22-5840

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH RAY SHOOK
Petitioner

v.

STATE OF FLORIDA
Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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Rehabilitation Facility
P.O. Box 7171
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QUESTIONS PRESENTED FOR REVIEW

Whether a Petitioner who is serving a life sentence without the possibility of parole is denied his constitutional rights do to trial court err by:

A. admitting photographs of the victim's body because all were irrelevant and unduly prejudicial

B. admitting evidence of the deceased's petition domestic violence injunction and documentation pertaining to her divorce proceeding, as such evidence was impermissibly used to prove Petitioner's motive and State of mind

Whether a Petitioner who is serving a life sentence without the possibility of parole is denied his constitutional rights to counsel where counsel's representation fell outside that range of reasonably professional assistance for:

C. failure to challenge perspective juror that was hard of hearing, which was detrimental to Petitioner's trial.

D. failure to opening the door, which allowed the State to introduce prejudicial and otherwise inadmissible hearsay, which was detrimental to Petitioner's trial.

E. failure to cross examining State witness, which was prejudicial to Petitioner's trial.

F. failure to request a curative instruction after trial court agreed a proper predict was not laid for the introduction of State's evidence and State witness's testimony.

G. failure to properly question witness as to the shovel that was allegedly used in burring the victim.

H. misadvising Petitioner not to testify in support of his defense.

I. failure to object to prosecutor remarks on Petitioner's right to remain silent.

J. failure to object to prosecutor remarks on facts not in evidence.

K. failure to object to the illegal prejudicial jury instructions on voluntary manslaughter where Petitioner was convicted of second degree murder.

L. failure to call witnesses that were available during trial.

M. failure to present available evidence of phone records from Petitioner's cell phone and pictures from Petitioner's computer, which supported Petitioner's defense and proved his innocence.

Whether it's proper to deny a claim without holding an evidentiary when the record clearly does not refute the claim?

INTERESTED PARTIES

There are no interested parties to the proceeding other than those named in the caption of the case.

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APPENDIX

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April 15, 2011, Order of the Second District Court of Appeal affirming Shook's direct review, from the State Court *Shook v. State*, 59 So. 3d 118 (Fla. 2nd DCA 2015); Also May 10, 2011 Mandate.

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May 29, 2019, Order of the Second District Court of Appeal, summarily affirming Shook's 3.850 motion for post conviction relief. *Shook v. State*, 274 So. 3d 1068 (Fla. 2nd DCA 2019).

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May 27, 2022, Order from the Eleventh Circuit, case No. 2:19-cv-00526-SPC-MRM denying Petitioner's Motion for reconsideration of the denial of his motion for a certificate of appealability.

TABLE OF AUTHORITIES CITED

STATUTE(S)

IN THE
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On Petition for Writ of Certiorari to the United States
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PETITION FOR WRIT OF CERTIORARI

Joseph Ray Shook, *pro* se, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the denial of his Petition for writ of habeas corpus. The motion for reconsideration filed on March 21, 2022, for which a timely petition for rehearing was denied on May 27, 2022, by the eleventh circuit, Appendix A-3.

OPINIONS BELOW

The unpublished decision of the highest state court to review the merits of Shook's motion for post conviction relief appears in Appendix A-2. The order of the Order from the Eleventh Circuit denying Petitioner's timely petition for rehearing

of the denial of his motion for certificate of appealability **Appendix A-3**.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Part III of the Rules of the Supreme Court of the United States. The District Court and the Court of Appeal for the Eleventh Circuit denied Petitioner's request for Certificate of Appealability and rehearing. In *Hohn v. United States*, 524 U.S. 236 (1998), This court held that, pursuant of 28 USC 1254 (1), The United States Supreme Court has jurisdiction, on certiorari, to review a denial of a request for Certificate of Appealability by a circuit judge or panel of a Federal Court of Appeals.

The date on which the United States Court of Appeals decided my case was May 27, 2022, and a copy of the order denying reconsideration appears at **Appendix A-3.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Shook question involves the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution. The Fifth, Sixth, and Fourteenth Amendment provides that a defendant has a constitutional right to effective assistance of counsel. The Sixth Amendment provides, in part, that:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides, in part, that:

> [N]or 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

On August 10, 2007, Petitioner Joseph Shook, was charged by the State of Florida with second-degree murder. After a jury trial Petitioner was adjudicated guilty of second-degree murder Count I.

On January 22, 2010, Appellant was sentenced to life.

