No. 22 - 7265

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN FRANKS--PETITIONER

Vs,

STATE OF FLORIDA--RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI

FOURTH DISTRICT COURT OF APPEALS, FLORIDA
(Name Of Court That Last Ruled On Merits Of Your Case)

PETITIONER FOR WRIT OF CERTIORARI

ALLEN FRANKS DC#I55977

DADE CORRECTIONAL INSTITUTION

19000 S.W. 377TH. STREET

FLORIDA CITY, FLORIDA 33034

QUESTION(S) PRESENTED

ISSUE (ONE)

WHETHER PETITIONER WAS DENIED DUE PROCESS WHEN TRIAL COURT FAILED TO ALLOW THE PETITIONER AN OPPORTUNITY TO FILE A REPLY TO STATE'S RESPONSE ON PETITIONER/'S 3.850 MOTION?

ISSUE (TWO)

WHETHER IT IS PERMITTED FOR A GOVERNMENT OFFICIAL TO USE DECEIT AND FRAUD TO ILLEGALLY OBTAIN INFORMATION FROM A MENTALLY RETARDED PETITIONER DURING A PLEA PROCESS TO OBTAIN A CONVICTION WHICH IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHT?

(ISSUE THREE)

WHETHER TRIAL COUNSEL MISADVISED THE PETITIONER TO ENTER AN OPEN PLEA BASED ON DEFICIENT INFORMATION?

(ISSUE FOUR)

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR MISADVISING THE PETITIONER THAT HE QUALIFIED FOR A DOWNWARD DEPARTURE?

(ISSUE FIVE)

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE THE PETITIONER OF A POTENTIAL DEFENSE?

LIST OF PARTIES

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

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

RELATED CASES

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to The petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state court**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[x] reported at Franks v State 4D22- 1725 October 6, 2022; or,
[x] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was N/A.

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

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

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

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

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

The date on which the highest state court decided my case was October 6, 2022. A copy of that decision appears at Appendix A.

[x] A timely petition for rehearing was thereafter denied on the following date: November 17, 2022, and a copy of the order denying rehearing appears at Appendix B.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Art. 1 Section 9, Amend 5.

> " ...**No shall any State deprive any person of life, Liberty or property without due process of law; not deny to any person within its jurisdiction the equal protection of the** law..."

Florida Constitution Article 1, Section 9: 14 Amendment.

> "...No person shall be deprived of life, liberty or property Without due process of law."

U.S. Constitution Amendment 6th.

Amendment 6 Rights of the accused.

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.

Amendment 14

Sec. 1. [Citizens of the United States.] 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

On October 24, 2014, Petitioner, Allen Franks was arrested and charged by information with 47 felony offenses. Counsel was appointed to represent Petitioner, thereafter a conflict of interest was asserted, the Court re-appointed different counsel: Scott Rubinchick. Due to the Petitioner's age, it was later determined by Scott Rubinchick that the Petitioner may be suffering from either Alzheimer 's disease, or another form of dementia, because Counsel was having a hard time communicating with the Petitioner.

The Petitioner moved counsel to investigate all defenses and to advise him of all available defenses. One defense was the Petitioner's detoriating health at a pre-trial hearing where counsel informed the court of Frank's second stage of dementia (**Fast scoring Five severity Stages of Dementia**); counsel subsequently filed a motion to determine the Petitioner's competence to stand trial.

Counsel further found that the State had secured a recording of a telephone conversation with one of the victims; the Petitioner was made aware that the call could be deemed inculpatory in nature. Counsel was further aware or should have been aware that the Petitioner was not the individual whom closed the deals rather, it was Danny Reynolds and John Cavallo who was responsible for closing the deals; and the Petitioner would be exempt under chapter 501 of the Florida Statutes which provided a viable defense to said charges. The Petitioner was never advised

that he had a defense, and upon the time trial was forthcoming Counsel informed the Petitioner that had no viable defense to some of the charges. At that juncture counsel coerced the Petitioner to enter an open plea and advised the Petitioner to sign a plea agreement, while advising the Petitioner that he did not qualify for prison time supposedly because it was his "first time in trouble". Counsel assured the Petitioner that he would be sentenced only to probation (R. pg. 2212). This is misadvised the Petitioner to go forward with the open plea.

