No. 22-7329

ORIGINAL
Supreme Court, U.S.
FILED
APR 12 2023
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE GILLMAN - PETITIONER,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; AND ATTORNEY GENERAL, STATE OF FLORIDA – RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, FIFTH DISTRICT, STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

PROVIDED TO
SUMTER CORRECTIONAL INSTITUTION
DATE 4-12-23
OFFICER INITIALS

ROBERT WAYNE GILLMAN, DC# U16057
SUMTER CORRECTIONAL INSTITUTION
9544 COUNTY ROAD 476 B
BUSHNELL, FLORIDA 33513

QUESTIONS PRESENTED

1. IS IT MANIFEST INJUSTICE WHEN CONFLICT OF INTEREST, PROSECUTORIAL MISCONDUCT AND JUDICIAL ABUSE OF DISCRETION AND FRAUD DEPRIVES DEFENDANT OF A FAIR TRIAL?

2. DOES A COURT'S DEPARTURE FROM NEUTRAL ARBITER RISE TO THE LEVEL OF STRUCTURAL DEFECT OR OTHERWISE ALLOW PETITIONER/DEFENDANT TO OBTAIN RELIEF AT ANY TIME?

LIST OF PARTIES

_____ All parties appear in the caption of the case on the cover page.

X All parties do not appear in the caption on the cover page.

A list of all parties to the proceedings in the Court whose judgment is the subject of this petition is as follows:

Ballard, Erwin Edward	Victim (Deceased)
Covington, Virginia Hernandez	U.S. District Court Judge
Demaggio, Bryan	Ex-Counsel for Appellant
Dixon, Ricky	Secretary, Fla. Dept. of Corrections
Evander	Fla. 5th District Court of Appeals Judge
Gillman, Robert W.	Petitioner/Appellant
Gladson, Bill	State Attorney, 5th Judicial Circuit (Fla.)
Harper, Robert A.	Ex-Counsel for Appellant
Harrell, Gregory C.	Marion County, Fla. Clerk of Court
Hodges, William T.	U.S. District Court Judge
Harris	Fla. 5th District Court of Appeals Judge
Jenkins, Patricia	Ex-Counsel for Appellant
Johnson, Huntley	Ex-Counsel for Appellant
Lammens, Hon. Phillup	U.S. Magistrate Judge
Moody, Ashley	Florida Attorney General
Morris, Allison	Office of the Attorney General
Sheppard, William T.	Ex-Counsel for Appellant
Swigart, William T.	Trial Judge (Deceased)
Tatti, Anthony	Fla. 5th Judicial Circuit (Trial Judge)
Thomas, D.G.	Ex-Counsel for Appellant
Tomms, Kenneth	Victim (Deceased)
Ufferman, Michael	Ex-Counsel for Appellant
Vipperman, Lloyd	Ex-Counsel for Appellant
Wallis	Fla. 5th District Court of Appeals Judge

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[1] Many of the Appendix Exhibits above were omitted by Mr. Harrell, Marion County Court Clerk (see Appendix 5) Gillman provided them to both Trial Court and DCA however DCA denied them in its November 30, 2022 order (Appendix D).

TABLE OF CITATIONS AND AUTHORITIES

OPINIONS BELOW

X For cases from Federal courts:

The opinion of the United States Court of Appeals appears at Appendix F and Appendix G, Appendix T and Appendix U to the Petition and is:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

X is unpublished.

JURISDICTION

This Honorable Court has jurisdiction under Title 28 U.S.C. § 1257(a) to rule on this Petition and review the final judgment rendered on May 12, 2022 by the Fifth Judicial Circuit Court in and for Marion County, Florida rendered final by the 5th District Court of Appeals December 6, 2022 order *per curiam affirming* (PCA) Fifth Judicial Circuits order and their corresponding January 20, 2023 order denying Petitioner's Motion for Panel Rehearing (without opinion) the PCA without opinion from the 5th DCA leaves the Florida Supreme Court without jurisdiction. Thus U.S. Code § 1257 provides in pertinent part, "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the U.S. Supreme Court by a Writ of Certiorari where the validity of a treaty or statute of the United States is drawn into question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States ----."

U.S. Supreme Court Rule 13.1 reads as follows; in pertinent part: A petition for a Writ of Certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed within 90 days after entry of the order denying discretionary review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL ISSUES INVOLVED

The Fifth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "No person shall be held to answer a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... 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 the law ..."

The Sixth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "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 where the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "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 any person within it's jurisdiction the equal protection of the laws."

Title 28 USC § 1257(a) reads, in pertinent part, as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decisions could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn into question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States ---
> -."

STATEMENT OF THE CASE

On January 14, 1997, Mr. Gillman was indicted for 1st Degree Murder, 2nd - Degree Murder, Armed Burglary, and Armed Extortion for an incident that occurred on December 21, 1996.

On October 11, 2002, following a jury trial in the Fifth Judicial Circuit Court, in and for Marion County, Florida, Mr. Gillman was convicted on all counts.

On April 11, 2003, upon Motion by the state, the trial judge granted a judgment of acquittal on the record for the extortion count. The Court sentenced Appellant to Life in prison on the First-Degree Murder count, plus twenty years on the remainder of the counts.

On April 20, 2004, the Fifth District Court of Appeal ("DCA") affirmed the judgment.

The following issues were raised on appeal: (1) the evidence was insufficient to sustain the conviction for Burglary; (2) the evidence was insufficient to sustain the conviction for Second-Degree Murder; (3) error to give the jury the "remaining in" part of the jury instruction on Burglary; (4) The verdicts were legally inconsistent; (5) the testimony of Ralph ("Duke") Troisi should have been excluded from evidence; and (6) Trial Court erred when denying a competency hearing for the Appellant. Mr. Gillman filed a Motion for Rehearing En Banc.

On June 28, 2004, the Fifth DCA denied the Rehearing motions and issued its mandate in this case. The conviction became final for triggering the one year

time limitation for filing a timely petition for writ of habeas corpus ninety (90) days later on September 7, 2004.