Appellant appealed his conviction to the Second District Court of Appeal. On Direst appeal the Petitioner raised two claims (1) The trial court erred by admitting photographs of the victim's body because all were irrelevant and unduly prejudicial. (2) The trial court erred in admitting evidence of the deceased's petition domestic violence injunction and documentation pertaining to her divorce proceeding, as such evidence was impermissibly used to prove Petitioner's motive and State of mind. Appellant's judgment and sentence was affirmed on April 15, 2011 with a mandate issued on December 13, 2013. *Shook v. State*, 59 So. 3d 118 (Fla. 2nd DCA 2011) (See Appendix A-3 at 1; Appendix A-2 at 1.)

On May 8, 2012, the Appellant filed a timely rule 3.850 motion for post conviction relief with Memorandum of law.

On April 25, 2018, the Twentieth Circuit Court denied Appellant's rule 3.850 motion for post conviction relief and Memorandum of Law. (See Appendix A-3 at 1; Appendix A-2 at 1.)

On May 10, 2018, Appellant filed a Motion for Rehearing, which was denied on June 28, 2018.

Petitioner filed a timely appeal and raised eleven claims in his initial brief alleging his constitutional right to effective assistance of counsel was violated. On May 29, 1019, the Second District Court of Appeal issued a decision *per curiam* affirming the state trial court's denial of his motion.

Petitioner filed a 2254 habeas corpus to the Middle District of Florida, which was denied. Petitioner appealed the denial to the United States Court of Appeal for the Eleventh Circuit, which was denied on March 21, 2022 Appendix A-3. A timely rehearing was filed and denied.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The United States Supreme Court has held that a defendant has Constitutional Right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.

A. Appellant's due process rights were violated when the trial court admitted unduly prejudicial photographs of the victim's body that were irrelevant.

The trial Court admitted pictures of Mrs. Shook's decaying body, and partially eaten face. The photographs did not assist the medical examiner in explaining the manner of death to the jury, and were also not relevant on disputed issue of Petitioner's ill will, hatred, spite, or evil intent in the second degree murder charge. The photos only served to incite emotion in the jury, and to provoke shock and disdain. These tactics were improper, and there is a reasonable probability that Petitioner was convicted solely on emotion, and undue prejudge causing Petitioner's trial to be constitutionally unfair. United States Supreme Courts have held that petitioner is only entitled to relief when admission of evidence violated his right to a fair trial under due process clause. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991), which held:

> Federal courts may not interfere with a state evidentiary ruling but may only consider whether the evidence was so prejudicial that its admission violated fundamental due process and the right to a fair trial

Young v. State, 234 So. 2d 341 (Fla. 1970), the Florida Supreme Court has held:

> the introduction of photographs taken away from the scene of the crime, and showing all or portions of the partially decomposed torso of

the victim, was unduly prejudicial.

In the case at bar, such error infringed upon the Petitioner's constitutional right under the Fifth and Fourteenth Amendment to a fair trial. Thus rising to the level of a constitutional violation rendering Petitioner's state trial fundamentally unfair and hence, violation of due process.

B. Appellant's due process rights were violated when the trial court admitted unduly prejudicial evidence of the deceased's domestic violence injunction and documentation pertaining to her divorce proceeding, as such evidence was impermissibly used to prove Petitioner's motive and State of mind

The trial Court entered the deceased's petition domestic violence injunction and documentation pertaining to her divorce proceeding. The victim's petition for domestic violence injunction, as well as documentation of the victim's dissolution of marriage was clearly hearsay.

The State in the post conviction court noted that the trial court chose not to admit the wife's petition for an injunction, certain documents that were part of the divorce action, and the wife's insurance policy due to the fact that the documents contained Statements and were testimony in nature.

No exception to Fed. R. Evid. 801(c) (b) (d) nor Rules Evid. 802, 803, 804 or 807 warranted the admission of the above mentioned evidence. Counsel objected arguing that such evidence would only bring fourth harassment, prejudice, and confusion. See *Hodges v. Sec'y*, 2007 U.S. Dist. LEXIS 12554 (M.D. Fla., Mar. 27, 2007) the Eleventh Circuit quoting *Bailey v. State*, 419 So. 2d 721 (Fla. 1st

DCA1982), held:

> the district court correctly held that Statements of a victim cannot be used to prove the State of mind or motive of a defendant because the hearsay exception created by subsection 90.803(3)(a), Florida Statutes (1989), does not apply to such a situation. We conclude, therefore, that the admission of the detectives' testimony as to Statements made by the victim was error.