During the change of plea hearing the State made references to a plea offer of below the guideline sentence' (R.pgs 2086-2217); Counsel alleged that due to the fact that the doctors did not completed their competency evaluations, he would be able to further argue that this would qualify the Petitioner for a downward departure sentence, the Petitioner now provides that the inducements coerced him to enter an open plea. However, Counsel was actually aware that the competency evaluation had not been completed and the Court was about to find that the Petitioner competent to proceed, pursuant to Fla. R. Crim. P. Rule 3.212 (7).

An Amended Information was filed on January 10, 2018.

On January 16, 2018, Petitioner entered an open plea as charged in the Amended Information. Additionally, a competency hearing was conducted without proper evaluation on mental state; a determination was made by the trial judge that Mr. Franks is competent to proceed.

On March 22, 2018, Franks filed a motion for Downward Departure, but his motion was filed under the wrong Statute; Counsel's motion cited section §901.0026, Fla. Stat. alleged a valid reason for departure and moved the court to impose an unauthorized sentence of Five years Florida department of corrections, followed by two years of community control and a life time of probation. However, counsel was aware that the criminal punishment code term of 38.9 years was the guideline sentence over the statutory maximum, as the Petitioner was in the process of filing a Motion to withdraw plea for good cause, pursuant to Fla. R. Crim. Proc., Rule 3.170 (f). Counsel knew this and prepared the erroneous motion for downward departure to continue to coerce Franks to move forward with the open plea, which the Petitioner did.

On April 3, 2018, the Court denied the erroneous downward departure sentence motion and sentenced the Petitioner to a total of 38.9 years in Florida State Prison.

On April 9, 2018, Petitioner filed a motion to withdraw his Involuntarily plea and specifically argued the followings:

(a) He was not properly informed of the consequences of his plea;

(b) He did not understand his Appellate right at the time of his plea;

(c) And clearly stated that he was not competent to proceed;

(d) He did not understand his potential sentence;

(e) He was misled and rushed into the plea and

(f) His attorney did not represent his interest prior to and during the acceptance of the plea.

On June 12, 2018 Petitioner's motion to withdraw plea was denied.

On November 26, 2019, Petitioner filed a motion to Correct Illegal sentence alleging an error in the calculation of the scoresheet. The motion was denied on December 12, 2019.

On March 15, 2020, Petitioner filed his Initial brief with the Fourth district Court of Appeal challenging the trial Court's ruling on his motion to withdraw plea.

On July 10th., 2020, the Fourth district Court Per Curiam Affirmed the trial court's decision in **Franks v. State**, 298 So. 3d. 48 (Fla. 4th. D. C. A. 2020).

On April 12, 2021 Franks appealed the denial of his motion to modify sentence which was dismissed by the Fourth District Court of Appeals on August 25, 2021, for lack of jurisdiction.

Petitioner proceeded and filed a 3.850 (n) that was facially insufficient and the trial court ordered the State Sixty days to file a response and the appeal was followed after the summary denial:

REASONS FOR GRANTING THE PETITION

Rules 10 (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

In the instant case, the law enforcement throughout the interrogation during pre-trial proceedings used multitude of lies including fabrication of the evidence, threat and intimidation against the Petitioner, a declared mentally ill, retarded person with Alzheimer's who had been treated in three different Hospital for the same, to illegally obtain a coerced statement, subsequently used at a pre-plea stage over defense objection, as a result secured an unjust conviction in violation of Petitioner's constitutional right of due process of law.

The Trial Court denied Petitioner's 3.850 motion based on the reasons contained in the State's Response, is not evidence, unsworn representation of an Attorney is not evidence. **State v. Lamm**, 945 So.2d. 647 (Fla. 4th. DCA. §2007). **E.H.W. v. State**, 321 So.3d. 364 (Fla. 2d. DCA.2021), Unsworn Statements from a clerk and a Department of Juvenile Justice representative together with the unsworn statements and legal arguments of the prosecutor do not constitute competent, substantial evidence. **Arnold v. Arnold,** 889 So.2d. 215 (Fla.2d. DCA. 2004). Unsworn statement cannot serve as the basis for a trial court's factual determinations, as these types of statements do not establish facts. **Neal v. State,** 697 So.2d. 903 (Fla. 2d. DCA. 1997). The prosecutor's unsworn representation is

