23-7329

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



ALRICK BROWN
*Appellant*

v.

STATE OF FLORIDA
*Respondent*

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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

**ALRICK BROWN DC# I52026**
Appellant, *pro se*
South Bay Correctional and
Rehabilitation Facility
P.O. Box 7171
South Bay, FL 33493

## QUESTIONS PRESENTED FOR REVIEW

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

Evidence Was Inconsistent With Appellant Claim Of Self Defense

Evidence Was Insufficient To Prove Premeditated Murder.

II. Whether a Appellant 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:

Misadvising Appellant Not To Testify Violating Appellant's 5th 6th And 14th Amendment Right's Under Ineffective Assistance Of Counsel And The United States Constitution, And Article 1, Section 12, Of The Florida Constitution

For Not Objecting To The Jury Instruction That Was Erroneous And Essentially Vitiated Appellant's Claim Of Self-Defense Violating Appellant's 5th 6th And 14th Amendment Right's Under Ineffective Assistance Of Counsel And The United States Constitution, And Article 1, Section 12, Of The Florida Constitution.

Trial Counsel Was Ineffective For Abandoning Stand Your Ground Motion Violating Appellant's 5th 6th And 14th Amendment Right's Under Ineffective Assistance Of Counsel And The United States Constitution, And Article 1, Section 12, Of The Florida Constitution.

The Cumulative Impact of Trial Counsel's Multiple Errors Deprived Appellant of a Fair Trial in Violation of the Sixth and Fourteenth Amendments to the United States Constitution

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

## INTERESTED PARTIES

## CERTIFICATE OF INTERESTED PERSONS

Appellant certifies the following persons may have an interest in the outcome of this case:

Abualown, Lubna, Trial Attorney

Bloom, Beth, United States District Judge

Burke, Patrick B., Appellate Counsel

Conner, JJ., Judge Fourth District Court of Appeal

Gerber, C.J., Judge Fourth District Court of Appeal,

Moody, Ashley Y., Florida Attorney General,

Napodano, Luke R., Attorney Florida Department of Corrections,

Perry, Donna M., Assistant Attorney General

Taylor, Carol Y., Judge Fourth District Court of Appeal,

Usan, Micheal A., Circuit Court Judge,

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**APPENDIX A CIRCUIT COURT OF APPEAL**

**A1**

December 21, 2023, Order from the 11th Circuit, Case No. 23-11313 denying Appellant's (COA) certificate of appellate ability.

## TABLE OF AUTHORITIES CITED

**STATUTE(S)**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

NO. _____

ALRICK BROWN
*Appellant*

*v.*

STATE OF FLORIDA
*Respondent*

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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

Alrick Brown, *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. Certificate of appealability filed on December 21, 2023, by the eleventh circuit, Appendix A-1.

## OPINIONS BELOW

The order from the Eleventh Circuit denying Appellant's timely 2254 petition for writ of habeas corpus of his motion for certificate of appealability **Appendix A-1**.

## 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 Appellant'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 December 21, 2023, and a copy of the order denying COA (certificate of appealability) appears at **Appendix A-3.**

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Brown question involves the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution. The Fifth, Sixth, and Fourteenth Amendment provides that an Appellant 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 defense.

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 September 26, 2016, Appellant Alrick Brown, was charged by the State of Florida with first-degree murder. After a jury trial Appellant was adjudicated guilty of first-degree murder Count I.

On October 17, 2016, Appellant was sentenced to life. Appellant appealed his conviction to the Fourth District Court of Appeal. *Brown v. State*, 238 So. 3d 798 (Fla. 4th DCA 2018)

On May 8, 2018, the Appellant filed a timely rule 3.850 motion for post conviction relief with Memorandum of law.

On March 1, 2021, the Seventeenth Circuit Court denied Appellant's rule 3.850 motion for post conviction relief and Memorandum of Law.

Appellant filed a timely appeal and raised six claims in his initial brief alleging his constitutional right to effective assistance of counsel was violated. On September 15, 2021, the Fourth District Court of Appeal issued a decision *per curiam* affirming the state trial court's denial of his motion. *Brown v. State*, 326 So. 3d 1107 (Fla. 4th DCA 2021)

Appellant filed a 2254 habeas corpus to the Southern District of Florida, which was denied. Appellant appealed the denial to the United States Court of Appeal for the Eleventh Circuit, which was denied on March 31, 2023 (Appendix A-1).

This petition for writ of certiorari follows.

## REASONS FOR GRANTING THE WRIT

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

#### A. Evidence Was Inconsistent With Appellant Claim Of Self Defense

At trial, the state failed to produce evidence, other than inadmissible hearsay, to rebut Appellant's defense of self-defense. The trial court therefore erred in denying Appellant's motion for judgment of acquittal.