There is an overwhelming possibility that domestic violence injunction evidence overcame any reasonable doubt the jury possessed and the outcome of the trial on the second Degree Murder charge would have been different. The Petitioner's constitutional right under the Fifth and Fourteenth Amendment to a fair trial. Thus rising to the level of a constitutional violation rendering Petitioner's state trial fundamentally unfair and hence, violation of due process.

II. The United States Supreme Court has held that a defendant has Constitutional Right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.

In order to establish a credible claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

C. Counsel was ineffective for failing to challenge perspective juror that was hard of hearing, which was detrimental to Petitioner's trial constitutional right to trial by an impartial jury under the Sixth and Fourteenth Amendment to the United States Constitution.

Juror Carol Moore expressed matter-of-factly that she was hard of hearing (T.T. 72). The federal courts have many cases where the judge excused a hard of hearing juror. See *United States v. Quiroz-Cortez*, 960 F.2d 418, 419 (5th Cir. 1992) (after jury deliberations had begun, district court excused a hard of hearing juror who may not have heard all of the trial testimony); *United States v. L'Hoste*, 609 F.2d 796, 801 n.4 (5th Cir. 1980) (prior to jury deliberations, the district court disqualified a juror as incompetent after concluding "she had a hearing impairment and had not heard portions of the testimony").

The Constitution affords Petitioner the right to an impartial jury and due process requires a jury capable to decide the case solely on the evidence before it. Juror Carol Moore was hard of hearing and therefore incompetent to serve on the jury and could not render a verdict based on a fair consideration of the evidence.

Clearly hearing from the juror's mouth that she was hard of hearing, counsel's decision to keep Juror Carol Moore on the jury cannot be considered a conscious and informed trial tactic. Counsel's failure to strike a juror with such disability was incompetence and constitutes deficient performance under *Strickland*. Counsel's deficient performance deprived Petitioner of his constitutional right to trial by an impartial jury under the Sixth Amendment and Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution.

Petitioner should therefore be afforded new trial.

D. Counsel was constitutionally ineffective for opening the door, which allowed the State to introduce prejudicial and otherwise inadmissible hearsay, which was detrimental to Petitioner's trial.

Defense counsel made an objection because she did not want prejudicial information/evidence to be heard by the jury. However, because counsel opened the door the unwarranted information/evidence was allowed in. Counsel was therefore constitutionally ineffective for allowing ill-chosen information/evidence that permeated the entire trial with obvious unfairness. The Federal Courts have held: A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel, unless it is so ill-chosen that it permeates the entire trial with obvious unfairness. See *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002).

The trial judge made it clear that the only reason for overruling defense

counsel's objection was because counsel ***opened the door*** (T.T. 421-422). The trial judge further made it clear "*that there had been three separate occasions during cross-examination that the issue has been raised by defense as to the victim's demeanor or State of mind. The most recent being on cross-examination of Mr. Castagner, regarding whether or not the victim would become unglued as it relates to the stress of childbearing or taking care of three children, so for those reasons the Court is overruling the objection as to relevancy and also as to the demeanor or character of the victim*" (T.T. 421-422).

Rodriguez v. State, 753 So. 2d 29, 42 (Fla. 2000) The Florida Supreme Court held:

> As an evidentiary principle, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted.

Petitioner avers that the information/evidence heard by the jury did have a substantial and injurious effect or influence in determining the jury's verdict. Thus, considering all of the circumstances, counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. No competent counsel would open the door and then object to the same information s/he allowed to come in. The Petitioner was prejudice, even counsel see the danger in the introduction of the evidence that's why counsel objected. Therefore, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Petitioner should therefore be afforded new trial.

E. Counsel was constitutionally ineffective for failure to cross examine State witness, which was prejudicial to Petitioner's trial.

In the case at bar, State witness brought testimony that was detrimental to Petitioner's defense and trial. The State needed this witness to build motive. After counsel opened the door State witness (Margaret Nosbush) was allowed to bring forth damaging testimonial evidence that the victim obtain a restraining order against the Petitioner. The record is clear that the testimony was damaging, because trial counsel objected and brought forth argument out of the presence of the jury that the statements were inadmissible (T.T.840-842). However, counsel failed to cross-examine state witness.