not evidence. The state's summary denial and asserts that the Petitioner's 3.850 motion is legally insufficient which is in opposition of the trial court's Order to the State to respond. (Show Cause Order) the trial court found that Petitioner's 3.850 motion was factually and legally sufficient when it ordered the State to respond. The court determined that Petitioner had shown through specific omission or an over act was a substantial and serious deficiency measurably below that of competent counsel. The trial Court's Judge abused its discretion for accepting the state's summary denial without addressing each individual claim on Petitioner's 3.850 motion with attachments of record refuting those claims once ordered its show cause to the State. Rule 3.850 (d) requires a trial court to determine the issues, and make findings of fact and conclusions of law with respect thereto. The trial court is required to address every issue raised. Judge relied on unsworn statements and legal arguments of the prosecutor that do not constitute competent, substantial evidence. Unsworn statements cannot serve as the basis for a trial court's factual determinations, as these types of statements do not establish facts.

The State's summary denial asserts that Petitioner's 3.850 motion failed to meet the **Strickland v. Washington** standard, in opposition to the State Summary denial Petitioner had shown the following without question in support of his 3.850 motion. Petitioner has shown that standards of counsel's "performance" and

resulting prejudice are evaluated through " cases " applying similar facts and legal principles . **Foster v. Dugger**, 823 f. 2d. 402, at 408 N.18 (11th.cir. 1987).

The prejudice component focused on whether counsel's deficiency rendered the results of the proceeding to be unreliable or fundamentally unfair; demonstrated by showing counsel has deprived Petitioner of any substantive {case law} or procedural {statutes + rules of court} rights to which the law entitles Petitioner. **Lockhart v. Fretwell**, 506 U.S. 364, at 372, 113 S.Ct. 838, at 844, 122 L. Ed. 2d. 180 (1993), the determinative question is: whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different and remains unchanged? **Lockhart v. Fretwell, Supra.**

ARGUMENTS

ARGUMENT (ISSUE ONE)

WHETHER PETITIONER WAS DENIED DUE PROCESS WHEN TRIAL COURT FAILED TO ALLOW THE PETITIONER AN OPPORTUNITY TO FILE A REPLY TO STATE'S RESPONSE TO THE PETITIONER'S 3.850 MOTION?

SUPPORTING FACTS:

Petitioner filed an Amended 3.850 motion for postconviction relief on Oct. 27, 2021.

On June 2, 2021, the State was ordered to file a response within Sixty-days.

On May 20, 2022, the State filed their response to Petitioner's 3.850 for postconviction relief. The trial court on May 23, 2022 denied the Petitioner's 3.850 motion based on the State's response three days after.

The trial court denied Petitioner's due process of law; Petitioner should have been afforded 20 days to file a reply followed the State's Response.

The court denied Petitioner an opportunity to file a reply to the State's response. See **Salow v. State**, 766 so.2d. 1222 (Fla. 5th. DCA. 2000); due process concerns in **Scull v. State**, 569 so.2d. 1251 (Fla. 1990). However, a reply is proper because a motion for rehearing is not a sufficient, meaningful the opportunity to be heard must be provided before rights are denied. To satisfy procedural due process, an opportunity to be heard must be meaningful and complete and not merely colorable or illusive. **Epps v. State**, 941 So.2d. 1206 (Fla. 4th. DCA. 2006).

The State Court should have vacated the premature order to afford Petitioner an opportunity to file a reply to the State's response.

ARGUMENT (ISSUE TWO)

WHETHER IT IS PERMITTED FOR A GOVERNMENT OFFICIAL TO USE DECEIT AND FRAUD TO ILLEGALLY OBTAIN INFORMATION FROM A MENTALLY RETARDED PETITIONER DURING A PLEA PROCESS TO OBTAIN A CONVICTION WHICH IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHT?

SUPPORTING FACTS:

In any criminal prosecution, the Petitioner should be able to afford the full protection provided by the U.S. Constitution Art. 1 Section 9, Amend 5.

> " ...**No shall any State deprive any person of life, Liberty or property without due process of law; not deny to any person within its jurisdiction the equal protection of the** law..."