Soon after the incident giving rise to this case, Appellant willingly gave a sworn statement to law enforcement. He explained that he and his wife had been arguing about her kissing another man; that she pulled out a knife and stabbed him; that he took the knife away from her; that she obtained another smaller knife and stabbed him again; and that he believed she was trying to kill him so he took the smaller knife away from her and stabbed her several times, ultimately killing her. SR1 at 30-34, 36; T. 589-592. Appellant told a detective that he stabbed her probably three to four times, though he wasn't sure. SR1 at 37. He was merely trying to defend himself. *Id.* at 38. He maintained that she had stabbed him in the stomach and he believed she was trying to kill him. T. 593-94. He sat down with her after he stabbed her, and she tried to "grab [him] by the balls" SR1 at 39. Appellant gave a similar account to the 911 operator. SR1 X. But he did not provide quite as many details. *Id.*

Dr. Iouri Boiko, an associate medical examiner for the Broward County Medical Examiner's Office, testified that he performed the autopsy on February 3, 2014. T. 366. Significantly, on cross examination, he agreed that if there are more than one or two stab wounds on a person, such wounds are usually not self-inflicted. T. 388. In other words, it was highly

unlikely, according to the state's own expert, that Appellant's wounds were self-inflicted, indicating that he had in fact been stabbed by his wife. This was consistent with Appellant's self-defense theory but inconsistent with the State's theory.

After the state rested, the defense moved for a judgment of acquittal. T. 648. Specifically, trial counsel argued that the defense put forth a valid case of self-defense, which the state failed to rebut. T. 648-50. The trial judge denied the motion with no explanation. T. 651.

Because the state failed to rebut Appellant's defense of self defense and the trial court denied Appellant's motion for judgment of acquittal, Appellant's rights under the Second and Fourteenth Amendments were violated. *See* *D.C. v. Heller*, 554 U.S. 570, 628-29 (2008) ("[T]he inherent right to self defense has been central to the Second Amendment."); *Jackson v. Virginia*, 433 U.S. 307 (1979) (holding that "the relevant question [in a sufficiency of the evidence review for criminal convictions] is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

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

**B. The Evidence Was Insufficient To Prove Premeditated Murder**

Appellant was charged with and convicted of premeditated murder in violation of § 782.04(1)(a)1., Fla. Stat. After the state rested its case, Appellant moved for a judgment of acquittal on the basis that the state failed to prove the essential element of premeditation. The

victim's wounds were the product of an unplanned, spontaneous incident, Appellant argued. There was zero evidence that Appellant had a premeditated intent to kill his wife. Appellant's reasonable hypothesis of innocence was that he acted in self-defense and that the stabbing occurred as a result of him preventing injury to himself. Appellant maintained that the knife wounds, although arguably consistent with premeditation, fell short of excluding every reasonable hypothesis of innocence, *i.e.*, self-defense. As such, the evidence presented by the state failed to prove premeditation, and the trial court should have granted a judgment of acquittal on first degree premeditated murder.

In support of his argument, Appellant cited Coolen v. State, 696 So. 2d 738 (Fla. 1997); Kirkland v. State, 684 So. 2d 732 (Fla. 1996); and Olsen v. State, 751 So. 2d 108 (Fla. 2d DCA2000). In all three cases, the state failed to prove the element of premeditation, as in Appellant's case.

In Florida the law is clear that "the law does not require that the premeditation be formed at a specific time prior to the killing. Rather, "[p]remeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must also exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act." See Phillips v. State, 207 So. 3d 212 (Fla. 2016) citing Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997) and Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986)).

Although Appellant did not cite Federal Supreme Court precedent in support of this particular claim in his initial brief on appeal, Appellant did cite Supreme Court precedent and the Fourteenth Amendment in the preceding issue, which was premised upon the same legal concept,

*i.e.*, sufficiency of the evidence. In other words, Appellant argued the claim in a federal context, thus alerting the state court to the federal nature of the claim. *Preston v. Sec'y, Florida Dep't of Corr.*, 785 F.3d 449, 457 (11th Cir. 2015) ("[A] Appellant need not use magic words or talismanic phrases to present his federal claim to the state courts."). This means that exhaustion occurs when the Appellant "present[s] his claims to the state courts such that they are permitted the opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004). The state appellate court *per curiam* affirmed the trial court's decision without explanation.

Because the state courts unreasonably applied *Jackson v. Virginia*, 433 U.S. 307 (1979), to this claim, Appellant's constitutional right were violated under the Fifth and Fourteenth Amendment to a fair trial. Thus, rising to the level of a constitutional violation rendering Appellant's state trial fundamentally unfair and hence, violation of due process.