The decision to cross-examine a witness and the manner in which it is conducted are tactical decisions "well within the discretion of a defense attorney." *Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001) (quoting *Messer v. Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985)). In order to establish prejudice, a habeas petitioner must show at least one "specific instance where cross-examination arguably could have affected the outcome of the trial."

A proper cross-examination would have brought forth crucial evidence that would have helped Petitioner's defense and possibly brought forth an acquittal.

No competent attorney would object to the introduction of harmful testimony and then not cross-examine the witness that brought forth the evidence *Nixon v. Newsome*, 888 F.2d 112, 115-16 (11th Cir. 1989) (finding ineffective assistance

where counsel failed to impeach the key prosecution witness with prior inconsistent testimony where the earlier testimony was much more favorable to the defendant).

Counsel deficient performance was prejudicial which created a actual and substantial disadvantage infecting Petitioner's entire trial with error of constitutional dimensions.

Petitioner should therefore be afforded new trial.

F. Counsel was constitutionally ineffective for failure to request a curative instruction after trial court agreed a proper predict was not laid for the introduction of State's evidence and State witness's testimony.

Trial counsel objected as to the State of mind, character evidence concerning the admissibility of the note and the testimony from Ruth Castagner about the contents of the note. The Court sustained the objection (T.T. 454). The Court sustained the objection stating that Justin Castagner was a witness who would corroborate or authenticate the note as being from Mrs. Shook. However, the witness had already testified (T.T. 455). The trial court determined that Ruth Castagner could not authenticate the note and barred her from further testifying about the contents of the note. The State then withdrew the line of questioning because he did not want to call Justin Castagner back to the stand to testify (T.T. 455). Defense counsel Ms. Fitzgeorge distinguished that the objection was moot as to the note, but not the testimony and the judge agreed (T.T. 455). Regardless of the objection the jury heard testimony from Ruth Castagner about the contents of the note, which made counsel object. *Williamson v. State*, 994 So. 2d 1000 (Fla. 2008) The Florida

Supreme Court held:

> We find that the postconviction court interpreted the defendant's claim too narrowly. In looking to the specific claim that Williamson presents, Williamson does not assert that trial counsel was ineffective because the jury heard testimony and argument presented during the sidebar conference. Instead, Williamson asserts [*23] that his counsel was ineffective because counsel resisted only at sidebar when the State attempted to link a hypothetical with the believability and credibility of the threat to which Panoyan testified and that his counsel was ineffective when the trial court sustained his objections and counsel did not seek curative instructions based on the prior testimony. Since the actual Statements to which defense counsel objects are the subject of the claim upon which we reverse and remand for an evidentiary hearing, we likewise remand this claim to the postconviction court for an evidentiary hearing.

United States v. Mitrovic, 2020 U.S. App. LEXIS 214471 (11th Cir. Ga., September 3, 2020), the Eleventh Circuit held:

> Because Movant's attorney challenged the expert testimony about which Movant complains and the Court instead struck the reference from the record and provided a curative instruction, Movant has failed to show that any decision his attorney made was not reasonable or professional, and/or that he was prejudiced thereby.

The record is clear that the speculative evidence was heard by the jury, and it's highly likely that the testimony allow[ed] the jury to consider the speculation statement as evidence of Petitioner's guilt. Therefore counsel was constitutionally ineffective for failing to request a curative instruction.

G. Counsel was constitutionally ineffective for failure to properly question witness as to the shovel that was allegedly used in burring the victim.

During cross examination by defense counsel the witness (Sherri Dunaske)

expressly Stated that they collected one shovel ***for the purpose of comparing the clay composition and sand composition with the soil found on the shovel*** (T.T. 1054). During cross examination she was asked ***why she only collected one of the three shovels*** she stated ***she cannot answer that question, because she did not want to get in trouble*** (T.T 1062).

Petitioner avers that Counsel's failure to cross examine State witness (Sherri Dunaske) as the reason she would get into trouble for taking only the one shovel falls below an objective standard of reasonableness under prevailing professional norms. Especially when the one shovel was collected for the purpose of comparing the clay composition and sand composition from the murder scene with the soil found on the shovel.

Detective Sherri Dunaske Statement clearly leads to foul play in the process of obtaining the one shovel. "*Did you collect other two shovels? No. You just made a decision not to?* ***Well, there's a reason, but I don't want to get in trouble.***" Id.

