No. 24-6871

IN THE

SUPREME COURT OF THE UNITED STATES

Diego J. Jimenez– PETITIONER
(Your Name)

vs.

Florida Secretary, DOC – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Florida, Case No: SC2024-1519
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Diego J. Jimenez DC# M43488
(Your Name)

1599 SW 187th Avenue

Miami, Florida, 33194 – 2801

305-228-2000
(Phone Number) Warden

QUESTION(S) PRESENTED

- Whether a bias and partial Judge that was recused (removed) before trial and any way presiding over a criminal defendant's trial "**created a Structural Error**" when is actually bias. This Judge was recused "three times" off of this case during the proceeding, also this Judge ignored her own recusal and intentionally kept herself on the Petitioner's case and review and rulings in "all" Motions in a post conviction proceeding. (See First Legal Analysis) and;
- Whether a "fraud in the Court" that created an unconstitutional, a constitutional deficient jury instructions that omitted ("because was intentionally erased") the essential element and also removed the total mens rea from the offense produced a fundamental injustice and error that can overcomes the procedural bar to prevent a manifest injustice and a denial of due process, and (see Second Legal Analysis); ("Second Structural Error" Sullivan V. Lousiana, 1993)
- Whether an accusation alleged that a police hand held radio was used by the Petitioner as a deadly weapon had to be found by a jury beyond a reasonable doubt in the jury instruction and should reflect on an special verdict form before trial Court may enhance Petitioner's sentence and (see Third Legal Analysis).
- Whether multiple enhancement (three times) for the same offense are permitted without violating the double jeopardy prohibition of the United States Constitution.

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

1) *Jimenez v. McNiel*, No.10-20388-civ-GRAHAN, U.S. District Court for the Southern District of Florida, Miami, Division. Judgment entered September 22, 2010. LEXIS 162247 (criminal Habeas Corpus) Appeal No: 11-10186-I U.S. Court of Appeals, Eleventh Circuit.

2) *Jimenez v. Jones*, No. 18-cv-22533, KMW, U.S. District Court for the Southern District of Florida, Miami Division. Judgment entered – December 15,2020. LEXIS 235861, LEXIS 89844.

3) In Re: *Diego Jimenez*, No18-11621-A-U.S. Court of Appeals for Eleventh Circuit, Judgment entered, May 02, 2018. (Brady and Giglio Violation).

4) In re: *Diego Jimenez,* No. 17-15146-D U.S. Court of Appeals for Eleventh Circuit, Judgment entered, November 21, 2017.

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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.

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

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

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

The opinion of the_____appears at Appendix ___ to the petition and is

[ ] 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 rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (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 1/17/2025. A copy of that decision appears at Appendix A.

[ ] A timely petition rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution

Amendment VI to the United States Constitution

Amendment XIV to the United States Constitution

U.S. Code 28 U.S.C. 455(a)

Florida Constitution Article 1, Sections 9, 13, 21

775.082, Fla. Stat.

775.087, Fla. Stat.

784.045, Fla. Stat.

784.03, Fla. Stat.

784.07, Fla. Stat.

924.051(3), Fla. Stat.

STATEMENT OF THE CASE

After a separation from his wife, the Petitioner was informed by his children, that his estranged wife who used to work as a stripper on a night club, after their separation, was visited at the family home (Section 8 housing) by **a great number of men, many of them staying overnight. "One of the children complained to his father that he had found a naked man inside their bathroom".** Suspecting that the mother of his children was involved in prostitution, Petitioner as a father realized that their children were being victimized by their mother's negligence and decided to take the legitimate action to monitoring the children's house and filming a video of his estranged wife's dangerous behavior with the purpose of obtaining a video tape evidence in order to get a full custody of the children (**"two girls and one boy"**) all were under the age of 10 years. Id. (proceeding at T.T. 13-25) also (T.T. 590-594). "Unfortunately" for Petitioner and his children he found that some of those visitors were Miami-Dade police officers dressed in complete uniform and driving marked Metro-Dade police vehicles.

One night around 12:30 am Petitioner hid in from his children apartment with a video camera and started recording these visitors, their marked patrol car numbers and their license tags. This first visitor was a

"**Metro-Dade School Resource Unit Officer**" (Officer John) Id. (T.T. 635-638). One hour later a second officer arrived but this second officer was aware that he had been filmed and quickly called Petitioner's wife, as Jimenez was leaving, she confronted him, demanding that he give her the videotape, but she was unsuccessful. Id. (T.T. 636-638) She also told Petitioner that she had called her police boyfriends (four of them) and they would take the videotape from him.

A few days later on December 4, 2000 around noon (the arrest day) Petitioner's wife confronted him and followed him for about 30 minutes prior to his arrest and demanding that he give her the videotape, again she was unsuccessful. A few minutes later Jimenez took the nylon white bag containing the camera and the original videotape he had filmed that night on November and left riding as a passenger on a friends car. Id. (Lazaro, the driver depo pgs 18-27) Three minutes later, Officer Rosario was heading towards Jimenez vehicle (opposite direction) spotted Jimenez, focused on him intensely (turned on the emergency lights) and made a quick u-turn. **Rosario who was also a school resource unit officer** Id. (T.T. 220) made the stop that was not initially reported. Id. (T.T. 227) Instead, Rosario ordered Jimenez to step out of the vehicle, placed his hands on the car's trunk, and emptied his pockets.