On July 1, 2005, Mr. Gillman filed a *pro se* Motion to Correct Illegal Sentence pursuant to Fla. R. Crim. P. Rule 3.800(a).[2]

On July 13, 2005, the lower court denied the 3.800(a) motion.

On December 13, 2005, on appeal, the Fifth DCA affirmed the lower court ruling on the 3.800(a) motion without opinion.

On January 18, 2006 the 5th DCA opinion became final upon denial of Gillman's Motion for Rehearing.

On February 2, 2006, Gillman filed a petition seeking review of the 3.800(a) motion denial and affirmance on appeal with the Florida Supreme Court.

On February 2, 2006, the Florida Supreme Court dismissed the Petition for lack of jurisdiction.

On February 6, 2006, the Florida Supreme Court issued its mandate.

On June 20, 2006, Mr. Gillman, through counsel, filed a Motion for Postconviction Relief pursuant to Fla. R. Crim. P. Rule 3.850, Counsel presented eight (8) claims for relief involving ineffective assistance of counsel (I.A.C.), Trial Court error and cumulative effect of error as follows: (1) IAC for failure to investigate and raise the issue of Gillman's incompetency to stand trial, (2) IAC trial counsel's conflict of interest. (Attorney Ms. Jenkins was a former Public Defender and Partner of Gillman's trial counsel that represented state key witness

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[2] Gillman was charged with 297 days against the one year AEDPA Statute of limitations. This left him with 68 days to file a timely Federal habeas corpus petition.

Ralph E. Troisi in matters arising out of the incident in which the Defendant was tried and convicted). Additionally, in the year 2000, Ms. Jenkins testified in behalf of Mr. Troisi at a bond hearing in an unrelated case. (3) IAC for failing to inquire and investigate the conflict of interest raised in Claim Two. (4) Ralph Troisi should have been excluded as a witness because he was mentally incompetent. At the evidentiary hearing on this claim, Gillman presented evidence that he was a heavy drug user and was 100% disabled due to Post-Traumatic Stress Disorder ("PTSD").

(5) IAC for failure to object to the admission of hearsay regarding Gillman's alleged unlawful entry into the Tomm's residence which formed the basis for conviction on all counts. (6) Ground 6 was withdraw from consideration (7) IAC for failure to object to the jury instruction identifying Mr. Ballard as Gillman's accomplice. This error essentially directed a verdict for the state against Gillman. (8) IAC for failure to object to the supplemental jury instructions which dealt with the right of Mr. Troisi to qualify as a guest in the Tomms's residence if Troisi knocked and identified himself before entering. The instruction shifted the burden of proof from the State over to Mr. Gillman.

On March 9, 2009, the 3.850 motion was denied. See Appendix Y.

On June 29, 2010, the 5th DCA Affirmed lower court's denial order (without opinion). See Appendix X.

On July 21, 2010, the mandate issued making the 3.850 final in the State courts.

On August 10, 2010, Mr. Gillman, through counsel, filed a 28 U.S.C. § 2254 Federal Petition for Writ of Habeas Corpus.

On March 6, 2013, the U.S. District Court Judge held an evidentiary hearing to take testimony regarding the "timeliness" of the petition, to wit, whether Mr. Gillman would have timely filed his Federal Petition but for hired Counsel's deficient performance. Following the evidentiary hearing, briefs were filed by the parties.

On July 5, 2013 the U.S. District Court dismissed the Petition for Writ of Habeas Corpus as being filed untimely. See Appendix Y.

On August 14, 2014 the Eleventh Circuit Affirmed the U.S. District Court's order. Appendix X.

On August 28, 2014, Mr. Gillman filed a *pro se* Motion for Reconsideration and a Motion to Discharge Counsel.

On September 16, 2014, the Eleventh U.S. Circuit Court of Appeals recognized Gillman's Motion to Discharge Counsel as received, and additionally directed the clerk's office to recall the Mandate.

On October 7, 2014, the Eleventh U.S. Circuit Court of Appeals denied the Motion for Reconsideration but cited information regarding issuance and stay of Mandate.

On January 12, 2015, through Counsel, Mr. Gillman filed a Petition for Writ of Certiorari with this Honorable Court.

On March 2, 2015, this Court denied the Petition for Writ of Certiorari.

MOTION TO PRODUCE DOCUMENTS FILINGS

On October 27, 2014, prior to filing his Petition for Writ of Certiorari with this Honorable Court. Gillman filed a *pro se* Motion to Produce Documents pursuant to Fla. R. Crim. P. 3.220 (Discovery Rule) with the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On November 3, 2014 the Motion to Produce Documents was denied.

On November 12, 2014, Gillman filed a Motion for Rehearing on the Denial order.

On January 5, 2015, the Motion for Rehearing was denied.

On February 3, 2015, Gillman filed a *pro se* Petition for Writ of Mandamus with the 5th DCA seeking an order to compel the lower Court to produce the requested documents pursuant to Fla. R. App. P. 9.030(b)(3) and Rule 9.100 and Article V, section § 4(b) of the Florida Constitution.

On April 2, 2015, the 5th DCA transferred the Petition for Writ of Mandamus to the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On July 1, 2015 the Petitioner filed a Motion for Disposition seeking a ruling on the mandamus pursuant to Article I, Section §13 of the Florida Constitution, and Article I, Section §p of the U.S. Constitution (motion amended July 15, 2015).

On or about July 16, 2015 the postconviction judge (Trial Judge deceased) ordered the Clerk of Court to respond to the motion within thirty (30) days.

On July 24, 2015, Gillman filed a Motion to Produce Out-of-State Documents requesting the Clerk of Court to produce the requested documents pursuant to Fla. R. Crim. P. Rule 3.220 (Discovery Rule).

On August 26, 2015, Gillman filed a Motion for Default Judgment due to the Clerk of Court, Fifth Judicial Circuit Court, in and for Marion County, Florida failure to meet the court-ordered thirty-day deadline imposed on or about July 16, 2015.

On November 23, 2015, the Fifth Judicial Circuit Court, in and for Marion County, Florida denied Gillman's Petition for Writ of Mandamus that was filed back on February 3, 2015.