There were three shovels in the garage, and all three shovels possessed the same clay dirt. The Petitioner could not have used all three shovels at one time. The three shovels with the same clay dirt on each shovel prove that the Petitioner did not use the one shovel to bury his deceased wife.

It is clear that counsels' representation fell below an objective standard of reasonableness, because no competent attorney would neglect to bring light to the fact there were three shovels that had the same clay dirt. Counsel's failure to cross-examine was in fact prejudicial to Petitioner's trial and defense and contributed to

the verdict. The shovel played an important role in the case at bar, because this was the ***actual shovel allegedly used to bury the victim. The shovel was the concrete evidence that was used to link the Petitioner to the alleged murder.***

The record is clear that counsel was deficient and that the deficiency prejudiced the defense and trial. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Therefore, Counsel's deficient performance deprived Petitioner of his constitutional right to a fair trial under the fifth, Sixth, and Fourteenth Amendment to the United States Constitution.

H. Counsel was constitutionally ineffective for misadvising Petitioner not to testify in support of his defense.

The United States Supreme Court has addressed this type of claim. The United States Supreme Court has made clear and have settled that a criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. *Rock v. Arkansas*, 483 U.S. 44, 49-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (*en banc*). This right is personal to the defendant and cannot be waived by the trial court or defense counsel. *Id.* The burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial counsel, and is therefore a component of effective assistance of counsel. *Teague*, 953 F.2d at 1533.

However, the United States Supreme Court has not addressed the constitutionality of whether misadvise of counsel not to testify deprives a defendant of affective assistance of counsel.

In Florida there is a two step test that must be met concerning an accused who raises an ineffective assistance of counsel claim concerning counsel's misadvise not to testify. The Florida Courts have held the first step in determining whether there was ineffective assistance of counsel where defendant claims he would have testified is to determine whether the defendant voluntarily agreed with counsel not to take the stand. [*Lott v. State*, 931 So. 2d 807, 819 (Fla. 2006)]. If that is established, then the trial court must answer the separate and second question which is whether counsel's advice to defendant "even if voluntarily followed, was nevertheless deficient because no reasonable attorney would have discouraged [defendant] from testifying." *Id.* *Simon v. State*, 47 So. 3d 883, 885 (Fla. 3d DCA2010).

FIRST PRONG: ***Agreed With Counsel Not to Take the Stand:***

The record before the Court is clear that counsel advised the Petitioner not to testify.

In the case at bar, the Petitioner was sworn and questioned by the trial court as to the Petitioner having an opportunity to consult with his counsel in private regarding the decision to testify (T.T. 1255). The Petitioner answered the trial court in the affirmative that he and counsel did discuss such matters and he understood the decision was his choice alone. The Petitioner made clear that the decision was not forced (T.T. 1256). The trial court read the Petitioner the instructions concerning testifying (T.T. 1256-1257). After the Court concluded the reading of the instructions the Petitioner was asked what he decision would be and the Petitioner

answered as follows:

THE DEFENDANT: *On advice of my counsel, I will not testify.* (T.T. 1257; lines 19-20)

The record is clear that Petitioner's decision not to testify was based on counsel's misadvise. The Middle District Judge acknowledged that the *record reflect Petitioner did, voluntary agree with counsel not to testify,* which proves that the Petitioner's decision not to testify was based on counsel's misadvise.

SECOND PRONG: ***Deficient Because No Reasonable Attorney Would Discouraged From Testifying*:**

The Petitioner testifying was crucial to the Petitioner's trial. One of Petitioner's defenses was an alibi defense and the Petitioner was the only person that could have testified where he was and who he was with. No competent attorney would encourage their client to not testify when the only way to receive crucial information that may acquit the Petitioner is by the Petitioner testifying.

SECOND PRONG: ***Prejudice the Petitioner's Trial and Defense***:

Counsel was constitutionally ineffective, which prejudice the Petitioner. Petitioner's proposed testimony does refute the evidence put on by the State during his trial. There was no eye witness, no finger prints of the Petitioner, no physical evidence that the Petitioner committed the murder. Petitioner defense was he was someplace else and with someone else. Petitioner would have also testified that he did not send any text messages neither did he have the victim's phone. Given the small amount of evidence supporting his guilt, there is a reasonable probability that

the jury would have acquitted Petitioner. The Petitioner testimony that he was at another place, miles away and whom he was with during the time of the murder was crucial testimony that should have been included to prove he did not commit the charged offenses. *Bribiesca-Tafolla v. State*, 162 So. 3d 1073 (Fla. 4th DCA 2015), which relied on *Loudermilk v. State*, 106 So. 3d 959, 960 (Fla. 4th DCA2013) citing *Visger v. State*, 953 So. 2d 741, 744 (Fla. 4th DCA2007) which held:

> "Counsel may be ineffective in advising defendant not to testify at trial, where the defendant's proposed testimony would have been the only evidence establishing a legally-recognized defense to the charges."

