitutional violations and errors complained of herein should have been corrected and resulted in a new trial for the Petitioner.

Accordingly, the state court's determination that there was sufficient evidence to support the conviction was contrary to, and involved an unreasonable application of clearly established Federal law as determined by this Supreme Court of the United States.

III. WHETHER THE DISTRICT COURT ERRED IN DENYING CLAIMS SIX THROUGH ELEVEN OF THE PETITIONER'S 28 U.S.C. § 2254 FOR THE INEFFECTIVE ASSISTANCE OF COURT APPOINTED COUNSEL WHERE THE STATE COURT DECISIONS WERE CONTRARY TO OR AN UNREASONABLE APPLICATION OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)?

The issue presented falls under 28 U.S.C. § 2254(d) subsections (1) and (2) where the District Court erred when it denied the Petitioner's argument that the State Court's denial of the Petitioner's ineffective assistance of counsel claims were not in violation of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The standard under *Strickland v. Washington* for an ineffectiveness claim is a familiar one. To be entitled to relief, a defendant must show "both that his counsel provided deficient assistance and that there was prejudice as a result." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). As to the performance prong, a court must apply a "strong presumption" that counsel's performance was within the "wide range" of reasonable professional assistance. *Id.* (citation omitted). To overcome that strong presumption and prevail, a defendant must show that "counsel made errors so serious that counsel was not functioning as

the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citation omitted). The standard against which to assess trial counsel's performance is one of objective reasonableness. *See id.*

As for the prejudice prong, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the would have been different." *Id.* (internal quotation marks and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks and citation omitted). Some conceivable effect on the outcome is not sufficient, *see id.*, but rather, counsel's error "must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," *id.* (internal quotation marks and citation omitted). Ultimately, under *Strickland*, the "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (quoting *Strickland*, 466 U.S. at 690). The petitioner must affirmatively prove prejudice by demonstrating that the unprofessional errors were so egregious as to render the trial unfair and the verdict suspect. *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001). Because judicial review of counsel's performance already "must be highly deferential," a federal habeas court's review of a state court decision denying a *Strickland* claim is "doubly deferential." *See Cullen v. Pinholster*, 563 U.S. 170, 189-90, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (quotations omitted). Further, because "*Strickland's* general standard has a substantial range of reasonable applications," *Harrington v. Richter*, 562 U.S. 86, 89-90, 131 S. Ct. 770, 178 L. Ed. 2d

624 (2011), "a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard," *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009). In sum, the pertinent inquiry under 2254(d) "is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 105.

Thus, under AEDPA, a person in custody pursuant to the judgment of a state court shall not be granted habeas relief on a claim "that was adjudicated on the merits in State court proceedings" unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or ... was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "For 2254(d), clearly established federal law includes only the holdings of the Supreme Court-not Supreme Court dicta.

As for the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Terry Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Under the "unreasonable application" clause, a federal habeas court may "grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts." Id. at 413, 120 S. Ct. 1495. "In other words, a federal court may grant relief when a state court has

misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Wiggins v. Smith,* 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Lockyer v. Andrade,* 538 U.S. 63, 76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)). And "an 'unreasonable application of' [Supreme Court] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald,* --- U.S. ----, 135 S. Ct. 1372, 1376, 191 L. Ed. 2d 464 (2015) (per curiam) (quotation omitted). To overcome this substantial hurdle, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id. Harrington* at 102.

The claims of ineffective assistance of counsel were argued in claims six through eleven within the Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Petitioner submits that counsel was constitutionally ineffective in her representation and addresses the claims as follows:

Petitioner Mansell alleged that counsel's performance was objectively unreasonable when she failed to (1) conduct an adequate pretrial investigation, (2) failed to raise the Petitioner's competency (mental impairment) due to encephalitis, (3) failed to properly advise the Petitioner it was his right to have lesser included offense in his jury instructions, (4) failed to object to the "Golden Rule" violation, failed to object to the prosecutor's comment on the Petitioner confessing to the charges, and (5) failed to properly argue the motion for judgment of acquittal which

allowed the Petitioner to be convicted on a charge that the elements were not proven at trial. For the purposes of Certiorari Review the Petitioner will only address the argument regarding counsel's ineffective assistance regarding the failure to investigate and present his competency to stand trial.

Deficient Performance:

1. Failure to Investigate the Petitioner's Competency:

Petitioner Mansell argued that counsel failed to investigate his mental illness history (encephalitis) prior to trial. Counsel's failure to investigate and alert the court of the Petitioner's need to be evaluated prior to trial violated his due process and the right to be determined competent to stand trial.