Officer Rosario then ordered Jimenez to assume "the position" **then frisked him and found nothing** also obtained his I.D., Rosario moved away and began to use his cell phone while looking at the Jimenez identification Id. (T.T. 237-241), Jimenez made no attempt to conceal anything he had "no" weapon in his hands, concealed in his clothes, or inside the car. Nor did Jimenez say anything threatening. Petitioner was not suspected on any personal criminal behavior, Jimenez had not committed, was not committing, or was to commit a crime. Id. (T.T. "327-340"). (See APPX(D)) Petitioner refused to continue to talk to Rosario and just walked away (a non-violent act), Jimenez was not arrested for anything that happened before he walked away. After that Rosario followed Jimenez and struggled ensued when Rosario (22 years old, 6' 1", 230 pounds) attacked Jimenez (40 years old) by his back and sent him to a hospital. After the struggle the officers took the video camera and its video tape by force from Petitioner. The evidence captures on the video was the real and surreptitious reason for initial stop of the vehicle in which Jimenez was the passenger; **Jimenez never ever attacked or hit officer with the radio at the contrary Rosario attack Petitioner by his back**. Petitioner was exercising his First Amendment right and was using that right to "protect" his children. The activity in which Jimenez was involved in November of 2000, when he

videotaped police misconduct was constitutionally protected speech. Id. *Robinson*, 378 F. Supp. 2d 534 (e.D. Pennsylvania 2005) citing *Smith*, 212 F. 2d 1332-33 (11th Cir.2000).

Officer Rosario's retaliation was brought about by the videotape that was in Jimenez's possession.

All felonies charged were "**fabricated**" by Officer Rosario after Jimenez just walked away. Rosario falsified the police report in order to conceal his true motive, recover (the video camera and its contents) seized illegally by the police and during the illegal detention and arrest of Mr. Jimenez.

Petitioner was unlawfully detained without reasonable suspicion of criminal activity, only for the reason that he exercised his universal right to "protect and care" for his three children, **who were being neglected by their mother's dangerous behavior. "And from that arrest day and for more than 24 years, Jimenez never see his children again".**

Also, all of these facts were reported to Internal Affairs for investigation Id. ("Internal Affairs file" number G1 2001-033 case number 662503x) and (See next page 7(A)) because Officer Rosario, using a **frequency on his radio that was unmonitored or recorded (side channel) called fellow Officer Aiken and Officer Mirone "who was also a school resource unit police officer"** to assist him as backup officer. Id. (T.T. 220)(T.T. 445-46)(T.T. 512).

After his arrest, Jimenez reported his wife's dangerous behavior and negligence to a "child abuse hotline" on January 18, 2001 at 7:10 p.m. (Operator Nataly, Id. 5153) For more detailed description of this account, see closing arguments Id. (T.T. 769 to 798) and Internal Affairs (Sgt. Trujillo) ("**said the police watched the video tape at the scene**"). (T.T. 686-"704"-710).

REASON FOR GRANTING THE PETITION

This three legal analysis in this petition should be granted for this Honorable Court to address the merits of the issues raised herein as a matter of great public importance for the whole United States of America, and to prevent that the Judges in the United States violating their own rule of judicial conduct and continuing violating the Due Process Clause for the Fourteenth Amendment when they created structural errors that originated fundamental miscarriage of justice, fundamental constitutional errors and manifest injustice. The Due Process Clause is one of the fundamental values for protecting the life, liberty and property in our society.

In light of this Supreme Court's decision *Liljeberg v. Health Service*, 486 U.S. 847, 865 108 S. Ct. 2194 (1988) and 28 U.S.C. 455(a), this fundamental constitutional errors that Petitioner will show here can undermine the structural integrity of the criminal system in the United

States, this structural and fundamental errors struck at fundamental values for our society, this structural defect dislodge one of the fundamental tenets of our criminal system, the due process. The due process must be applied with integrity, to a fair and impartial tribunal; *Marshall*, 446 U.S. 238, 242 (1980). The Judge neutrality requirement help to guarantee our liberty, our life, our property and at the same time, it reserves both the appearance and reality, of fairness generating the filing that justice has been done. This Honorable United States Supreme Court should grant this issues presented here in benefit of our entire society. Therefore, the action by this Honorable Court is necessary for made a contemporaneous opinion ratifying the due process protection during the trial proceeding and for prevent the creation of structural errors; fundamental constitutional errors; fundamental miscarriage of justice and manifest injustice. The entire American society will feel better protected with the strong new opinion that guarantees that no person in the United States be deprived of the right to receive due process law during any legal proceeding. Petitioner would urge this Honorable Supreme Court to take this case and make the resolution of this matter that should serve as a warning to Judges in the entire United States not to engage in personal matters that affect the structural integrity of the judicial and criminal system. See *Arizona v. Fulminante*, 499 U.S. 279, 111

S.Ct. 1246 (1991). (Please see the first legal analysis). And also in light of this Court decision *In re Winship*, 397 U.S. 358 (1970) and *Sandstron*, 442 U.S. 510 (1993) declare that the omission of an essential element of the offense from the jury instructions that was disputed at trial is a fundamental error that always will make the conviction constitutionally invalid and due that the Court should adhere to the rule that "overcomes the procedural bar" to prevent a manifest injustice and fundamental miscarriage of justice and a denial of due process caused by the fundamentally flawed jury instruction and requires that "Federal and State Courts grant Habeas Corpus that accomplish with the burden of demonstrating a "manifest injustice" through clear proof of the four requirements **at any time**: (1) That there was an error; (2) that was a plain error (clear error); (3) that it affected Defendant's substantial rights; and (4) that it affected the fundamental fairness of the proceeding. Thus, if the Petitioner met very clear the four requirements the relief should be granted at any time to prevent fundamental injustices and denial of due process in the whole United States. See *Wolfork v. State*, 992 So. 2d 907 (Fla. 2nd DCA 2008)(analogue situation). (See the second legal analysis).