On November 23, 2015, Gillman filed a Motion to Compel in the Florida Supreme Court requesting an order to compel the lower courts to produce the documents he was seeking in this case. This motion was filed pursuant to Article I, Section §13 of the Florida Constitution, and Article I, Section §4(b) of the U.S. Constitution (motion amended January 27, 2016).

On December 4, 2015, the Florida Supreme Court assigned New Case Number #SC15-2222 to the Petitioner's Motion to Compel.

On December 7, 2015, Gilman filed a Motion for Rehearing on the November 23, 2015 Denial Order of his Gillman's Petition for Writ of Mandamus with the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On December 18, 2015, the Florida Supreme Court ordered the Motion to Compel to be treated as a Petition for Writ of Mandamus and transferred the case

back to the 5th DCA pursuant to the holding in *Havard v. Singletary*, 733 So.2d 1020 (Fla. 1999). The 5th DCA then issued orders for the lower court to respond.

On January 26, 2016, the Fifth Judicial Circuit Court, in and for Marion County, Florida issued a denial order on the Petitioner's December 18, 2015 Petition for Writ of Mandamus, and contemporaneously denied the Petitioner's August 26, 2015 Motion for Default Judgment.

On January 27, 2015, the Fifth Judicial Circuit Court, in and for Marion County, Florida issued a denial order on the Petitioner's July 15, 2015 Amended Motion for Disposition and contemporaneously denied the Petitioner's On July 24, 2015 Motion to Produce Out-of-State Documents.

On March 18, 2016, the 5th DCA issued its own order denying the Petitioner's December 18, 2015 Petition for Writ of Mandamus.

On April 4, 2016, Gillman filed a Motion for Rehearing, Clarification, and Certified Opinion with the 5th DCA.

On April 21, 2016, the 5th DCA issued its order, denying the Motion for Rehearing, Clarification, and Certified Opinion.

Other Related Federal Court Filings

On October 2, 2015, Gillman filed a *pro se* Application for Leave to File a Second or Successive Federal Habeas Corpus Petition pursuant to 28 U.S.C. §2244(b) with the Eleventh U.S. Circuit Court of Appeals (amended on October 16, 2015).

On November 19, 2015, the Eleventh U.S. Circuit Court of Appeals denied the Application (see Appendix V).

On July 28, 2016, the Petitioner filed a Second Federal Habeas Corpus Petition under 28 U.S.C. §2254 with the U.S. District Court, Middle District, Ocala Division (Case No. 5:16-cv-00479-WTH-PRL).

On December 16, 2016, and on December 19, 2016, the U.S. District Court dismissed the Petitioner's Federal Habeas Corpus Petition as successive.

On January 6, 2017 the Petitioner filed a Notice of Appeal in the U.S. District Court which construed the appeal notice as an inferred Motion for Certificate of Appealability ("COA") and Leave to Proceed *In Forma Pauperis* ("IFP").

On February 21, 2017, the U.S. District Court denied the Motion for COA and denied the Leave to Proceed IFP.

On March 7, 2017, the Petitioner filed a Motion for Rehearing with the U.S. District Court asking the Court to construe/continue the §2254 Petition as a Fed. R. Civ. P. Rule 60(b)(6) motion.

On March 22, 2017, the U.S. District Court denied the Petitioner's Motion for Rehearing.

The Petitioner then filed a Motion for COA and Leave to Proceed IFP with the Eleventh U.S. Circuit Court of Appeals.

In a subsequent order, the Eleventh U.S. Circuit Court of Appeals accepted jurisdiction to hear the issue regarding the timeliness of Gillman's Petition and granted the Petitioner IFP status. The Court determined that issuing a COA was

not necessary (citing *Hubbard v. Campbell*) and holding, in part, "Gillman has shown that he has a non-frivolous issue."

In early October 2017, the Petitioner filed an initial Brief that was Amended on October 18, 2017. On November 13, 2017, a final Initial Brief was filed in accordance with an order from Hon. U.S. Circuit Court Judge Charles Wilson.

On March 27, 2018, the Eleventh U.S. Circuit Court issued an Order Vacating the December 16, 2016 and December 19, 2016 Orders by the U.S. District Court that had dismissed the Petitioner's habeas corpus petition as successive, and Remanding Case Number 5:16-cv-479-WTH-PRL back to the District Court for further proceedings (see Appendix O). The Order held, in part, "Because we cannot discern from the record whether the District Court considered Gillman's tolling argument under Fed. R. Civ. P. Rule 60(b)(6), or, if so, on what grounds it may have rejected his argument, we cannot meaningfully review its decision and therefore remand."

On May 14, 2018, the U.S. District Court, on remand, issued an Order (doc. 26) in instant Case Number 5:16-cv-479-WTH-PRL and re-assigned Case Number 5:10-cv-380-OC-PRL stating, in part:

"Petitioner is seeking relief from judgment with respect to the court's initial ruling, (therefore) the motion is more properly docketed as Case Number 5:10-cv-380-OC-PRL" and "While the Court will review the Petitioner's argument under Fed. R. Civ. P. Rule 60(b)(6) in a separate order, there has been no ruling on the

merits of the motion or any finding or any filing as to whether the motion is subject to procedural default or bar" (see Appendix N).

Pursuant to the above order, the Petitioner then filed motions for leave to file briefs and to introduce new evidence for the court's consideration.

On August 29, 2018, the U.S. District Court issued an order granting the Petitioner leave to file briefs and to introduce new evidence.

On September 16, 2014, the Eleventh U.S. Circuit Court of Appeals recognized Gillman's Motion to Discharge Counsel as received, and additionally directed the Clerk's Office to recall the mandate.

On October 7, 2014, the Eleventh U.S. Circuit Court of Appeals denied the Motion for Reconsideration but cited information regarding issuance and stay of mandate (see Appx. W).

On January 12, 2015, through Counsel, Mr. Gillman filed a Petition for Writ of Certiorari with this Honorable Court.

On March 2, 2015, this Court denied the Petition for Writ of Certiorari (see Appx. U).