A. Mental Illness:

The Petitioner had been previously diagnosed with encephalitis (a degenerative brain disorder) that he contracted while serving two voluntary tours of duty during the Vietnam war. More importantly, the disorder only gets worse over time and there is no cure for it. However, despite the Petitioner's continued pleading with counsel about his mental health and his inability to comprehend the situation he was facing, counsel still neglected to have the Petitioner evaluated thinking that he was playing with her. In fact, it wasn't until the Petitioner went back for an evidentiary hearing and it was ordered that he be examined by mental health experts, that the issue came to light. While the postconviction court ultimately denied his claim, one of the doctors that evaluated him, Dr. Marotti opined before the postconviction court that the Petitioner was incompetent to stand trial. Furthermore,

that based on her assessment his competency was at issue at the time of trial. As a result of counsel's inactions and failure to investigate the Petitioner's mental health, he proceeded to trial while incompetent. Thus, counsel was deficient for failing to investigate and present the Petitioner's mental illness to the trial court to make a determination of competency. More importantly, his mental illness was a viable defense to the alleged crimes he was accused of and the failure to investigate resulted in a violation of 5th, 6th, and 14th Amendment rights.

Under the Sixth Amendment, counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. *See also Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (holding that counsel must make an "informed choice" among possible defenses). The decision whether to investigate must be assessed for reasonableness based on the circumstances, "applying a heavy measure of deference to counsel's judgments." *Strickland*, at 691.

Prejudice:

The Petitioner was prejudiced by counsel's failure to investigate as no competent attorney would have neglected the Petitioner's mental health issues and allowed their client to proceed to trial while incompetent. Counsel's deficient performance allowed an incompetent man to be tried and convicted depriving him of his due process and right to a fair trial.

A criminal defendant may not be tried unless he is competent. *See, Pate v Robinson*, 383 US 375, 378, 15 L Ed 2d 815, 86 S Ct 836 (1966). In *Dusky v United*

States, 362 US 402, 4 L Ed 2d 824, 80 S Ct 788 (1960) (per curiam), we held that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." Ibid. (internal quotation marks omitted). *Accord, Drope v Missouri,* 420 US 162, 171, 43 L Ed 2d 103, 95 S Ct 896 (1975). "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." "A criminal defendant has a procedural due process right to the observance of procedures adequate to protect his or her right not to be tried or convicted while incompetent to stand trial.")("[T]he failure to observe procedures adequate to protect a defendant's right to not be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."). *Id.*

While counsel's decision to not investigate and present certain evidence may at times qualify as a tactical decision within his or her discretion, "[i]t is unquestioned that under the prevailing professional norms . . . counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'" *See Porter v. McCollum*, 558 U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)); *Hannon v. State*, 941 So. 2d 1109, 1124 (Fla. 2006). That did not happen here even though counsel was well aware of his mental illness and allowed the Petitioner to proceed to

trial based on her own clinical evaluation and [a]ssumptions he was *competent* to proceed. More disturbingly, both of the State Courts, the District Court, and the Eleventh Circuit all passed on the opportunity to correct the constitutional injury suffered by the Petitioner as a result of counsel's ineffective assistance. Thus, it is left to this court to correct the constitutional injury and violations complained of herein which should have been corrected long ago and resulted in a new trial for the Petitioner.

The Petitioner submits that he has satisfied the *"contrary to"* clause, on the question of law and that the state court [d]id decide the case differently than [the Supreme Court] on a set of materially indistinguishable facts." *Id. Williams v. Taylor, supra.* Under the *"unreasonable application"* clause, the State Court unreasonably applied this principle to the facts of the Petitioner's case the governing legal principle[s] connected with the Petitioner's competency claim. *Id. Wiggins, supra.* The unreasonable application of' Supreme Court holdings by the State court regarding the Petitioner's competency issues [w]as *"objectively unreasonable"* because it allowed the Petitioner's verdict to stand when he was actually declared incompetent by a medical mental health professional after the fact. The State court decisions are in direct conflict with this Court's rulings in *Dusky, Pate, and Drope, supra.*

The Petitioner avers that he has demonstrated the double differential standard of *Strickland,* and the applicable laws pursuant to *Harrington, Cullen, and Knowles, supra,* that counsel was constitutionally deficient and ineffective in her representation of the Petitioner.

Accordingly, the state court's determination that there was no competency issue resulted in a decision that was contrary to, and involved an unreasonable application of clearly established Federal law as determined by this Supreme Court of the United States. The above mentioned constitutional violations warrant the granting of certiorari relief and the reversal for a new trial.

Petitioner Mansell is in custody of the Florida Department of Corrections contrary to the Constitution, Laws, and or Treaties of the United States.

CONCLUSION

The Petitioner respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Lwane Mansell

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