Also, this petition should be granted as a matter of great public importance in a light of this Honorable Court's decision in *Apprendi v. New*

Jersey, 530 U.S. 466 (2000) and its progeny for the purpose of guiding Federal and State Courts into the adequate procedural to follow when addressing sentences enhancement statutes and fundamental error in the jury instructions that allow a jury to convict defendants without every essential element of the offence that result of deprivation of the Constitution's organic Due Process Clause. It is also in the interest of justice to grant relief if this Honorable Court agrees with the Petitioner that this **triple** enhanced sentence is a manifest injustice and a violation to *Apprendi*, supra, its progeny and the V, VI, and XIV constitutional Amendments. Furthermore, this Honorable Court may also identify in this petition other relevant issues that might have escaped the scope of this humble pro se litigant. (See the third legal analysis).

First Legal Analysis

Structural Error/Fundamental Miscarriage of Justice

Violation of 28 U.S.C. 455(a)

The entirety of the circumstances surrounding Petitioner's case, trial and conviction are a travesty of justice. This fundamental constitutional error that Petitioner will show here can undermine the structural integrity of the criminal justice system in the United States, this structural error struck at fundamental values of our society, this structural defect dislodges one of

the fundamental tenets of our Criminal Justice System, the due process, the due process is a fair and impartial tribunal.

The overtones of police corruption during Petitioner (Jimenez) arrest, and because Petitioner was directly through the trial proceeding before Judge (Bertila Soto) with a big conflict of interest that created a super bias and potential for prejudice Judge Soto had a direct personal interest in the outcome of the Petitioner's trial and in convicting Defendant. Judge Soto "**never ever disclosed**" or informed Jimenez that her husband was a Metro-Dade police officer like the alleged victim Officer Rosario (co-workers), this creates suspicion and reinforces the Petitioner's fear that the Judge Soto will not be fair and impartial. When Jimenez discovered that in the Court a prompt Motion ("**the first**") for Judge Soto to recuse herself was orally filed by Petitioner's defense attorney, "Mr. Elio Vasquez" (SPD) in open Court on ("**April 11,2003**") (**before trial**) based on Jimenez's well founded fear of not receiving a fair trial, and fear of going to trial before Judge Soto due to the obvious conflict of interest and prejudice at that time and because Jimenez case was atypical case, and had elements of a police corruption case against around "ten" Metro-Dade police officers. After Jimenez's attorney had voiced his concerns and fears to Judge Soto, she granted the motion and the case was subsequently transferred to "Judge Joseph P. Fİrtel" on

"April 11, 2003". (See case number: F00-38717, Docket Sheet (Seq.) # 331). (See Appendix "B.")

Thereafter as the case was proceeding to trial, for some unknown reason (at that time) the case was reassigned back to Judge Soto. Despite the known prejudice and bias. Judge Soto was made aware of **she continued to allow the case to proceed to trial with her**. This proceeding was conducted over Petitioner's objection. Jimenez made these concerns known to his public defender attorney at that time, who downplayed the issue as not important. ("Now I think he was conspired"). Judge Soto violated the Code of Judicial Conduct. Canon 1.3 E(1)(d)(iii). 3C(1) 3F, and Federal Code 28 U.S.C. 455(a) Judge Soto did not comply with their own canon of ethics. The law is clear and requires a Judge to sua sponte disqualify herself if her neutrality or impartiality might reasonable be questioned. The commentary to Canon 3E(1) provides that a Judge should disclose on the record information which the Judge believes the parties or their lawyers might consider relevant to the question of disqualification. See *Livingston v. State*, 441 So. 2d 1083 (Fla. 1983); *Arizona v. Fulminante*, 499 U.S. 279, 311, 111 S. Ct. 1246 (1991).

Consequently, the Judge Soto bias was definitely direct personal and under influence of her husband a Metro-Dade police officer. Her husband

was a co-worker with around "ten" Metro-Dade police officers that were under Internal Affairs investigation in this case for corruption; fabrication of the charges, false statement; misconduct and tampering with evidence for almost a year and were represented by expensive lawyers in Miami. Id. ("Internal Affairs", file No. G1 2002-033, Case No. 662503X). Considering
See (7) → that all these officers working together in Miami-Dade, "(7)" Petitioner well founded fear of not receiving a fair trial and fear to going to trial before Judge Soto due to the obvious conflicts of interest and prejudice, were materialized because Jimenez fearfully went to trial with the already recused Judge Soto and received 60 years general sentences (that is illegally) (See Appendix "B") only because Judge Soto said that Jimenez had a domestic "nolle prossed" case in the Court criminal system. (Id. sentencing hearing). **Petitioner had no criminal record when he went to trial**. (Id. proceeding (APPX B) T.T. 20), Nolle prossed is not a criminal record. In addition during the sentencing, Judge Soto "comments" that she had believed that Petitioner was guilty and that the witnesses were in fear of him, and there is not guilty because is clear by the record that Officer Rosario fabricated the charges. In the Florida sentencing scheme, the sentencing Judge serves as the ultimate fact finder. If the Judge was not impartial, there would be a violation of due process. The law is well

established that a fundamental tenet of due process is a fair and impartial tribunal. *Porter*, 49 F. 3d 1483 at 1487 (11th Cir. 1995). Petitioner got 60 year general sentences for a false and fabricated aggravated assault; aggravated battery on law enforcement officer. ("**That in the reality is a simple battery jury instruction**"); resisting arrest and battery on a single episode. (see Appendix C) Judge Soto was under the influence of her husband to commit a fraud, because that was the only logical explanation that she intentionally and in bad faith adulterated ("falsify") the aggravated battery on law enforcement officer jury instruction in Count Two in benefit of her husband Metro-Dade police officers co-worker and the State. Judge Soto "**transform**" the aggravated battery FS. 784.07(2)(d) instruction in the misdemeanor simple battery F.S. 784.03(1) with the heading title of aggravated battey.