MOTION TO PRODUCE DOCUMENTS FILINGS

On October 27, 2014, prior to filing his Petition for Writ of Certiorari with this Honorable Court. Gillman filed a *pro se* Motion to Produce Documents pursuant to Fla. R. Crim. P. Rule 3.220 (Discovery Rule) with the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On November 3, 2014, the Motion to Produce Documents was denied.

On November 12, 2014, Gillman filed a motion for rehearing on the denial order.

On January 5, 2015, the motion for rehearing was denied.

On February 3, 2015, Gillman filed a *pro se* Petition for Writ of Mandamus with the 5th DCA seeking an order to compel the lower court to produce the requested documents pursuant to Fla. R. App. P. Rule 9.030(b)(3) and Rule 9.100 and Article V, Section §4(b) of the Florida Constitution.

On April 2, 2015, the 5th DCA transferred the Petition for Writ of Mandamus to the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On November 14, 2018, the District Court entered an order stating as follows: "Upon due consideration, the Petition was properly dismissed as untimely for the reasons stated in the Court's July 5, 2013 order, which the Court of Appeals affirmed. Petitioner's Motion for Relief pursuant to Fed. R. Civ. P. Rule 60(b)(6) is DENIED" (see Appendix M).

On November 29, 2018, the Petitioner filed a Motion for Reconsideration with the U.S. District Court.

On December 6, 2018, the U.S. District Court denied the Motion for Reconsideration (see Appendix L).

On December 14, 2018, the Petitioner filed a Notice of Appeal that the U.S. District Court modified four days later. The Petitioner also filed a Motion to Proceed IFP for Appeal purposes.

On February 5, 2019, the U.S. district Court issued an order denying the Petitioner's Motion for Appeal, Motion for COA and Motion to Proceed IFP (see Appendix K).

On March 13, 2019, the Petitioner filed a Motion for COA and Motion to Proceed IFP directly with the Eleventh U.S. Circuit Court of Appeal.

On April 24, 2019, the Eleventh U.S. Circuit Court issued its order denying the Petitioner's Motion for COA and Motion to Proceed IFP (see Appendix J).

The Petitioner filed a timely Motion for Reconsideration.

On June 25, 2019, the Eleventh U.S. Circuit Court issued its order denying the Petitioner's Motion for Reconsideration (see Appendix I).

STATEMENT OF THE FACTS PERTINENT TO 28 U.S.C. § 1257(a)

In February, 2022 Mr. Gillman filed a *pro se* POST CONVICTION MOTION FOR NEW TRIAL pursuant to Fla. R. Crim. P. Rule 3.600 in the Fifth Judicial Circuit Court in and for Marion County, Florida.

With the POST-CONVICTION MOTION Gillman also filed A NOTICE TO THE COURT. In both these motions Gillman entered the claim that the final order in October 2002 resulting in all Gillman's convictions was obtained by fraudulent means, therefore allowing Gillman's filing of the 3.600 motion to be timely.

On May 12, 2022 the Court denied the Rule 3.600 motion as untimely and successive, and construed the 3.600 motion as a Fla. R. Crim. P. 3.850 motion. See Appendix F

In May 2002 Gillman fled MOTION FOR REHEARING. Denied May 31, 2022. App. E

Gillman appealed to the Fifth District Court of Appeals, ("5th DCA hereafter") in July 2022.

December 6, 2022 the 5th DCA *per curiam affirmed* Gillman's Appeal (without written opinion) App. B

Rehearing denied January 20, 2023. App. A.

Gillman avers at this time that his constitutional rights under at minimum the Sixth and Fourteenth Amendment were violated.

Gillman opines this Court has jurisdiction as 28 U.S.C. § 1257(a) reads in pertinent part as follows:

> where the validity of a treaty or statute of the United States is drawn into question on the ground of it's being repugnant to the constitution, treaties, statutes of or any commission held or authority exercised under the United States.

See *Wells v. State*, 132 So. 3d 1110 (Fla. 2014) @ 1112

> "Thus a District Court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

RULE 10. Considerations Governing Review on Certiorari

Review on certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The

following, though neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

In pertinent part:

(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;

(c) a state Court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. THE FLORIDA COURT OF LAST RESORT HAS DECIDED A CASE IN A WAY THAT CONFLICTS WITH WELL SETTLED DECISIONS OF BOTH THIS COURT AND FLORIDA COURTS.

This Court should grant certiorari to answer a question of law concerning Fla. R. Crim. P. 3.850(h)(2). Mr. Gillman filed on February 2, 2022 A NOTICE TO THE COURT, and postconviction motion for new trial pursuant Fla. R. Crim. P. 3.600. The court construed Gillman's *pro se* motion as a Fla. R. Crim. P. 3.850 motion. The Fifth Judicial Circuit Court, Marion County Florida denied Petitioner's motion citing Rule 3.850(h)(2) App. F p. 2-3.

> "A Court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, —"

However, in a recent Florida case ruling by a United States Court, *Luna v. Dixon*, Fla. App. Lexis 103553 the court found in 3.850(h)(2)

> "Where a state court has found a habeas claim procedurally barred on adequate and independent state grounds, federal habeas review is precluded unless the petitioner can show cause for the actual default and actual prejudice." Eg. *Ward v. Hall*, 592 F.3d 1144, 1156-57 (11th Cir. 2010).

Procedural default can also be excused in the "extraordinary case where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 485, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

Second, a federal court may also grant habeas petition on a procedurally defaulted claim, without a showing of cause and prejudice to correct a fundamental miscarriage of justice, *Murray*, 477 U.S. at 495-496. A "fundamental miscarriage of justice" occurs in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent – End *Luna* –

Detailed argument in Trial Court postconviction conviction motion for new trial filed February 2, 2022. In the Fifth Judicial Circuit postconviction motion for new trial and 5th DCA Initial Brief Gillman attached same appendix A-Z. To follow: Appendice letter for this instant Petition for Writ of Certiorari. Gillman will reference same letters as in state motions. After given certiorari appendix numbers.