There was no reason given why counsel advised the Petitioner not to testify.

EVIDENTIARY HEARING IS NECESSARY FOR THIS CLAIM

The Eleventh Circuit has held that if the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the Petitioner must offer proof. *Aron v. United States*, 291 F.3d 708, 715, n.6 (11th Cir. 2002)

Petitioner avers that in applying *Strickland*, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Petitioner avers that the trial court erred in denying this claim. There is nothing in the record that conclusively negates the allegation that counsel was deficient, which prejudice the Petitioner's trial in misadvising Petitioner not to

testify.

I. Counsel was constitutionally ineffective for failure to object to prosecutor remarks on Petitioner's right to remain silent.

The Florida Supreme Court and the United States Supreme has adopted a very liberal rule for determining whether a comment constitutes a comment on silence. Both the State and the United States Supreme Court has held that any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). "***[A]ny comment*** on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000) (quoting State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985)); see also DiGuilio, 491 So. 2d at 1139 "***[A]ny comment, direct or indirect***, by anyone at trial on the right of the defendant not to testify or to remain silent is constitutional error and should be avoided." Also See Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the United States Supreme Court held that:

> the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. Id. at 615.

During closing argument by Mr. Lee, State Prosecutor, made prejudice remarks pertaining to Petitioner's right to remain silent, ***And by doing so he is***

telling you the jury precisely what he wants (T.T. 1295). It is clear in the record before us that the State prosecutor made a comment that he (the Petitioner) is telling you (the jury) precisely what he wants.

Petitioner never made a statement, because he never testified, or gave a statement during police questioning.

Petitioner avers that counsel failure to object to the questionable comments of a prosecutor constitutes ineffective assistance of counsel, because it affected the trial with unfairness. The Petitioner told the jury nothing and for the prosecutor to say that the Petitioner is telling the jury *precisely what he wants, which was nothing is a comment on the Petitioner's silence.* ***Meaning if he had something to say he would have said it.*** The United State held in United States v. Robinson, 485 U.S. 25, 32, 99 L. Ed. 2d 23, 108 S. Ct. 864 (1988).

> counsel's failure to object to questionable comments of a prosecutor constitutes ineffective assistance of counsel only when the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

The Fifth Amendment prohibits a prosecutor's comments on a criminal defendant's constitutional right to remain silent. Griffin v. California, *Id.*

J. Counsel was constitutionally ineffective for failure to object to prosecutor remarks on facts not in evidence.

The United States Supreme Court has held that a reviewing court must evaluate an allegedly improper comment in the context of both the prosecutor's

entire closing argument and the trial as a whole, because "[c]laims of prosecutorial misconduct are fact-specific inquiries which must be conducted against the backdrop of the entire record." *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir.1995); accord *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the Statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial.").

In the case at bar, during closing argument by State prosecutor improperly argued facts not in evidence *"he said the he sees her in the ground in the woods"* (T.T. 1307), along with other arguments that were not in evidence nor testified to during trial (T.T. 1312, 1317, 1385, 1388, 1389).

The Middle District Court acknowledged and admitted that the Statements the trial prosecutor argued during closing argument were not the same testimony the State witness testified the Petitioner said to him (See Response at 61).

The prejudicial comments were a clearly improper, because it conceded the Petitioner's guilt. How did the Petitioner know where the deceased body was unless he killed her?

Petitioner avers that the prosecutor's comments were improper, and these comments infected the trial with unfairness making the Petitioner's resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637,

94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Counsel was therefore, constitutionally ineffective for failing to object to prosecutor remarks on facts not in evidence.

K. Constitutionally ineffective for failure to object to the illegal prejudicial jury instructions on voluntary manslaughter where Petitioner was convicted of second degree murder.