This fundamental error fabricated by Judge Soto in Count Two is a mistake of law that seriously affected the fairness, integrity and public reputation of the judicial system proceeding. (See the Second Legal Analysis, also see Appendix C). This fraudulent and unconstitutional jury instruction in Count Two is a "**plain error**" that was instructed with malice by Judge Soto in benefit of her husband co-workers and this fraud also relieved the State of its burden of proving the essential element of the

charged offense and made a conviction very easy for the State because State only needed to prove the misdemeanor elements in the jury instruction with the heading title of Aggravated Battery on LEO that is a first degree felony ("what a trick"). The objective of this fraud was guaranteed that Petitioner was found guilty easy and send him to prison for 30 years.

Judge Soto advised the jury that once the State proved that: (1. DIEGO JIMENEZ intentionally "touched or struck" OFFICER CARLOS ROSARIO against his will) and aggravated battery on a law enforcement officer was proven. As you can see this element is for a misdemeanor simple battery F.S. 784.03(1) that can "only" be reclassified to third degree felony 5 year sentence by F.S. 784.07(2)(b). (See Appendix C). Only this wrongful conviction in Count Two holds Petitioner illegally in prison and Petitioner was deprived of his 5th, 6th and 14th constitutional amendment right.

Furthermore, the procedural post conviction parade of horrible that followed where the already "**two time recused**" Judge Soto ruled in all Post Conviction Motions after being recused for a second time on ("June 14,2004") (See Orders of recusal, Appendix B) Judge Soto again transferred the case this time to "Judge Israel Reyes". Further, when a Judge has been recused (removed) from the case, they cannot proceed to trial,

review or rule on any Post Conviction Motions, Rule 3.800(a) or 3.850 proceeding because any subsequent Orders entered by a recused Judge are void and have not effect. In this petitioners case, that void Orders entered by the recused Jude Soto "STILL IN EFFECT". See *Meawether v. State,* 732 So. 2d 499 (Fla. 1st DCA 1999) and *Carson v. State*, 60 So. 2d 504 (Fla. 1st DCA 2011). Consequently, the Judge Soto bias is definitely personal when she "insist and insist" in control Petitioner's case anyway and Judge Soto was **recused again for a third time** on (July 11, 2008). (See Appendix B) (Orders of recusal, complaint letter to the Court Chief Judge on June 17, 2008; "Florida Judicial Qualification Commission" (Judge Bertila Soto Complaint No. 0916-05/2009). Judge Soto again entered this "**third recusal Order**" on her own because Petitioner wrote a complaint letter to the Court Chief Judge, Joseph Farina and he forced her to enter this third recusal order where Judge Soto recognized that she had already recused herself. (See Appendix B). Also see *Lilgeberg v. Health Service*, 108 S. Ct. 2194 (1988); *U.S. v. Patti*, 337 F. 3d 1321 (11th Cir. 2003); *Porte v. Singletary*, 49 F. 3d 1483, 1488 (11th Cir. 1995); 28 U.S.C. 455(a); Fla. Code Jud. Conduct, Canon 1; 3E(1)(d); Canon 3C(1) and 3F.

See APPX(B-3)

By then, it was too late, the damage was already done because all Petitioner's available post conviction remedies, 3.800 and 3.850 had been

reviewed and denied by a Judge Soto that previously recused herself two times and continued with the insistence in remaining on Petitioner's case. Petitioner still cannot understand how and why Judge Bertila Soto did all this abuse of power and proceeding upon the poor indigent Defendant that only was trying to protect his children. She put petitioner's children on the side and went directly to help her husband's co-workers and the State in violation of Petitioner's constitutional right to receive due process law under the Fourteenth Amendment. All this facts made Judge Soto responsible for creating a fundamental error, a fundamental miscarriage of justice and structural defects in the Constitution of the trial mechanism by the presence on the bench of a Judge who was not impartial that result that Petitioner was adjudicated by a biased Judge.

The purpose of the Structural Error Doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). Structural error thus constitutes a limited class of fundamental constitutional error that defy analysis by harmless error standards. This error undermined the structural integrity of the criminal justice and dislodges one of the fundamental tenets of the United States criminal justice system the Due Process Clause.