The following are what Gillman opines to be constitutional violations leading to the conviction of an innocent man (Gillman)

ISSUE ONE – DEFENDANTS COMPETENCY/INCOMPETENCY

The Trial Court denied Gillman constitutional due process, 14th Amendment U.S. Constitution, in denying his pretrial motions to determine competency. See App. 1(A)(B)(C)[3]. The Florida Supreme Court held in *Hill v. State*, 473 So. 2d 1253 that

> "A hearing to determine his competency has been clearly set forth by the United States Supreme Court in *Bishop v. United States*, 350 U.S. 91 (1956), *Dusky v. United States*, 362 U.S. 402 (1956); *Pate v. Robinson*, 383 U.S. 375 (1966); and *Drope v. Missouri*, 420 U.S. 162 (1975).

Detailed argument in Trial Court postconviction motion p. 6-14.

At the time of his trial, Gillman suffered from severe head injuries (trauma) and lasting mental deficiencies which resulted from two motor vehicle accidents. The first was a motorcycle accident January 13, 2001. The head injuries consisted of bilateral diffuse cortical contusions, hematomas, and bleeds, causing Gillman to remain in a coma for over two weeks.

Prior to the trial in present case after the first accident, Defense Counsel had Gillman evaluated by Elizabeth McMahon Ph.D., but only in regard to an unrelated non-complex case in Hillsborough County. Although her evaluation concluded Gillman competent to stand trial in the 2001 case, it did so due to simplicity of that case. Noting that "his competency to proceed would be significantly impaired in a proceeding that was complicated, involving many witnesses, complex testimony,

[3] The following Exhibit A consists of pretrial motions to continue and determine competency found in Vol 3, Record on Appeal Fla.R.Crim.P. 3.850 Motion filed "2002" case #1996-3875.
Exhibit B consists of 3.850 Record on Appeal [Vol 6, p. 8-27] concerning court being informed as to State's witness Ralph Troisi's incompetency and Defense Counsel's conflict of interest and will be referred to again.
Exhibit C demonstrates Gillman's incompetency.

and numerous items of evidence; all factors in the instant homicide case (emphasis added).

In Florida law, *Brockman v. State,* 852 So. 2d 330, the Court held that Trial Court failed to comply with requirements of Fla.R.Crim.P. 3.210(h) by not holding a proper competency hearing before trial. And it determined that the competency reports, "even if they were in evidence, they were simply too old to be relevant in a determination of competency," the *Brockman* Court further wrote even if a Defendant has previously been declared competent, the Trial Court must hold another competency proceeding if a *bonafide* doubt is raised as to the Defendant's competency.

In Appendix 1, Exhibit B, during a colloquy, Defense Counsel Johnson: page 9. So we have, I think, three difficulties. One is Gillman's competency, two is Troisi's competency. "To include the obvious one that the Court is reading, by Dr. McMahon's report of him having, unintentionally had his motorcycle run into a vehicle"— "he flew over the top," "he was in a coma for two weeks," "he was reviewed by the Brain Institute," "he's not the same to everyone who knew him."

At this point the Court was well aware of Gillman's mental deficiencies. In the above cited United States Supreme Court cases *Bishop, Dusky, Pate,* and *Drope* cited in *Hill v. State*, 473 So. 2d 1253 make clear Gillman was not afforded a fair trial due to his incompetency.

Petitioner avers he was forced to stand trial while incompetent in violation of well settled Florida and United States Supreme Court law by the denial of the competency motions before trial.

Petitioner avers he was forced to stand trial while incompetent in violation of well settled U.S. Supreme Court law in denial of his competency motions before trial.

ISSUE TWO – JURY INSTRUCTIONS

The Trial Court allowed erroneous jury instructions in violation of the Florida Supreme Court precedent as well as their own 5th District Court of Appeal precedent, in re: "remaining in" Detailed Argument. The jury was given an erroneous jury instruction.

In short the Florida Supreme Court in *Delgado v. State*, 476 So. 2d 233 (Fla. 2000) held the "remaining in" language in jury instructions be deleted. Remaining in had to be done surreptitiously, which was not the situation in the instant case.

The legislature in Florida enacted section 810.015, Florida Statutes (2001) stating the Supreme Court improperly interpreted the Burglary statute in *Delgado* and nullifies its holding. The legislature cannot nullify a judicial holding retroactively.

The erroneous jury instructions given at Gillman's October 4-11, 2002 trial led to all convictions Gillman is imprisoned for. The Armed Burglary charge being the predicate felony leading to the felony murder counts of First and Second Degree Murder. The erroneous instruction read – in pertinent part – as follows:

"Burglary is defined as unlawfully entering or remaining in a structure" Appendix 2 D, p. 242 and 250

Gillman was an invited guest seeking to purchase a small amount of marijuana. See Appendix 3X (photos of bagged marijuana)

Appendix 2 E, p 1185-88 details the colloquy that took place leading to Courts erroneous ruling based upon case and statutory law to follow.

Defense Counsel Johnson correctly argued at 1185:

"the remaining in language"—"should be removed"

The State Attorney followed with the argument and Court agreed with State at 1188.

"I'll agree with that"

In *State of Florida v Raymond Ruiz*, 863 So. 2d 1205 (2003) the Fla. Supreme Court held:

"Based on the foregoing, we answer the rephrased question in the negative and hold that section 1 of chapter 2001-58, Florida Statutes (2002) is not applicable to conduct that occurred before February 1, 2000.

Also in *Ruiz,*

"we recently explained in *Floyd v. State*, 850 So. 2d 283 (Fla. 2002) that the express language of section 810.015(2) makes it inapplicable to cases where the conduct occurred before February 1, 2000.

Footnote 8 as follows:

"The consequence of our decisions that *Delgado* should not be applied retroactively cannot be used to alter *Braggs* and *Ruiz* rights under *Smith*, in which this Court made a clear distinction between cases on collateral review and those "in the pipeline." See 598 So. 2d at 1066 n.5

n.5 "pipeline cases are those pending on direct appellate review or are otherwise not yet final at the time of a pertinent change in the law. *Smith v. State*, So. 2d 1063, 1066 n.5 (Fla. 1992)

Gillman's instant case took place December 21, 1996, and was in "the pipeline" as his direct appeal case #5D03-1331 was not final until April 20, 2004 affirmed *per curium,* mandate issued June 28, 2004.

