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Application No.

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

Charles C. Wendell
PETITIONER

v.

Ricky D. Dixon, Secretary,
Florida Department of Corrections et al
RESPONDENT.

APPEAL NUMBER:

PETITION FOR WRIT OF CERTIORARI

Charles C. Wendell, DC# P26134
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, Florida 32124
Petitioner, Pro 'Se

QUESTIONS PRESENTED

GROUND ONE:

WHETHER THE FAILURE TO ADEQUATELY IMPEACH A WITNESS, IN A WHOLLY CREDIBILITY CASE, CONSTITUTES A VIOLATION OF THE SIXTH AMENDMENT'S GUARANTEE OF COMPETENT REPRESENTATION OF COUNSEL AND A FAIR AND IMPARTIAL TRIAL AS MADE OBLIGATORY UPON STATE COURTS BY THE FOURTEENTH AMENDMENT.

GROUND TWO:

WHETHER FAILING TO PROPERLY CHALLENGE THE STATE'S INTRODUCION OF EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS CONSTITUTES A VIOLATION OF THE SIXTH AMENDMENT'S GUARANTEE OF COMPETENT REPRESENTATION OF COUNSEL AND A FAIR AND IMPARTIAL TRIAL AS MADE APPLICABLE BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

GROUND THREE:

WHETHER FAILING TO INVESTIGATE, INTERVIEW, AND/OR CALL WITNESSES TO TESTIFY AT TRIAL CONSTITUTES A VIOLATION OF THE SIXTH AMENDMENT'S GUARANTEE OF COMPETENT REPRESENTATION OF COUNSEL AND A FAIR AND IMPARTIAL TRIAL AS MADE APPLICABLE BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

GROUND FOUR:

WHETHER FAILING TO REQUEST THE COURT TO ORDER THE ALLEGED VICTIM TO UNDERGO A MEDICAL EXAMINATION CONSTITUTES A VIOLATION OF THE SIXTH AMENDMENT'S GUARANTEE OF COMPETENT REPRESENTATION OF COUNSEL AND A FAIR AND IMPARTIAL TRIAL AS MADE APPLICABLE BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

GROUND FIVE:

WHETHER FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER COMMENTS DURING CLOSING ARGUMENT CONSTITUTES A VIOLATION OF THE SIXTH AMENDMENT'S GUARANTEE OF COMPETENT REPRESENTATION OF COUNSEL AND A FAIR AND IMPARTIAL TRIAL AS MADE APPLICABLE BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

LIST OF PARTIES

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 as follows:

RELATED CASES

Wendell v. State, 289 So3d 872 (Fla. 1st DCA 2020)
Wendell v. State, 392 So3d 273 (Fla. 1st DCA 2024)

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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 N/A to the petition and is

- reported at N/A; or,
- has been designated for publication but is not yet reported; or,
- unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

- reported at N/A; or,
- has been designated for publication but is not yet reported; or,
- 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 *Wendell v. State*, 392 So3d 273 (Fla. 1st DCA 2024) or,
- has been designated for publication but is not yet reported; or,
- unpublished.

The opinion of the court appears at Appendix N/A to the petition and is

- reported at N/A; or,
- has been designated for publication but is not yet reported; or,
- unpublished.

JURISDICTION

[] For cases from federal courts:

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

- No petition for rehearing was timely filed in my case.
- A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 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 (date) on (date) in Application No. A .

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

[X] For cases from state courts:

The date on which the highest state court decided my case was November 13, 2024. A copy of that decision appears at Appendix B.

- A timely petition for 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 (date) on (date) in Application No. NA

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Violation of right to competent representation of counsel and a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

1. On October 6, 2017 Petitioner was charged via information with: Capital Sexual Battery (victim under the age of 12 Petitioner over the age of 18) (count 1); and Sexual Battery (while in a position of familial or custodial authority) (count 2).
2. On September 20, 2018 Petitioner was convicted, in a trial by jury, as charged. (R P 285-286) At the conclusion of trial Petitioner was sentenced to a term of Natural Life for count 1 and a consecutive term of 30 years for count 2.
3. On January 21, 2020 Petitioner's direct appeal was per curiam affirmed without a written opinion. Mandate was issued on February 18, 2020. See *Wendell v. State*, 289 So3d 872 (Fla. 1st DCA 2020)
4. On August 20, 2021 Petitioner filed a Motion for Post Conviction Relief (pursuant to *Fla. R. Crim. P. 3.850 (b) (2)*).
5. On March, 8, 2022 the Post Conviction Court granted an Evidentiary Hearing on Grounds 1, 2, 3, and 4 of the Motion for Post Conviction Relief.
6. On December 29, 2022 an Evidentiary Hearing on Grounds 1, 2, 3, and 4 of the Motion for Post Conviction Relief was conducted.
7. On August 21, 2023 the Post Conviction Court entered a Final Order Denying Motion for Post Conviction Relief with directions for the Clerk to

correct the Judgment and Sentence.¹

8. On August 7, 2024 the First District Court of Appeal for the State of Florida Affirmed the Lower Tribunal's denial of Petitioner's Motion for Post Conviction Relief with a written opinion. Mandate issued on September 4, 2024.