When the United States District Court for the Southern District of Florida adopted the Magistrate Judge report and Recommendation in the **case number 10-20388-civ-GRAHAN in September 22, 2010 ("Ground Eleven")** this adoption was an abuse of the District Court discretion because the report was a true defect in the integrity on the Federal Habeas Corpus proceeding. The Magistrate Judge Report caused that the previous resolution was in error because precludes a correct merits determination. The Magistrate Judge "omitted" in his Report and Recommendation the relevant and essential facts that Judge Bertila Soto was recused (removed) from the case before trial on ("April 11, 2003"). The law is very clear, that any Judge shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned 28 U.S.C. 455(a), is clear also, that no Judge is allowed to sit on defendant's proceeding whose neutrality is questioned. *Livingston v. State*, 441 So.2d 1087 (Fla. 1987) Canon 3E(1)(d)(1). And also the Magistrate Judge "omitted" that Jude Soto was recused again for a second time on ("June 14, 2004") after trial. Furthermore, a Judge previously recused cannot rule on any subsequent post conviction Motions because any Order the Judge enters in that case are void and have no effect. *Carson v. State*, 60 So. 2d 504 (Fla. 1st DCA 2011). Further, the Magistrate Judge again "omitted" in the report that because Judge Soto

"insistence" to continue review and ruling in the Post Conviction Motion she was recused again for a third time on("July 11, 2008"). In the Petitioner's case is abundantly clear that Judge Soto was recused "three times" during the proceeding and this should be deemed as structural error that affects the trial proceedings and required this Honorable Supreme Court action because the cause is fundamental unfairness and this cause represent extraordinary circumstance. See U.S.D.C. case number 10-20388 ("Ground Eleven") LEXIS 162247.

In conclusion, Petitioner trial was contaminates by the structural error that affects the framework within which the trial proceeds. This trial was fundamentally unfair. The law is well established that a fundamental tenet of due process is a fair and impartial tribunal. *Marshall v. Jerrico*, 446 U.S. 238, 242, 100 S. Ct. 1610, 1633 (1980). There this Honorable Supreme Court said: The due process clause entitled a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceeding safeguards the two central concerns of procedural due process... The neutrality requirement help to guarantee the life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness,...generating the feeling, so

important to a popular government, that justice has been done...by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. 446 U.S. at 242, 100 S. Ct. at 1633.

As evidence of the trial Judge Bertila Soto partiality and bias Petitioner presents the following evidence:

1) Judge Soto was recused before trial on "April 11, 2003" based upon conflict of interest and Petitioner fear of going to trial before Judge Soto due to the obvious conflict and prejudice present at that time. Judge Soto did not comply with their own Canon of Ethics, Canon 1, Canon 3E(1)(d) and Federal Code 28 U.S.C. 455(a) because despite the known prejudice and bias Judge Soto was made aware of, "she insisted" in continued to allow the case to proceed to trial with her, over the objection and protest of the Petitioner. Judge Soto was well aware that the law is clear that no Judge is allowed to sit on defendant's trial when her partiality or neutrality was in question. Judge Soto abused her power and proceeding upon indigent defendant with a public defender. When she ignored her own recusal returning to Jimenez's case that was an intentional act for her personal interest to sway the trial proceeding and ruling in the case. This matter

affected the "equality and integrity" when an individual's liberty interest are involved.

2) Judge Soto was personal interesting in that the testimony of Lazaro Gonzalez, the driver of the vehicle where Jimenez was a passenger and the "defense key eye witness" was not heard by the jury. "Lazaro was the most important witness in Defendant's trial". His testimony was pivotal, essential and a factual matter the jury had to hear for Defendant's case to be balanced and supported by the theory defense counsel was presenting. Lazaro would have testified about the initial stop made by Officer Rosario, he would testify about the entire incident when the officers seized the video camera and their diligent efforts to view the tape, and eventually confiscated it. Id. (I.A. T.T. "704") Lazaro witnessed the entire incident with the radio and the video camera. He also witnessed the initial aggravation created by Officer Rosario upon Defendant, and the subsequence chase and eventual physical beating by the police ("the trumped up charges").Lazaro would have testified that "Officer Rosario visited him" ("the key eye witness against them") in his house before trial. (That is completely illegal and corrupt try to intimidate Lazaro)(*Id.* Rosario Deposition) Lazaro Gonzalez testimony would have swayed the jury to the point or reasonable doubt in Defendant's case. Judge Bertila Soto was well aware that Lazaro

entered in the Courtroom and was talking to the defense lawyer in front of her, everybody in the trial Court knew that Lazaro was there, available and ready to testify. *Strickland*, 104 S. Ct. 2064 (1984). Judge Soto ignored him totally and intentionally downplayed the Lazaro presence like he was invisible man and he was not in the Courtroom.

3) Judge Soto intentionally and fraudulently removed (erased) totally the second and necessary essential element of the offense (Element 2a and 2b) F.S. 784.07(2)(d) and "moved" Element Three to Element Two position and named #2. This fraud "**transform**" the Aggravated Battery instruction into Simple Battery instruction with the heading title of Aggravated Battery. (See Appendix C). This fraudulent act by Judge Soto created a fundamental error in benefit of her husband, police officers, co-workers and guaranteed that Petitioner (Jimenez) was found guilty very easy and sent to prison for 30 years with the misdemeanor jury instruction ("good trick") by Judge Soto. Also this fraud relieved the State of its XIV Amendment burden of proving the essential element of the charged offense and guarantee that the State got Petitioner conviction in one easy way. Jimenez still suffers the consequences of this barbarity act by Judge Soto because it is possible that Jimenez is the only person in the whole State of Florida that was sentenced to thirty years for the first degree misdemeanor F.S. 784.03(1)

(**1. DIEGO JIMENEZ intentionally touched or struck OFFICER CARLOS ROSARIO against his will**.) that was reclassified by Judge Soto as a first degree felony and with malice order to running consecutive with Count One for a total of 45 years sentences. (See Appendix B and E). (See case F00-38717, Court Docket entry Seq# 805 Court Order on March 19, 2015, page 2) Miami-Dade 11th Circuit Court. APPX B(1).