In MOTION FOR REHEARING App. 4 dated July 28, 2022 Petitioner cited *Paul v. State*, 183 So. 3d 1154 (5th DCA) Held:

> "Viron Paul appeals the order summarily denying his Fla. R. Crim. P. motion for post-conviction relief. However, for the reasons we discussed below was concluded that this is one of those rare, exceptional cases where failure to grant relief would result in manifest injustice."

In *Paul*, the 5th DCA found the erroneous jury instructions given constituted fundamental error. This was based on the Supreme Court of Florida's ruling on the same erroneous jury instructions in Viron Paul's brother Vishauls case.

In *Page v. State*, 201 So. 3d 207 (2016 DCA) the court held:

> Appellant's Petition For Writ of Habeas Corpus was granted and his conviction and sentence for second degree murder were reversed because on application of manifest injustice doctrine, error occurred at his trial by the use of fundamentally flawed jury instruction.

In *Mitchel v. State*, 274 So. 3d 1138 (5th DCA)

Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1956):

> "if it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, 'it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice"

See *Foster v. State*, 861 So. 2d 434, it reads

> "mistaking an element of an offense in instructing a jury --- even in accordance with an often used standard jury instruction constitutes fundamental error requiring reversal without regard to the usual rules of preservation because an inaccurate definition reduces the States burden of proof on an element."

Also in *Foster*, relying on Fifth Districts Analysis in *Valentine v. State*, 774 So. 2d 934 (5th DCA 2001) the Supreme Court concluded that giving of the instruction was fundamental error, requiring reversal of the convictions of Armed Burglary. *Floyd*, 850 So. 2d at 401-02.

In the instant case App. 1 page 16, Assistant State Attorney James Phillups in jury instruction argument argues to have testimony by Ralph Edward Troisi to convict Gillman for unlawful entry. Mr. Troisi shot and killed at least one of the victims. Mr. Troisi testified fraudulently. See issue 3 to follow.

The law in Florida is clear concerning flawed jury instructions. Fla. Supreme Court, the 5th DCA and more. Mr. Gillman hereby opines his conviction is manifestly injust due to the erroneous jury instructions, based on citation above.

ISSUE THREE – TROISI INCOMPETENCY

The Trial Court abused discretion while committing fraud to allow the testimony of Ralph Edward Troisi,.

A more complete argument in postconviction motion for new trial filed in Trial Court February 2, 2022.

The record best reveals evidence of fraud below by/on the court with defense and State Attorneys equally responsible.

In support petitioner offers the following:

On October 2, 2002 through counsel, Gillman filed a motion to exclude testimony and motion to continue based on the incompetency of state's only eyewitness, Ralph Edward Troisi. See Appendix 4 F.

Pursuant to 90.063 Fla. Stat. Gillman moved the court to exclude Troisi's testimony, his lack of ability to perceive the events that occurred on the date of the incident. (12-21-1996).

On October 5, 2002, pretrial Troisi was deposed Mr. Troisi's testimony is as follows:

A. "I flash back to things - I flash back to things that didn't even happen."

Q. "In Vietnam?"

A. "In Vietnam. I'm talking about this incident right here. You know how many times I flash back to things that I thought was true, and then, you know, after a while it wasn't true."

"I think this is true. I think this is what really happened. But I could be wrong, still."

Q. "Okay."

A. "I don't know." See App. 4 (F) motion to exclude testimony; Motion to continue."

During trial October 8, 2002 the court ruled on the Troisi motions App 4(G).

The Court: "For the record: I read the motions last night, I read the entire deposition. I find that he is competent to testify in the matter for which he spoke and the weight of his testimony

"And number one and number two: This case happened more than five years ago. Even though the witness is not a party to the case, I assume no testimony was obtained as to his

	medical records from the past; from the V.A. or otherwise, from this witness. And so it's a little late now to be getting them. But for those reasons and others, I deny the motion."
	"Do I have a copy of the Dr.'s Report?"
	"Dr. Krop."
Mr. Johnson, Defense Counsel:	"Your Honor, I have to supplement the record with it. It's somewhere in the recesses. I have got a spare one."
Mr. Phillups, Asst. State Attorney:	"Please."
The Court:	"I will put that in the record."
The Court:	"For the record, the Court has considered the report from Dr. Krop, Ph.D., Director of Community Behavioral Services, V.A. dated July 2001. App. 4(G)."

There is the fraud. The above Dr. Krop Ph.D. 2001 July competency report used by Trial Court to declare Ralph Edward Troisi competent, is actually a competency report of Petitioner Robert W. Gillman's. See App. 4(H).

The date stamps on the Krop report identify it as filed into the record day and time Judge Swigart cited, (above) and the State possessed a copy since July 30, 2001.

The Court, Defense Counsel and Prosecution were all party to the fraud.

ISSUE FOUR

In March 9, 2009 Trial Court's denial of Gillman's original Fla. R. Crim. P. 3.850 motion App. 1(A) the Court wrote in denying Gillman's conflict of interest claim that Gillman's trial attorneys Johnson Vipperman and Jenkins, the conflicted attorney Trish Jenkins was a public defender at the time she represented Troisi, hence, she was a government lawyer under Rule 41.10(e). There is no precedent for imputation of a public defender's representation of a firm she later joins. Rule 4-1.9(a) and Rule 1-1.10(a) and (b), Rules Regulating the Florida Bar are inapplicable to this case. Appendix BB p. 4.

Contrary to above court ruling see *Spaziano v. Seminole County*, 726 So. 2d 772 (Fla. 1999) (finding conflict of interest where public defender had previously represented witness who gave deposition, incriminating to defendant, even though the witness was removed from the prosecutions witness list after the deposition.).

Rule 4-1.10(b) as follows: Where a lawyer becomes associated with a firm, the firm may not knowingly represent in the same or a substantially related matter in which that lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom, the lawyer, had acquired information protected by 4-1.9a, and Rule 4-1.10(a) and (b) that is material to the matter.

Rule 4-1.10(b) R. Reg. Fla. Bar. As the Eleventh Circuit explained in *United States v. Campbell*, 491 F.3d 1306 (11th Cir. 2007), the rules governing the imputation of conflicts, such as rule 4-1.10(b), include situations where any member

of a firm representing a criminal defendant has previously represented a witness for the prosecution.