## II. The United States Supreme Court has held that a Appellant 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 an Appellant must show that counsel's performance was deficient, and that the deficient performance prejudiced the Appellant. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

### C Counsel was constitutionally ineffective for Misadvising Appellant Not To Testify Violating Appellant's 5th 6th And 14th Amendment Right's Under Ineffective Assistance Of Counsel And The United States Constitution, And Article 1, Section 12, Of The Florida Constitution.

Appellant avers that trial counsel was ineffective for advising him not to testify at trial.

Counsel advised Appellant not to testify during an off-the-record discussion. Counsel also advised him to tell the trial court that it was his decision not to testify.

Appellant contend that he wanted to testify, that he told his counsel as much, and that "[n]o competent attorney would deny his client the right to testify and tell his side of the story in a first degree murder case when his theory of defense is self defense." Appellant maintained, "his proposed testimony was the only evidence establishing a legally-recognized defense to his charges." R. 11 (citing Lott v. State, 931 So. 2d 807, 819 (Fla. 2006); Loudermilk v. State, 106 So. 3d 959, 960 (Fla. 4th DCA2013)). The record is clear that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." VISGER V. STATE, 953 So.2d 741 (2007)

In making such assertions, Appellant set forth a meritorious claim of ineffective assistance of trial counsel based on counsel's advice not to testify. Appellant's testimony was critical to his self-defense theory, and no competent attorney would have advised silence in such a case. Appellant was accused of having stabbed his wife to death, and he pursued a defense of self-defense. Thus, it was absolutely essential for him to take the stand and tell the jury his side of the story. Appellant would have testified that the deceased first stabbed him, that he feared for his life and defended his life by stabbing her. Appellant would have testified that the reason there were multiple stab wounds to the deceased was because she continued to fight him. She grabbed another knife and again charged him. This was the only way he could have conveyed to the jury that he was acting in self defense. And yet, counsel advised silence.

The state trial court summarily denied this claim without conducting a hearing. The trial court issued a one-page order adopting the state's response. In its response, the state argued that

"[n]othing in this ground demonstrates how counsel misadvised [Appellant], nor is there anything in the motion which indicates the substance of the testimony... other than a general statement that he wanted to testify about self-defense." Response at 5. Moreover, the state contended the trial court conducted a colloquy which demonstrates Appellant "knew and understood his right to testify and his right to remain silent, and it was his decision, not that of counsel, as to whether to testify." Response at 5.

The state also asserted the record refutes Appellant's allegation because he gave a recorded statement to law enforcement about acting in self-defense. And this allowed him to place his self defense theory before the jury "without the prosecutor having the opportunity to cross-examine [him]." Response at 6.

It's interesting how Respondent can argue at one point that Appellant's pre-trial statement to law enforcement was inadequate to substantiate his self-defense claim, Resp. at 18-20, only to later suggest that Appellant's statement was sufficient to substantiate his claim of self-defense. So which is it? Either Petitioner's statement wasn't enough to show he acted in self-defense, or it was enough and the trial court should have granted his motion for JOA. Respondent can't have it both ways.

The United State Supreme Court and Florida Courts have made it clear that Counsel must advise the defendant (1) of his right to testify or not testify; (2) of the strategic implications of each choice; and (3) that it is ultimately for the defendant himself to decide whether to testify." *McGriff v. Dep't of Corrections*, 338 F.3d 1231, 1237 (11th Cir. 2003) (citing *Teague v. Dep't of Corrections*, 953 F.2d 1525 at 1533 (11th Cir. 1992)

Federal Courts have made it clear that counsel gives ineffective assistance with respect to

the defendant's right to testify where counsel "has refused to accept the defendant's decision to testify and refused to call him to the stand. See *Gallego v. United States*, 174 F.3d 1196, 1197 (11th Cir. 1999).

The state trial court's application of *Strickland* was unreasonable. *See Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (holding that for a convicted Appellant's claim of ineffective assistance of counsel to warrant post-conviction relief, two components must be present—deficient performance and prejudice). Appellant has a constitutional right to testify on his own behalf about his lack of intent to commit the crime for which he was accused, a cornerstone of his fundamental constitutional right to a meaningful opportunity to present a complete defense. Therefore counsel was constitutionally ineffective for misadvising Appellant not to testify.