4) Judge Soto intentional and with malice omitted (suppressed) the necessary lessers charged "**written jury instruction**" on Count Two, battery on LEO and simple battery in this way she forced the jury to rely "only" in the fraudulent and fundamental flawed jury instruction that she fabricated. (See R-201, R-202, R-203) also see (T.T. 811) and (Appendix E, Habeas Corpus page 12).

5) Judge Soto was already "**recused two times**" when she reviewed and "increased" the sentences and also denied all Petitioner's Post Conviction Motions, that illegal act demonstrated clearly that Judge Soto had direct personal interest apart from the administration of justice. Her interest was to keep Jimenez illegally in prison at any cost. Judge Soto was well aware of the law that made clear that when the Judge has been disqualified (recused) from the case, no further proceed to trial; review or ruling be

allowed and subsequent Orders Judge Bertila Soto entered in this case are void and have no effect. See *Carson*, 60 So. 2d 504 (Fla. 1st DCA 2011) Supra. Thus, without any doubt the returning of Jimenez case two times to Judge Soto was an intentional act to ensure that Petitioner's case was sabotaged by Judge Soto personal interest to sway rulings in Jimenez's case.

6) Please see Appendix "B," resentence Order (filed on February 8, 2008) that shows that Judge Bertila Soto, "that was recused two times already" in retaliation, vindictive and in bad faith bringing back ("**resuscitated**") the sentences in Counts 3, 4, 5, 6, and 7 that were already served ("**expired**") and in addition Judge Soto's Order, that those already expired counts run consecutive to each other for a total of 60 year sentence with a 5 year minimum mandatory again.

At the time of Jimenez's resentence on February 8th, 2008, he had served (7 years and 2 months) of the "original concurrent sentence" with credit for jail time lacking the prison time of "7 years and 2 months". Judge Soto intentionally failed to check the box that awards prison credit in the resentence Order. Furthermore, the Judge's action directly violated the Defendant's 5th Amendment under the Double Jeopardy Protection Clause.

See *Gisi v. State*, 4 So. 3d 613 (Fla. 2009); *State v. Rabedeau*, 2 So. 3d 191 (Fla. 2009). The decision was affirmed and approved. See (Appendix "B") February 8, 2008 resentence Order, and original sentence R-244, R-245 and R-247) and;

*7) Please, See: Judge Soto improperly commented on Jimenez' guilty See Page 14 at "(7)."

SECOND LEGAL ANALYSIS

FUNDAMENTAL ERROR/MANIFEST INJUSTICE/MISCARRIAGE OF JUSTICE

On January 17, 2025, the Florida Supreme Court emited the following Order in response to the Petitioner's Great Writ of Habeas Corpus/Exceptional Extraordinary Circumstance to Correct a Fundamental Injustice/Vindicate a Manifest Injustice: (See Appendix A and E).

"The Petition for Writ of Habeas Corpus is hereby denied as procedurally barred. A Petition for Extraordinary Relief is not a second appeal and cannot be used to litigate or relitigate issues that were or could have been raised on Direct Appeal or in prior post conviction proceedings. See *Denson v. State*, 775 So. 2d 288, 290 (Fla. 2000); *Breedlove v. Singltary*, 595 So. 2d 8, 10 (Fla. 1992). No Motion for Rehearing will be considered."

The Honorable Florida Supreme Court relied in *Denson* and *Breedlove* are misplaced in the Petitioner's case. Those cases are not

applicable to the Petitioner's Habeas Corpus/Manifest Injustice because:

1) First in *Denson*, 775 So. 2d at 290[4] his claims have already been decided against him on the merits and his claims were barred under the concept of res judicata. In *Breedlove*, 595 So. 2d at 11, the Court stating that the Motion was untimely, but the trial Court went on to the merits of the Motion claims.

2) The Petitioner's case is "distinguished" from *Denson* and *Breedlove*, because this claim of true fundamental error in the jury instruction in Count Two has never ever been considered onto the merit for the State Courts. Even when Petitioner filed a Habeas Corpus/Manifest Injustice on November 4, 2013, claimed the true fundamental error in the jury instruction in Count Two the trial Court stated: "While it was found to have merit, it was denied by the trial Court as untimely." IN Petitioner's case the trial Court or the appeal Court never ever went on to the merit. (See the Court Order filed on March 19, 2015, page 2 (#10) this Order is attached to the end of the Habeas Corpus. See Supreme Court, case number SC2024-1519). APP(E).

3) The State three lower Courts, the 11th Circuit Court (Miami-Dade) the Third District Court of Appeal and the Florida Supreme Court never ever (nunca) Order to respond or issued the show cause Order to the State

Attorney or to the Attorney General for answer this claim of true fundamental error in the jury instruction in Count Two. This matter have never been decided on the merit and Petitioner never ever had a day in Court for considered this fundamental error that is on the face of the record a plain error in plain view.

4) This true fundamental error in Count Two have never ever been considered as a matter adjudged or res judicata, simply these State Courts in Florida never ruling or decided this issue onto the merit. See *Wolfork v. State*, 992 So. 2d 907 (Fla. 2d DCA 2008)(analogue situation).