In holding that the conflict was imputed to the entire firm, also in *Campbell* "It is not necessary to decide whether [the representing attorney] himself had a conflict of interest, we required instead whether [a] law partner would have an actual or serious conflict of interest had the defendant retained him." *Id.* at 1311 (emphasis added) the court also noted that "[t]he fact that an imputed conflict is, by definition, and indirect conflict doesn't mean that an imputed conflict is somehow merely a potential conflict." *Id.* at 1311, n. 4 for the reason that the Court held "as a matter of law" [the partners] actual conflict was imputed to, and therefore, became [the representing attorney's actual conflict" (emphasis in original). See also *Fruend v. Butterworth*, 16 F.3d 389 n. 33 (11th Cir. 1999) (noting that a conflict of one member of a law firm "imputes equally to the rest of the law firm).

In review of the post-conviction motion App. 1 and Initial Brief App. 3 along with their attached at filing Appendix App. 1 there is far more detailed explanations best revealed by the record that Gillman defense counsel member Trish Jenkins assisted the State to conceal Ralph Edward Troisi's incompetency and more at July 7, 1997 deposition/suppression hearing, see *Kyles v. Whitley* "[T]he relevant inquiry [for determining whether a person is a member of the prosecution team] is what the person did, not who the person is.

Mr. Troisi was/is the State's only eyewitness, however Troisi has an array of mental health deficiencies that render him unfit/incompetent to testify. See App. 4 (F) and (I).

For example, the March 21, 1997 letter to then Public Defender Tricia Jenkins, in pertinent parts as follows:

> "Mr. Troisi is rated as disabled by the Department of Veterans Affairs at a level of 100% for PTSD. The guidelines for deciding the severity of the disability read as follows:
>
> 'when the condition is manifested by totally incapacitating psychoneurotic symptoms boarding on gross repudiation of reality with distorted thought or behavioral processes associated with almost all daily activities and the veteran is demonstrating unable to obtain or retain employment, an evaluation of (100%) may be assigned.'
>
> See Appendix 4 (I), p. 530-31
>
> p. 533 is a letter to Assistant State Attorney James Phillups dated September 22, 2000 explaining Ralph Troisi's 1005 PTSD rating showing the State was long aware of Ralph Troisi's incompetence. James Phillups represented State against Gillman from the January 14, 1997 indictment, through the October 4-11, 2002 trial and convictions of Robert Gillman, Petitioner.

Petitioner prays court to fully review this issue and petitioner opines this to be abuse of discretion, fraud, and departing from settled law.

ISSUE FIVE

The Florida court of last resort decided the matter concerning Gillman's motions to supplement the Record adverse to Florida Statute.

Fla. R. App. P. 9.200(f)(2) which reads as follows:

> If the court finds a record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.

Fla. R. App. P. 9.200(e) reads as follows:

> The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the Petitioner or Appellant.

Any party may enforce the provision of this rule by motion; denied January 20, 2023 Appendix A and November 30, 2022 App. C.

Petitioner will now refer this Honorable Court to 5th DCA Motion for Rehearing with detailed explanation.

Gillman is also providing all cited documents.

September 27, 2022 Court order granting in part Gillman's motion to supplement record Appendix D filed July 28, 2022 / October 12, 2022 Notice of Inability to Supplement Record from Marion County Clerk. Appendix 5 November 30, 2022 Fifth DCA order granting Gillman's Motion to enlarge page limits but denying Gillman's August 26, 2022, October 27, 2022 and November 3, 2022 Motions to Correct and Supplement Record Appendix C.

In the November 30, 2022 denial of Gillman's three motions to supplement the record, the 5th DCA committed reversible error.

It should be noted by Court that the photos Marion County Clerk Gregory C. Harrell claimed to be unable to copy, were copied and provided to both Courts by Gillman's mother Sharon, as explained in detail in denied motions to correct and supplement record. Also left out by Gregory Harrell were the Gillman and Torisi

competency records provided to this Court and both Florida Courts by Gillman. All part of the public record Court file.

The Florida Supreme Court held in *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 @ 1152 (Fla. 1979) held:

> "Without a record of the trial proceedings, the appellate court cannot properly resolve the underlying factual issues so as to conclude that the Trial Courts judgment is not supported by the evidence or by an alternative theory. Without knowing the factual content neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal."

See *Hill v. Hill*, 778 So. 2d 967 (Jan. 25, 2001 Fla. S. Ct.) The Court held citing Applegate

> "In a situation such as this one, in which it is obvious that a defect in the appellate record may be quickly and easily corrected, it seems clear that the ends of justice are best served, and the litigant's constitutional right to effective review is best preserved by affording the Appellant a reasonable opportunity to supply the omitted parts of the record."

In *Contrera v. Florida Unemployment Appeals Comm'n*, 894 So. 2d 269 "that Rule 9.200(f)(2) obliges us to always afford a party an opportunity to supplement the record before we decide --- (*Contrera* is 1st DCA)

Florida Wellness and Rehab Ctr., Inc. v. Feldman, 262 So. 3d 234 (3rd DCA 2018);

"9.200(f)(2) requires an appellate court to allow the appellant an opportunity to supplement an incomplete record before deciding the case based on the insufficiency -- *Kirrie v. Indian River Code Enforcement*, 104 So. 3d 1177 (4th DCA 2012);

> "the motion was still pending when the Circuit court affirmed without opinion. In doing so, the circuit court deprived the petitioner of due process."

Under Fla. R. App. P. 9.200(f)(2), 9.220(a) Petitioner should have been allowed to supplement the Appendix.

As per Fla. R. Crim. P. 9.200(f)(2), the Florida Supreme Court, and the First, Third and Fourth District Courts of Appeal (FLA) the Fifth District Court of Appeal committed reversible error in denying Gillman's Motion to Correct and Supplement, then ruling with incomplete records. Appendix C. See *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, at 1152 (Fla. 1979) Also *Hill v. Hill*, 778 So. 2d 1967 (January 25, 2001 Fla.) "it seems clear the ends of justice are best served, and the litigants constitutional right to effective review is best preserved by affording the Appellant a reasonable opportunity to supply the omitted parts of the record."