**D Counsel Was Ineffective For Failing to Object to Flawed Excusable Homicide Instruction Violating Appellant's 5th 6th And 14th Amendment Right's Under Ineffective Assistance Of Counsel And The United States Constitution, And Article 1, Section 12, Of The Florida Constitution.**

Appellant avers that his trial counsel was ineffective for failing to object to part three of the excusable homicide instruction—the sudden combat portion—where it negated his sole defense of self-defense. Motion at 9-12. Part three of the excusable homicide instruction states:

> Three. When the killing is committed by accident and misfortune resulting from a sudden combat if a dangerous weapon is not used and a killing is not done in a cruel and unusual manner. Motion at 12 (citing T. 740-41).

Appellant's motion explained that he was involved in "a life and death struggle" with his wife and that he "acted in self-defense when he stabbed his wife with a knife." Motion at 13. He said he "took the knife from his wife after she... stabbed [him] three more times." Motion at 13. Thus, the sudden combat portion of the instruction should have been removed, as Appellant was

pursuing a defense based on heat of passion during sudden provocation, not sudden combat.

Importantly, Appellant's motion contended that "[t]he jury instruction vitiated [his] claim of self-defense and essentially relieved the state of its burden of proving beyond a reasonable doubt that [he] did not act in self-defense." R. 13. He relied upon *Bowes v. State*, 500 So. 2d 290 (Fla. 3d DCA1986), for the proposition that it is error for the trial court to read part three of the excusable homicide instruction—the sudden combat portion—where the Appellant pursues the sudden provocation defense under part two of the instruction, because it suggests that a homicide can never be excusable where a dangerous weapon is used. Appellant's case involved the use of a knife.

Had the jury not been given the erroneous jury instruction, Appellant contended, "there is a reasonable probability that [he] would have been acquitted." Motion at 13.

In summarily denying ground five, the trial court issued a one-page order adopting the state's response. In its response, the state argued that Appellant "fail[ed] to note how an issue about an allegedly improper jury instruction could not have been raised on appeal." Response at 6. The state also contended that the instructions, as read, were proper, and that Appellant "fail[ed] to indicate any case law which demonstrates that the instruction at issue was erroneous in any way." Response at 6.

There is nothing in the record to show that the State presented sufficient evidence for a jury to find that Petitioner acted with premeditated intent and that the killing was not by accident and misfortune in the ***heat of passion***. The record is clear that his wife stabbed [him] several times before he begun a life and death struggle acting in self-defense when he stabbed his wife with the knife.

The record is clear that counsel should have objected to the jury instruction that was erroneous and essentially vitiated Appellant's claim of self-defense. *Perry, v. Sec. Dept. Of Corr.*, 2016 U.S. Dist. LEXIS 122498 (N.D. Fla. August 9, 2016), which is inopposite of Appellant's case.

Florida Statute 782.03 Excusable homicide instruction specifically states:

*Homicide **is excusable** when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, **without any dangerous weapon** being used and not done in a cruel or unusual manner.*

It was error to give such juror instruction where it is clear that in order for the homicide to be excusable the Appellant could not have a weapon.

The holding that the third circumstance excluding dangerous weapons from the defense only applies to situations involving sudden combat is error. Such instruction is misleading to the jury that a killing can never be excusable if committed with a dangerous weapon. Thus, on this record, counsel was constitutionally ineffective for not objecting to the standard jury instruction which failed to allow the jury to find that the stabbing was excusable based on Appellant's defense theory that it was self defense.

Appellant have shown from the face of the record that "counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Therefore,

Counsel's deficient performance deprived Appellant of his constitutional right to a fair trial under the fifth, Sixth, and Fourteenth Amendment to the United States Constitution.

**E Counsel was Constitutionally Ineffective For Abandoning Appellant's "Stand Your Ground" Motion Violating Appellant's 5th 6th And 14th Amendment Right's Under Ineffective Assistance Of Counsel And The United States Constitution, And Article 1, Section 12, Of The Florida Constitution.**

On May 16, 2016, trial counsel filed a motion to dismiss information based on Florida's "Stand Your Ground" law. *See* § 776.032, Fla. Stat., and Fla. R. Crim. P. 3.190(b). On May 31, 2016, however, counsel abandoned the motion. Counsel's decision was flawed, amounting to constitutionally ineffective assistance.

Prior to the hearing on the motion, the state moved to videotape Petitioner's testimony for later use at trial. Trial counsel objected, and the trial court ruled in favor of the state based on the Fourth District Court of Appeal's holding in Cruz v. State, 189 So. 3d 822 (Fla. 4th DCA2015). Instead of pursuing Petitioner's Stand Your Ground motion, counsel abandoned the motion for fear of the state's later use of Petitioner's testimony at trial. But this was not a valid reason to abandon the motion. Had counsel pursued the motion, there is a reasonable probability the motion would have been granted and the case dismissed.