Florida Constitution Article 1, Section 9:

> "...No person shall be deprived of life, liberty or property Without due process of law."

Defense counsel in all criminal prosecution has a duty to thoroughly conduct a pre-trial investigation, including the mental state of the Petitioner. Defense counsel also has a duty not to go against his client's wish pertaining to type of defense to be presented to the court during pre-trial hearing and or at trial. During post-trial proceedings, defense counsel also has a duty to argue his client's timely filed post-trial pro se motion as was requested to by Allen in this case. Defense counsel failed to effectively do the above and severely prejudiced the Petitioner, also failed to use due diligence to retrieve new evidence along with his own expert witnesses' testimony on Mr. Allen's Dementia that he suffered since he was a child subsequently led to his unjust conviction.

Defense counsel never inquired about Mr. Allen's childhood history and experience that may have contributed to his involvement when he accepted to act

under the authorities of two business owner: **Danny Reynolds and John Cavallo** who was responsible for closing the deals. Mr. Frank was the third party and operated under duress and did what he was told. During the time Mr. Allen had never received the necessary therapy to help him deal with the abnormal dementia that had traumatized him during his entire adolescence. He is therefore less culpable than the two owners of the business and so deserved less punishment than 39 Yrs. in prison. Petitioner's action and involvement was a flashback to what Dr. Fischetto testified to in court on trial transcript page 5, line 19-24:

Q: Anything noteworthy in the medical documents?

A: There were different notations of various diagnoses and observations. Some indicated that he had early stages Alzheimer's, memory problems he complained about... continued on page 6-7.

Here in this case, review is necessary in order to prevent further manifest injustice and miscarriage of justice. Thus, denied Frank an adequate representation during the plea process as require by the 6th. Amendment on **Strickland vs. Washington**, 104 S.Ct 2052; **Hills vs. Lockhart**, 474 U.S. 52, 88 L. Ed. 2d. 203, 106 S.Ct. 566 (1995).

In this case, at the time of the Petitioner's arrest to pre- interrogation, the Police engaged in a systematic orchestration of lies, fabrication and misrepresentation of several tape-recorders to Mr. Allen's evaluation of the total

circumstance, shows that the Petitioner's statements were involuntary, coerced and not the result of a free and rational choice. See an accord of the following cases: **Nelson v. State**, 850 so. 2d. 514, 521 (Fla. 2003); **Thompson v. State**, 548 So.2d. 198, 203 (Fla. 1987); **Johnson v. state**, 696 So.2d. 326, 329 (Fla. 1997); **Thomas v. State**, 456 So.2d. 454, 458 (Fla.1984). The coercive aspects of the Petitioner's arrest/interrogation corroded any sense of voluntariness in his statement from the start.

The true nature of the evidences against Petitioner as the interrogation technique specially designed to overcome Mr. Frank's will, a mentally retarded person, who subjected to any kind of influence. Petitioner had been treated and admitted into three different Hospitals, received treatments and medication especially as a mental patient.

First, He was admitted in 1959 at: Walter reed, National Military Medical Center, 4494 Palmer Rd. N., Bethesda, MD. 20814; Second, to Doctor Laura Chin Lenn, MD., 328 N. Congress Ave., Boynton Beach, Fla. 33426. And Third, in 1958 for seizures & memory loss, he was admitted at: Essex County, Hospital Center, 204 Grove Ave., Cedar Grove, N.J. 07009. Petitioner received therapy for over 20 yrs., 2yrs. In Georgia, 4 yrs. In Florida and in N.J., Md. Ect. Wherefore, the Petitioner's plea could not be free and voluntary entered. Trial counsel failed to properly investigate the case and his client's mental stage before acceptance of the

plea. Relief is required based on the above facts. This court should vacate the plea, set aside the sentence and remand the Petitioner for a new trial in the interest of justice.

ARGUMENT ISSUE (THREE)

WHETHER TRIAL COUNSEL MISADVISED THE PETITIONER TO ENTER AN OPEN PLEA BASED ON DEFICIENT INFORMATION?

Supporting facts:

The State's summarily denial filed on the 20th. day of May 2022, is insufficient argued and misrepresentation of facts on ground One for the following reasons:

Counsel was ineffective for not being present in court when Petitioner entered an open plea to the court on January 16, 2018, where counsel was at a first degree murder case in different court room.