Petitioner Gillman provided complete record with motions to correct and supplement record, and with both post-conviction motion, and initial brief.

The portions of record deleted by Fifth Judicial Circuit Clerk Gregory C. Harrell were competency records pertinent to Gillman, and Gillman's report used to establish Troisi's competency.

Troisi's incompetency records, and photos demonstrating fraudulent representations/testimony. All absolutely necessary to "permit intelligent review." *Contrera*, 894 So. 2d 269.

REASONS FOR GRANTING THE PETITION

Robert W. Gillman went to Kenneth Tomms residence on December 21, 1996 with Erwin Edward Ballard "Ocala Ed" to by a, "bag of weed," marijuana for thirty dollars.

Ralph Troisi being high on cocaine possessing is mental problems went postal and began shooting Gillman.

Petitioner prays this Court will carefully review the post-conviction motion and 5th DCA Initial Brief to identify the false testimony of Troisi, Marjorie Jodeanne Moore and rest used to convict Gillman of a story completely unsupported by the evidence. Exhibits X, Y and Z (photos) Appendix (X, Y, Z) show the pot for sale on kitchen counter at time of incident, and Gillman's bloody hands showing "the stick" had to be placed after Gillman gone by someone else. Ms. Moore identified perpetrator as wearing green flannel shirt. Postconviction Motion.

In February 2, 2022 postconviction motion in Trial Court p. 37-38 Tomms girlfriend testified (Q) that Kenny Tomms sold marijuana and he was bagging marijuana "looks like it" during the December 21, 1996 incident (instant case) Appendix 3 (X) Ms. Moore also testified.

Defense: "But you don't have any idea if they had an invitation or not, do you? "

Ms. Moore: "No."

This is the key element. See *State v. Ruiz,* 863 So. 2d 1205 (Fla. 2003). As invited guests, and removing the "remaining in" Burglary instructions. Gillman's case does not qualify as Burglary.

Ralph Troisi testified at trial that he and Kenny Tomms, in pertinent part:

Troisi: "stopped in front of a dumster..."

"he threw out a turn up jacket"

Defense: "It wasn't yours?"

Troisi: "No, it wasn't mine."

This is most significant. The black motorcycle Troisi refers to is identified by Detective Chas Maier's testimony at trial as being worn by Troisi along with a green flannel shirt also found in dumpster during the December 21, 1996 crimes commission. Post-trial Motion (S).

Defense: "The clothing was identified as belonging to Troisi, correct?"

Marer: "Yes sir."

Defense: "whose blood was that?"

Marer: "Kenny Tomms.
"

The blood on jacket proves Ralph Troisi lied about who put clothes in dumpster, why and when.

The rest of Troisi's testimony proved fraudulent by his own past testimony and other witnesses Jodeanne Moore and Josh Simmons.

Assistant State Attorney James Phillups was convinced they needed Ralph Troisi's testimony to convict Gillman. Appendix 7 (N), p. 67-68.

> "that it would be nearly impossible to get a conviction, frankly, of first degree without his (Troisi) cooperation."

The State was also aware of Troisi's mental health problems and falsified documents to eventually have his testimony allowed. See Appendix 6 (K). July 8, 1997 *nolle prosequi* document saying the reason:

> "immunized statement to testify in first degree murder trial,"
> However, in the July 10, 1997 *nolle prosequi* in State file.
>
> "in light of recently received information, likelihood of conviction remote as to knowledge and intent."

Both *nolle prosequi* documents were copied to Tricia Jenkins and Chas Maier also VA records in Appendix 4 (I).

Medical examiner Susan Rendon found in (U) testified at trial that "Ocala Ed" Ballard, not Tomms, had skull fractures conducive to being hit with "the stick" alleged to been yielded by Gillman (fraud).

A look at Appendix 8 (Y), blood trials and stick on floor, demonstrate Gillman's bleeding to point where stick was found. Appendix 9 (Z) show Gillman's hand both bloody from gunshot wounds, yet not even trace elements of blood on the stick.

Everything the State's theory alleges Gillman to have done, the physical evidence proves to have been done by the decedent and State witnesses.

Gillman asks that this Court grant certiorari, and fully review the fraud by the Court, and on the Court in his trial.

Detective Chas Maier in Postconviction Motion (S).

IN FACT, Postconviction Motion (W) shows Gillman was first NOT ALLOWED to leave by Troisi, at gunpoint. Postconviction Motion (W).

The entire evidence collection was "a mess." Postconviction Motion (V) Trial testimony of Ocala P.D. crime scene investigator Eric Peterson.

Medical Examiner Susan Rendon testified Ed Ballard had skull fractures conducive to being "struck a forceful blow from that stick" Answer yes at 42. Postconviction Motion (U)

Again, review of shows numerous pieces of fraudulent testimony, proves State's theory to be false and Gillman innocent of the Armed Burglary and subsequent felony murder charges. See *McQuiggin v. Perkins*, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) "there exists an "equitable exception" for a colorable claim of actual innocence. Indeed, "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup*, 513 U.S. at 324.

Schlup v. Delo, 513 U.S. 298, 330, 115 S. Ct. 851, 120 L. Ed. 2d 808 (1995) states that the habeas Court reviewing the gateway claim of actual innocence must consider the credibility of the State's witnesses presented at trial.

In the case at bar, the evidence presented at trial was fraudulent. The contained "Record" in Postconviction Motion proves the State's theory to be in error and fraudulent testimony led to the conviction of innocent man.

This Honorable Court is certainly familiar with *Guzman v. Secretary Dept. of Corrections*, 663 F.3d 1336 (11th Cir. (Fla) 2011) citing *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 342 (1935) "deliberate deception of a court and a jury by the presentation of known false evidence is incompatible with "rudimentary demands of justice." *Napue v. Illinois*, 360 U.S. 264 (1959) "First it is established that a

conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and [t]he same result obtains when the State although not soliciting false evidence, allows it to go uncorrected when it appears."

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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