In the case at bar the Petitioner was charged with Second Degree Murder. The trial court instructed the jury on Second Degree Murder and Voluntary Manslaughter (T.T. 1388-1389) The trial court erred in instructing the jury to the lesser offense of manslaughter which went as follows: *To prove the crime of manslaughter, the State must prove the following two elements beyond a reasonable doubt: One, Melissa Jill Shook is dead. Two, Joseph Ray Shook* ***committed an intentional act that caused the death*** *of Melissa Jill Shook or the death of Melissa Jill Shook was caused by the culpable negligence of Joseph Ray Shook.* (T.T. 1388-1389)

Petitioner is not challenging the fact that a lesser included offense and jury instruction is permissive, which is the reasons for the lower courts denial. Petitioner avers that counsel was ineffective for objecting to the prejudicial jury instruction where the manslaughter by act instruction erroneously requires intent to kill, and the only non-intentional homicide offense remaining for the jury's consideration is second degree murder.

Petitioner avers that Florida Statutes 782.07 do not require the jury to make

such a finding (committed an intentional act that caused the death). That statute provided in pertinent part as follows:

> Manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; aggravated manslaughter of an officer, a firefighter, an emergency medical technician, or a paramedic.-
> (1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.§ 782.07(1), Fla. Stat.

The Florida Supreme Court in *Daniels v. State*, 121 So. 3d 409 (Fla. 2013) relied on *Montgomery*,[1] which quoting *Pena v. State*, 901 So. 2d 781, 787 (Fla. 2005) explained that "[i]f the jury is not properly instructed on the next lower crime, then it is impossible to determine whether, having been properly instructed, it would have found the defendant guilty of the next lesser offense." Id. at 259

The Eleventh Circuit *Barron v. Jones*, 2018 U.S. Dist. LEXIS 104103 (S.D. Fla., June 20, 2018) relying on a Florida case *Hodges v. Florida*, 64 So. 3d 142, 143 (Fla. Dist. Ct. App. 2011), which held:

> Given the Florida Supreme Court's April 2010 Montgomery decision, we are bound to conclude that appellate counsel should have raised the issue at the appellate level before our decision in the appeal was final." Id. Thus, the court of appeals vacated Hodges's judgment and remanded for a new trial. Id.

Also see *Minnich v. Florida*, 130 So. 3d 695, 696 (Fla. Dist. Ct. App. 2011),

[1] *State v. Montgomery*, 39 So. 3d 252, 259 (Fla. 2010)

Minnich filed a petition for writ of habeas corpus arguing that, based on *Montgomery*, the trial court committed fundamental error by issuing the standard instruction for attempted manslaughter by act as a lesser included offense. Id. The state court agreed, observing that "because petitioner's conviction was not yet final when this court issued the opinion in *Montgomery*, the holding in that case applied to petitioner's case." Id.

Thus, because the trial court had committed fundamental error under Montgomery, counsel was constitutionally ineffective for failing to object to the illegal prejudicial jury instructions on voluntary manslaughter by act.

L. Counsel was constitutionally ineffective for failure to call witnesses that were available and willing to testify during trial.

The Eleventh Circuit and the United States Supreme Court has held that to establish ineffective assistance of counsel based on the failure to call a witness, a Petitioner must prove both (1) the substance of the witness's missing testimony and (2) the availability of the witness. See *Hill v. Moore*, 175 F.3d 915, 923 (11th Cir. 1999); and *Gilreath v. Head*, 234 F.3d 547, 551 n.12 (11th Cir. 2000) (citing *Horsley v. State of Ala.*, 45 F.3d 1486, 1494-95 (11th Cir. 1995)). Thus, to establish ineffective assistance of counsel based on the failure to call a witness, a "petitioner must prove both (1) the substance of the witness's missing testimony and (2) the availability of the witness." *Louis v. United States*, 2014 U.S. Dist. LEXIS 145773, at *12, 2014 WL 5093850, at *5 (M.D. Fla. Oct. 10, 2014). "[E]vidence about the testimony of a putative witness must generally be presented in the form of actual

testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (cited *by Estiven v. Sec'y, Dep't of Corr.*, 2017 U.S. App. LEXIS 27097, at *10, 2017 WL 6606915, at *4 (11th Cir. Sept. 28, 2017) (order denying certificate of appealability)).