At sentencing counsel started arguing about what Petitioner's co-Petitioners may get if found guilty at trial.

The court argued the following:

The court: this is not a first –degree murder case, while there is some case law being promulgated about what one Petitioner got verses another, you can make your argument, but I heard the testimony, from a number of victims, who were lead into the fraud, and they were cross-examined.

You weren't here, but your client pleads open to the court. He entered a plea, which means he is not disputing his complicity. So you can argue minor, and I will listen to you, but the state gets to rebut that with their arguments.

Mr. Rubinchik: Understood, you're Honor.

The court: So I don't care what the others, there were two others that were sentenced to probation, their entered a negotiation plea.

Your client plead open to the court, so I m not bound by what the office of Statewide prosecution recommended in terms of their sentencing. I'm certainly I'm not bound by their recommendation today. I can do what I feel is appropriate (Transcripts Page 3-5). As I said, I basically listened to the state's factual basis when I accepted Mr. Frank's plea. I took notes on that (pg.6).

Trial court abused its discretion in accepting Petitioner's open plea without his counsel present, in violation of Fla. Rules of Criminal Proc. 3.172 (c) (2) Acceptance of guilty or nolo contender plea (c) Determination of voluntariness (2) Right to representation, if not represented by an attorney, that the Petitioner has the right to be represented by an attorney at every stage of the proceeding and if necessary, an attorney will be appointed to represent him or her. Petitioner's counsel was ineffective for being absent during an important court proceeding. Petitioner's (open plea to the court) See **Delgado v. Lewis**, 223 F. 3d.976, (9th. Cir. 2000) Counsel's absence from every important court proceeding but the

hearing on change of plea may support plea being involuntary. **Gardner v. Florida**, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d. 393 (1977),

Prejudice is presumed in cases where a Petitioner goes unrepresented by counsel regardless of whether the denial was actual or constructive. U.S.C.A. Const. Amends.

The State's summary denial: In this case, the information sufficiently tracked the language of the Statute to put Franks on notice as to the charges against Florida is a law pleading State, not a fact pleading State. Hence, due to the liberal discovery rules of this State, Franks was not forced to obtain information about his case solely from the charging document. This is a misrepresentation of facts Florida is a law pleading State based on (1) fact (2) reason (3) thesis (4) opinion. (1) The information failed to sufficiently track the language of the Statute to put Franks on notice as to the charges against him. Counsel stipulated to all the evidences at sentencing when most of the counts financial records and bank statements could not be attributed to appellate which was basically hearsay. Counsel misadvised the Petitioner to enter an open plea to the counts alleged within the state's amended information because the information was within some counts did not specifically alleged facts in other to inform Franks of the nature of his criminal conducts of the fraudulent transactions and money laundering counts, violating the Petitioner's due process rights. The Petitioner asserts that: Florida

rules of criminal procedure Rule 3.140 (d) provides "each count of information in which a Petitioner is to be tried shall alleged the essential facts that constitute the offense charged".

The State summarily denial states during the nearly four years that Franks actively engaged in pre-trial litigation, he was represented by several attorneys who had the opportunity to review the ample evidence provided in the discovery as well as deposed the state's witnesses. All of which support the state's allegations. As his claim is meritless, his counsel cannot be deemed to be ineffective for failing to raise a claim he knew was meritless.

This statement above is misrepresentation of facts, Petitioner had two lawyers over the course of four years, he fired his first counsel; second counsel Scott Rubinchick was ineffective on the face of the record when counsel misadvised the Petitioner to enter an open plea to the counts alleged within the State's amended information. The amended information was amended after the Petitioner enters an open plea to the counts in court.

The information misled the Petitioner and embarrassed him in the preparation of his defense, as indicated by counsel's confusion regarding the charge conduct and what the State needed to prove at trial.