Instruction that allows a jury to convict without every element of the offense violates in re *Winship's* requirement that every fact necessary to constitute the crime "must be proven beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364 (1970). "Due process requires criminal convictions to rest upon jury determination that the defendant is guilty of every element of the crime with which Jimenez is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310 (1995). Therefore, this instruction in Count Two relieves the State of the burden of proving mens rea beyond a reasonable doubt contradicts the presumption of innocence and invades the function of the jury, thereby

violating due process. *Sandstron v. Montana*, 442 U.S. 510, 521-24, 99 S.Ct. 2450 (1979). Every Federal Court to consider the question since this Court decided *in re Winship*, has agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid, void. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993). See also *Osborne v. Ohio*, 496 U.S. 103, 122-24, 110 S. Ct. 1691 (1990) (Omission of element from jury instruction s violated due process); *United States v. Mendoza*, 11 F. 3d 126, 128 (9th Cir 1993) (When a trial Judge omits an element of the offense charge from jury instructions, it deprives the jury of its fact finding duty and violates the defendant's due process right. It is therefore clear that the omission of the mens rea element (2.b) (Defendant in committing the battery used a deadly weapon) from the jury instructions to the jury violated Petitioner's right to due process by allowing the jury to convict him without finding an essential requisite element of Aggravated Battery offense (F.S. 784.07(2)(d) element (2.b) (See Appendix C and E).

This misleading jury instruction in Count Two is a fundamental error and is on the face of the record, a "plain error". *U.S. v. Atkinson*, 297 U.S. 157 (1936) also *Wolfork v. State*, 992 So. 2d 907 (Fla. 2 DCA 2008). The direct appellate counsel, Leslie Scally conducted Petitioner's appeal pursuant to

Anders v. California, 386 U.S. 738 (1967). This was a mistake. The Third District Court ruling: "per curiam affirmed." The Third District Court of Appeal did not examine the record, and abandoned its unrenunciable judicial duty to correct fundamental errors. See *David v. State*, 309 So. 3d 318, 321 (Fla. 1st DCA 2021). Had the Third District Court simply reviewed the jury instructions given to the jury and complied with *State v. Causey*, 503 So. 2d 321 (Fla. 1982) and correct the fundamental error Jimenez's conviction would have been vacated on Direct Appeal in 2005. Thus, petitioner was "**prejudiced**" because he should have received relief on this issue in his Direct Appeal in 2005 and it is a manifest injustice to permit this conviction on Count Two to stand. (See Appendix C and E_.

And again when the United State's District Court in Miami adopted the Magistrate Judge Report and Recommendation in **Ground Twelve (B)**, in the case number 10-20388, the District Court abuse it discretion because the report in this Ground 12(B) was another true defect in integrity on the Federal Habeas Corpus proceeding happened. The Magistrate Judge report caused again that previous resolution was in error because precludes a correct merits determination in the Ground Twelve (B). The Magistrate Judge said: "Jimenez additionally alleges in ground Twelve – that the jury instruction as to Count Two, aggravated battery of law enforcement officer, was inadequate- and

insufficient due to the absence of the element of "use of a deadly weapon" an essential element of the offense charged. Fla. Stat. 784.07(2) (West Supp 2003)" Magistrate said: "Jimenez is mistaken. The jury instruction did include the element of use of a deadly weapon." See trial transcript 810-11: Also the Magistrate Judge struck petitioner in a face when said: "Review of the jury charge indicates that the trial Court **properly** instructed the jury on Aggravated Battery of a Law Enforcement Officer." (See "Ground Twelve (B)") U.S.D.C. case number 10-20388, Sept. 22, 2010).

This show clear another defect in integrity in the Federal Habeas Corpus proceeding because ("Definition: give if 2.b. alleged") "is not" the essential element of the offense (2.b) and the magistrate report failed to recognize the "total omission" of the essential element (2.b.) in the jury instruction caused that a previous habeas ruling which precluded a merits determination was in error. And is on the face of the record that the whole element 2.b., (**Defendant in committing the battery used a deadly weapon**), simply "**does not exist**" in the jury instruction in Count Two. (See next page) (See Appendix C and Supreme Court of Florida case number SC2024-1519)(See Appendix C and E). The Florida Courts disregarded of Petitioner V; VI and XIV constitutional amendment rights and only the great Writ of Habeas Corpus is the only effective means of preserving and fight for

Petitioner's rights.

PRIMA FACIE
WRITTEN JURY INSTRUCTIONS

IN COUNT TWO THE JURORS WERE INSTRUCTED:

Aggravated Battery on Law Enforcement Officer

F.S. 784.07(2)(d):

Before you can find the defendant guilty of aggravated battery of a law enforcement officer, (Count Two), the State must prove the following "five elements" beyond a reasonable doubt: The first element is a definition of battery.

1. DIEGO JIMENEZ intentionally touched or struck OFFICER CARLOS ROSARIO against his will.

2. OFFICER CARLOS ROSARIO was a law enforcement officer.

3. DIEGO JIMENEZ knew OFFICER CARLOS ROSARIO was a law enforcement officer.

4. OFFICER CARLOS ROSARIO was engaged in the lawful performance of his duties when the battery was committed against him.

As you can see above, it is in "plain view", it is a "plain error" because those are the four elements for a misdemeanor simple battery F.S.

784.03(1) that can be reclassified to third degree felony by F.S. 784.07(2)(b) (See Appendix C).