In the case at bar, the Petitioner provided counsel with the name of Sandra Emory a perspective witness; the location of perspective witness (1861 Liberty Road, Murphy North Carolina 28906), and she was available and willing to testify. Petitioner also provided counsel with some of the Statements Sandra Emory would have testified too, (The the Petitioner called her between 10:30 A.M. and 11:00 A.M. the alleged time the deceased was murdered. That between July 24 through July 29 the Petitioner spent most of his time with her, which was crucial to Petitioner's trial and defense. The examiner concluded that the death occurred between July 24 and July 29. Her testimony would have proven that when the victim left the Petitioner she was alive and that during the time of death there was a possibility that the Petitioner was with her and not the person that murdered the victim. This testimony was favorable to the Petitioner's trial and defense. Therefore, the Petitioner has demonstrated that Sandra Emory testimony would have been exculpatory.

The Petitioner also provided counsel with the name of Grant Fitcher a perspective witness, the location of the witness (P.O. Box 1002, Alva Florida 33920),

and he was available and willing to testify. The witness would have testified that the deceased told him on several occasions that he did not need to be present, because her and the Petitioner was getting along fine. He would have also testified that the Petitioner called him every morning between 12:00 noon and 12:30 to give him the weather report, because he worked outside and the petitioner was still doing this between July 24 and July 29. This witness was also crucial to Petitioner's trial and defense.

Counsel was constitutionally ineffective for failing to call two crucial witnesses that would have cast doubt and supported Petitioner's defense that he was not the person that killed his children's mother.

EVIDENTIARY HEARING IS NECESSARY FOR THIS CLAIM

The Eleventh Circuit has held that if the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the Petitioner must offer proof. *Aron v. United States*, 291 F.3d 708, 715, n.6 (11th Cir. 2002)

Petitoiner avers that in applying *Strickland*, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

There is nothing in the record that conclusively negates the allegation that counsel was deficient, which prejudice the Petitioner's trial and defense.

M. Counsel was constitutionally ineffective for failure to present available evidence of phone records from Petitioner's cell phone and pictures from Petitioner's computer, which supported Petitioner's defense and proved his innocence.

The phone records from Petitioner's cell phone records and pictures from Petitioner's computer were crucial to the Petitioner's trial. The State introduced a restraining order that was the most significant evidence used in the Petitioner's case to prove motive. Along with the fact the murder happened days before the Petitioner and the victim's mediation in their divorce case this evidence (cell phone records and pictures) from Petitioner's computer was vital. The evidence would have clearly shown pictures of the deceased hugging and laughing with the Petitioner and the text messages from the victim would have shown that the deceased was requiring that the Petitioner spend quality time with her.

Counsel action was deficient and such deficient performance fell below an objective standard of reasonableness, which prejudice the Petitioner's defense and trial. Defense Counsel argued that the State failed to establish that there was any ill will or intent, since the evidence demonstrated Mrs. Shook continually and voluntarily visited Petitioner at his home to drop off the kids despite a pending divorce and domestic injunction. However, counsel never presented any evidence to support the argument. No competent attorney would not bring forth evidence to refute motive and prove Petitioner and deceased had hashed out their differences that went beyond just dropping the kids off at the Petitioner's house. The question is what reasons the Petitioner would have to kill his children's mother. There is not

one, because the evidence would have proven that they were on good terms and showed that the deceased desired to be with the Petitioner.

Even if counsel made a reasonable tactical decision to forego use of the pictures and text messages as the Respondent assumed cannot be determined without an evidentiary hearing.

EVIDENTIARY HEARING IS NECESSARY FOR THIS CLAIM

The Eleventh Circuit has held that if the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the Petitioner must offer proof. *Aron v. United States*, 291 F.3d 708, 715, n.6 (11th Cir. 2002)

Petitioner avers that in applying *Strickland*, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

There is nothing in the record that conclusively negates the allegation that counsel was deficient, which prejudice the Petitioner's trial and defense.

Given this evidence, Petitioner has establish a reasonable probability that the verdict would have been different had counsel presented the evidence (phone records and pictures form computer). *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

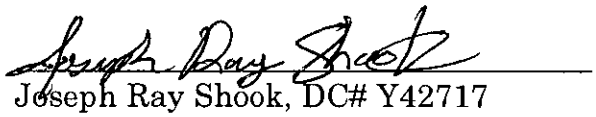
CONCLUSION

This Court has acknowledged that a Defendant's constitutional rights under ineffective assistance of counsel is violated under *Strickland*, when defendant has demonstrated both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. 466 U.S. at 686, 104 S. Ct. at 2064.

Thus Petitioner was deprived of his constitutional right to effective assistance of counsel. Petitioner prays this court will remand this case for a new trial.

South Bay, Florida
October 4, 2022

Respectfully Submitted,



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