In the case at bar, the information merely charged Franks by citing the entire range of conduct pursuant to the "fraudulent transaction and money laundering"

the statute language without specific subsection, or any factual conduct on the part of the Petitioner; and thus failed to place Petitioner on notice as to the crime being charged and as a result exposed him to a clear due process violation in most of the counts alleged, also exposed him to embarrassment. Thus these counts alleged within the Amended information failed to allege the nature of the Petitioner's violation. Then, after the Petitioner entered the open plea, the State amended the information again, at that juncture or before, counsel should have move for a motion to dismiss based on the vague nature of the charges. This constitute a defense counsel failed to apprise the Petitioner of, which could have led to a dismissal or some of the Counts, and considerably reduce the Petitioner's bottom of the guideline sentence. The dispositive issue before the court is whether, based on a scintilla of proof, said motion would have been granted.

Counsel Rubinchick was ineffective based on his failure above; furthermore, his failure to advised Frank of a potential defense can state a valid claim, as the Petitioner that there is a reasonable probability that the Petitioner would not had enter the plea if the Petitioner was properly advised. The Petitioner argues that had counsel presented the defense of filing a motion to dismiss erroneous counts that violated Petitioner's due process, some counts would have been dismissed. Petitioner argues that there is a reasonable probability that the Petitioner would not have entered an open plea and insisted on going to trial.

ARGUMENT ISSUE (FOUR)

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR MISADVISING THE PETITIONER THAT HE QUALIFIED FOR A DOWNWARD DEPARTURE?

SUPPORTING FACTS:

The State's summarily denial on ground there is a misrepresentation of facts on page 7 of 19: The Petitioner's convolute argument is based on a conclusionary allegation that his counsel misadvised him that he would qualify for a downward departure. Franks alleges that he was told to "sign these papers" as well as a few other conclusionary statements including an allegation that he would qualify because his "mental health evaluation were not complete". As noted in the procedural history set forth above, this is not the first time that Franks had attacked his voluntary open plea and on each occasion his argument have been rejected, and the same outcome should be here.

In opposition of the State's summary denial Petitioner state's the following:

Any trial court, counsel, prosecutor, or evidentiary error – even if raised and rejected on direct appeal can be raised so long as its occurrence can be attributed to trial counsel error. **Highsmith v. State,** 493 So.2d 523 (Fla. 2nd DCA 1986).

Petitioner affirmatively alleged that trial counsel Scott Rubinchick was ineffective for misadvising the Petitioner that he qualified for a downward departure based on counsel's assertion that mental health evaluations were not complete. This is despite that counsel was fully informed that on January 16, 2018, the same day the Petitioner entered an open plea, without counsel, the trial court deemed the Petitioner competent to proceed pursuant to Fla. R. Crim. Proc., 3.212(7), not only does this constitute misadvice to the Petitioner, counsel was absent and no representation during his open plea, unequivocal misrepresentation of the facts.

Furthermore, unknown to the Petitioner, the court could not have honored the entrance of any plea because his counsel was not present to represent the Petitioner in violation of Fla. R. Crim. Proc., 3.172(c)(2), if the mental health evaluation were still outstanding, pursuant to Rule 3.212(7). This further establishes that, based on misrepresentations of fact by counsel, the Petitioner entered an Involuntary plea.

Counsel filed a Motion for Downward Departure citing section 901.0026, Fla. Stat., which the Petitioner asserts is the incorrect statute for this Honorable Court to grant relief; the proper statute in section 921.0026, Fl. Stat.

Furthermore, counsel asked for an illegal sentence to be imposed and moved this court to depart from the recommended sentencing range of the Florida

Punishment Code by requesting a sentence of no more than five years in the Florida Department of Corrections followed by a two-year period of community control to be followed by the remainder of his lifetime on probation with any and all special conditions deemed necessary by this Honorable Court.

However, an appropriate sentence could not have been the lowest permissible sentence allowed by the Criminal Punishment Code, which in this case was five-years in the Florida Department of Corrections; two-year community control, and 31.9 years of probation.

Trial Counsel told the Petitioner to "sign the papers," referring to the plea agreement while saying "he doesn't qualify for prison" because" it was his first time in trouble." Then, when the court made a reference, during the plea colloquy, saying that "probation was a consideration" (R. Pg., 2212), Counsel Rubinchick stated, "See, I told you." Again, this was as unequivocal misrepresentation of facts when the Petitioner's lowest permissible sentence, pursuant to the Criminal Punishment Code was 38.9 years in the Florida Department of Corrections.