THIRD LEGAL ANALYSIS

The officer's testimony at trial was that during the struggle the Petitioner took his hand held radio and hit him in the center of the forehead causing him a bruise and bump. The Petitioner denied the officer's allegations. Whether the Petitioner used or did not use the hand held radio as a weapon was a central dispute fact during the trial. It should be noted that eleven years after the arrest and 8 years after trial with the assistance of another inmate, the Petitioner subpoena and obtained a face officer's photograph taken by the fire rescue at the scene of the crime, that shows that officer suffered no injuries and the officer had no marking on his forehead. This photograph might cas doubt on the officer's testimony at trial that he was struck in the center of his forehead. Also this photograph evidence establishes with no doubt that the officer suffered "**no obvious injuries**". See the United States Court of Appeal for the Eleventh Circuit, in re Diego Jimenez No. 18-11621-A, (See Appendix D), "*Giglio*" 405 U.S. 150 (1972) and "*Brady*", 373 U.S. 83 (1963) violation.

Petitioner was charged by Information with several counts, that as of

this date he has already served (expired) except for Count Two which is the subject of this Writ of Certiorari Petition.

On Count Two of the Petitioner's Information charges him in pertinent part with using a deadly weapon, to wit: A Handheld Radio, in violation of s. 784.045 (The Aggravated Battery Statute) and 784.07 (The reclassification statute for assault or battery on a LEO). And s. 775.082 (The punishment statute) and s. 775.087 (The 10/20/life statute). (Appendix C).

The jury found: "The Defendant is guilty of Aggravated Battery on Carlos Rosario, a law enforcement officer, the crime charged." (Appendix C) Under Florida law, there are only two ways that aggravated battery may be committed, to wit: 784.045(1)(a)(1) by causing great bodily harm, permanent disability or permanent disfigurement, and because there was no evidence, adduced at trial of such, 784.045(1)(a)(1) is inapplicable to the Petitioner. Thereby, the only other option is through 784.045(1)(a)(2), that is, by the use of a "deadly weapon" which pursuant to Florida law requires an specific jury finding in the jury instruction and on a special verdict form which in this case "**does not exist**". See (Appendix C Verdict).

In other words, the jury verdict in Count Two (Appendix C) can only support a conviction for simple battery in violation of s. 784.03(1), which is a

first degree misdemeanor but because the victim of the battery was a law enforcement officer through s.784.07(2)(b) Petitioner's sentence could legally be enhanced from a first degree misdemeanor to a third degree felony which carries a five year statutory maximum. One of the constitutional error in this case was that without any evidence of bodily harm, injury or permanent injury or an specific jury finding in a special verdict form that the Petitioner used a "deadly weapon" that 3rd degree felony was enhanced to a 2nd degree felony as aggravated battery which is already an enhanced statute that does not accept any further enhancement, and then through 775.087 it was enhanced for the third time from a 2d degree felony to a first degree felony.

Whether the Petitioner used the handheld radio as a deadly weapon was a fact that needed to be found specifically by the jury beyond a reasonable doubt. In Count Two the jury instruction totally omitted the necessary and essential element of the offense (2. Defendant in committing the battery b. used a deadly weapon) and instead was found by the trial Judge (not the jury) under preponderance of evidence standard in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. CT. 2531 (2000). Furthermore, the trial Court improperly enhanced petitioner's sentence **three times** for the same offense in violation of the double jeopardy

prohibition of the 5th Amendment enforce on the States through the XIV Amendment.

This Honorable Court has held that a defendant is protected against multiple punishments for the same offense. See *Monge v. California*, 524 U.S. 721, 728, 118 S. Ct. 2246 (1998) citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

According to Florida law it is error to reclassify a felony and enhance a sentence based on defendant's use of a weapon absent a special verdict form reflecting jury's separate finding that the defendant used a weapon during the commission of the felony; a finding that the Defendant is guilty as charged is insufficient to constitute a finding that he used a weapon even though the Information alleged use of a weapon during "the commission of the offense." *Palmer v. State*, 692 So. 2d 974, 975 (Fla. 5th DCA 1999) See also *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984) See (Appendix C verdict).

Moreover, that improperly enhanced second degree felony was again improperly enhanced for a "**third time**" through F.S. 775.087 which specifically excludes a felony in which the use of a deadly weapon or a firearm is an essential element of the offense. See 775.087(1). In the instant case, the use of a deadly weapon is an essential element of the aggravated

battery. Aggravated battery with the use of a deadly weapon; F.S. 784.045(1)(a)(2) is not subject to reclassification pursuant to 775.087(1) because the use of a deadly weapon is an essential element of the crime. *Lareau v. State*, 573 So. 2d 813, 815 (Fla. 1991), see also *Webb v. State*, 997 So. 2d 469 at 471 (Fla. 2nd DCA 2008).

In the instant case, Petitioner could not have been convicted for more than a third degree felony and he is thereby illegally detained since he has "served more than 5 times" for a five year statutory maximum prescribed for that type of felony. Petitioner prays this Honorable Court will construe his pro se Motion liberally. *Haines v. Kerner*, 404 U.S. 519, 520; 92 S. Ct. 594 (1972); *Tannenbaum v. U.S.*, 148 F. 3d 1262, 1263 (11th Cir. 1998).

CONCLUSION

Wherefore, based on the stated facts and authorities, the Petitioner prays this Honorable Court grants Certiorari review to clarify this matter in the interest of justice for future litigants and provide the Petitioner with the relief that this Honorable Court deems just and proper.

MARCH 13, 2025
Date

Respectfully submitted,

03/13/2025

Diego J. Jimenez # M43488
Everglades Correctional Institution
1599 SW 187th Ave.
Miami, Fl. 33194–2801