Respondent argues this claim is without merit and not substantial under *Martinez v. Ryan*, 566 U.S. 1 (2012), because counsel's decision to abandon the pre-trial Stand Your Ground motion was strategic. Resp. at 30. Respondent notes that "[b]oth the trial court and counsel for Petitioner recognized this was a strategic decision of trial counsel and thus the trial court declined to colloquy Petitioner on whether he agreed with the decision to withdraw the motion to dismiss." *Id.* (citing DE 10-1 p. 9).

Appellant avers that the Respondent's argument is without merit.

The undisputed facts of this case are as follows: On February 2, 2014, Petitioner was at his residence where he had a right to be. He got into a heated argument with his wife concerning her behavior the night before (Petitioner saw her kiss another man inside of the man's vehicle). During the argument, she grabbed a large knife and stabbed him multiple times. Petitioner took the knife away from her and threw it on the floor. She grabbed a smaller knife and stabbed him again, so Petitioner took this knife away from her as well and, having no other options, stabbed her multiple times, ultimately killing her. Petitioner suffered multiple stab wounds in the neck, stomach, and other areas, requiring emergency surgery. The facts therefore establish, by a preponderance of the evidence, that Petitioner acted in self defense for fear of being further injured by his wife.

Section 776.013, Fla. Stat., states:

> (1) A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and has the right to stand his or her ground and use or threaten to use:
>
> (b) Deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

Dismissal of Petitioner's case was warranted under § 776.013(1)(b), the "Stand Your Ground" law. He was at his private residence where he had a right to be. He was not engaged in unlawful activity. And he reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself. He had a textbook case of self defense, warranting dismissal of the charges.

The record is clear that Petitioner was at his private residence where he had a right to be. He was not engaged in unlawful activity. And he reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself.

The Respondent's reliance on *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982)) was misapplied, because *Costa* is inapposite of Appellant's case. In *Costa*, the petitioner argued that his attorney "should have called his mother as a witness to testify that he was involved in a legitimate business." *Id.* at 1364. But "Costa's mother was not a witness to any acts relating to the crime," as noted by the Eleventh Circuit, and "[a]ny testimony by her that Costa was engaged in a lawful business would not be particularly relevant...." *Id.* The Eleventh Circuit concluded that Costa's "[c]ounsel cannot be faulted for not calling her as a witness" because counsel's decision was reasonable and strategic.

Here, trial counsel's decision to abandon the Stand Your Ground motion was neither reasonable nor strategic, thus amounting to ineffective assistance under *Strickland*, 466 U.S. 668. As such, Petitioner makes a substantial and meritorious claim of ineffective trial counsel based on counsel's abandonment of the motion. . SEE, HESTER V. STATE, 319 So. 3d 126 (2021)

***EVIDENTIARY HEARING IS NECESSARY FOR THIS CLAIM***

Appellant avers that an evidentiary hearing is necessary to resolve the issue in claim **H** that counsel was constitutionally ineffective for abandoning Appellant's "stand your ground" motion. See *Palmer v. Sec. Dept. of Corr.*, 2021 U.S. Dist. LEXIS 41379 (N.D. Fla. February 5, 2021) and *Ferrier v. Fla. Dep't of Corr.*, 2020 U.S. Dist. LEXIS 220160 (N.D. Fla., February 12, 2020) the issue of counsel abandoning the stand your ground motion was not resolved until after a evidentiary hearing.

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 Appellant must offer proof. *Aron v. United States*, 291 F.3d 708, 715, n.6 (11th Cir. 2002)

Appellant 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).

The record clearly shows that counsel was deficient, which prejudice the Appellant's trial and defense.

## F Cumulative Impact of Trial Counsel's Errors

The United States Supreme Court further held that "cumulative effect error is a recognized claim in federal criminal proceedings. *Reynolds v. Chatman*, LEXIS 41694 (U.S. Dist. 2005)

These errors and others complained of *supra* created a cumulative effect, which this court should assess when conducting the prejudice prong analysis of *Strickland*. In combination, all of the above errors by counsel deprived the Petitioner of a just and fair trial in this case. *See United States v. Blasco*, 702 F. 2d 1315 (11th Cir. 1983) The Eleventh Circuit noted that "a piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our constitution.

## CONCLUSION

This Court has acknowledged that a Appellant's constitutional rights under ineffective assistance of counsel is violated under *Strickland*, when Appellant 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 Appellant was deprived of his constitutional right to effective assistance of counsel. Appellant prays this court will remand this case for a new trial.

South Bay, Florida
April 8 2024

Respectfully Submitted,

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