The Petitioner argues that a Petitioner is entitled to be completely represented and advised of the valid prospect or proving a downward departure.

When there is a showing that trial counsel misadvised the Petitioner regarding a downward departure, an evidentiary hearing should be held to determine the facts of this case. See, **Peloquin v. State**, 858 So.2d 1213 (4th DCA

2002). "We reverse and remand for an evidentiary on Petitioner's claim that his lawyer represented that the trial court would grant his motion for downward departure." See, **Page v. State**, 90 So.3d 347 (5th DCA 2012). Petitioner is entitled to an evidentiary hearing.

In this case, at the change of plea hearing (R. Pgs 2086-2217), the State acknowledged that an offer of a below the guidelines sentence had been previously made (R. pg. 2174). Counsel did not want the Petitioner to hear the allegations within the amended information and moved the court to not have the allegations within the information read in open court, as the Petitioner would allege that counsel review that the Petitioner would question the validity of the information (this Court should take judicial notice that the amended information was filed after the Petitioner open plead to the Court). The Petitioner asserts that Counsel never clearly explained the rights that Petitioner was waiving. The Petitioner argues but for Counsel's unprofessional errors, the prejudice is clear that the misadvice as to the downward departure, there is a reasonable probability that Petitioner would not have entered the open plea and insisted on going to trial, as there is a reasonable probability sufficient to undermine confidence in these proceedings. Petitioner has suffered constitutional deprivations at the hands of Trial Counsel, Scott Rubinchick.

GROUND ISSUE (FIVE)

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE THE PETITIONER OF A POTENTIAL DEFENSE?

The Petitioner would argue that Trial Counsel, Scott Rubinchick was ineffective for failing to properly advise the Petitioner of a potential defense and misadvising the Petitioner that he had no defense to the offenses charged. At the change of plea hearing originally scheduled, as Trial Counsel advised Franks he "had no defense to any of the underlying charge or predicate offenses," and told Franks that "he could mitigate a sentence of time served with probation. Sign these papers."

In opposition of the State's summary denial Petitioner argues the following:

In the instant case, the State gave a factual basis statement of what it would prove if the Petitioner proceeded to trial (R. pgs 2201-2207); that Franks was a commissioned telemarketer, who did not begin to work with Danny Reynolds and John Cavallo, who started JDC in early 2009, after which Franks began telemarketing and supplied old leads to JDC in late December, 2009.

In **Wojnowski v. State**, 98 So.3d 189 (1st DCA 2012), the First District held that it is necessary for the State to prove that a Petitioner "could not get licensed"

to tele-market pursuant to Chapter 517 of the Florida Statutes. Additionally, Florida Statutes do not contain any blanket exceptions to specific types of business; however, the Florida Telemarketing Act does carve out exceptions for individuals performing certain act, or actions performed at stages of the sale which certainly creates a legal defense.

Section 510.604 (3), Fla. Stat. states:

> "A person who does not make the major sales presentation during the telephone solicitation and does not intend to, and does not actually complete or obtain provisional acceptance of a sale during the telephone solicitation...is exempt."

Danny Reynolds and John Cavallo were most certainly required to be licensed to telemarketing. However, one in Franks role, who conducted a front or Scripted presentation would be essentially exempt under Chapter 501. Reynolds and Cavallo organized JDC and were solely responsible for closing sales. Mr. Franks was merely a frontier.

Section 507.604(3), Fla. Stat. essentially provides a defense and the facts of the case support it. Section 501.604 exempts Franks from the actions taken by those who acted in false pretenses or those who made the closing presentations.

Having failed to adequately advise the Petitioner of this potential defense was ineffective. See, **Sosataquechelus v. State**, 246 So.3d 497 (3rd DCA 2018). See, **Brown v. State**, 270 So.3d 530.

The Petitioner argues that prejudice is established when Counsel fails to apprise the Petitioner of a potential defense and the Petitioner was misadvised of said defense. The Petitioner would affirmatively assert that but for Counsel's unprofessional errors; the Petitioner would not have entered the plea, and would have insisted on going to trial. The Petitioner suffered constitutional deprivation at the hands of trial counsel, Scott Rubinchick pursuant to the 6th. Amendment of the Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Allen Franks

Date: 4/4 2023