9. On November 13, 2024 the Florida Supreme Court denied discretionary review.

¹ Judgment and Sentence was corrected on August 21, 2023.

REASONS FOR GRANTING A WRIT OF CERTIORARI

GROUND ONE: ² TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO IMPEACH THE ALLEGED VICTIM WITH HER PRIOR INCONSISTENT STATEMENTS.

The alleged victim's testimony was the only evidence adduced at trial therefore the her credibility was a pivotal factor in this case. Had counsel impeached the alleged victim with her prior statements, it would have impacted the her credibility thereby significantly weakening the State's case. Petitioner asserted in the lower courts and asserts here that: introduction of a prior statement that is inconsistent with a witness' trial testimony is the proper way to attack the credibility of that witness. The theory of admissibility is not that the prior statement is true and the in-court testimony is false, but that because the witness has not told the truth in one of the statements, the jury should disbelieve both statements. A statement offered to impeach a witness is not hearsay because it is not offered to prove the truth of the matter asserted. Instead, the purpose of admitting evidence of prior inconsistent statements is to test the credibility of a witness whose testimony is harmful to a defendant and it is offered to show why the witness is not trustworthy. To be inconsistent, a prior statement must either directly contradict or materially differ from the testimony at trial. Counsel's failure to adequately impeach the alleged victim's trial testimony by highlighting these contradictions, discrepancies, or inconsistencies was highly prejudicial because the alleged victim's testimony was vital to the prosecution's case, and any attack on her credibility could have affected the verdict, and thus the error must be considered prejudicial. Despite knowing that the alleged victim's credibility would have to be completely destroyed trial counsel still failed to utilize these contradictions during cross-

² Grounds One and Two of Petitioner's Motion for Post Conviction Relief both pertain to counsel's failure to impeach the alleged victim and for convenience/clarity are being combined and argued as ground one in this Petition.

examination to impeach the alleged victim. Petitioner asserts that counsel's lackadaisical and slipshod approach to preparing and defending Petitioner resulted in his not being afforded a meaningful opportunity to demonstrate to the jury the extent of the alleged victim's untruthfulness. Not once, during cross-examination, did counsel confront the alleged victim with the conflicts between her trial testimony, the Child Protection Team (CPT) interview, and her deposition. Petitioner asserts that there is no reasonable justification for his this failing to make use of a witness' prior inconsistent statements see *Dixon v. Snyder*, 266 F3d 693,703 (7th Cir. 2002). Trial counsel's choice to abandon this line of questioning was prejudicial, particularly when that line of questioning would have impeached the alleged victim's damaging testimony see *Rivas v. Fischer*, 780 F3d 529, 549-50 (2nd Cir. 2015). Because this case was a credibility contest, trial counsel's failure to make use of the witness' prior inconsistent statements was so egregious that it doomed the chances of an acquittal from the start. Had trial counsel cross-examined the alleged victim adequately, significant doubt would have been cast on the alleged victim's credibility. Because no other evidence existed all trial counsel needed to do was undermine the credibility of the State's only witness see *Williams v. Washington*, 59 F3d 673, 684 (7th Cir. 1995). Petitioner asserts that because the statements made by the alleged victim were the only evidence introduced at trial, and because the jury was expressly instructed to consider whether the witness seemed to have an accurate memory and whether the witness made any prior statements that were inconsistent with her trial testimony, the error could not be considered harmless. Petitioner asserts that due to the alleged victim's testimony being the only evidence linking him to the alleged crime discrediting her was Petitioner's only viable defense.

Cross-examination is not confined to the identical details testified to in direct, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to during direct examination. Had trial counsel presented the inconsistent testimony, from the CPT interview and deposition, to the jury, Petitioner would not have been prejudiced. However because trial counsel failed to demonstrate that the alleged victim's trial testimony and prior testimony were inconsistent, and that the allegations were the product of coaching and the alleged victim was [imperfectly] parroting a manufactured story and the "truth" that the jury heard was the alleged victim's current version. The accuracy and truthfulness of the alleged victim's testimony was the utmost importance for the jury to properly assess the credibility of the only witness. Petitioner asserts that due to trial counsel's deficient performance the jury did not have the evidence necessary to acquit because the failure to properly impeach the alleged victim prevented the jury from hearing, for themselves, how the alleged victim's story changed, dramatically, with each telling. Petitioner asserts that he has an absolute right to a full, fair and effective cross-examination of the alleged victim. Trial counsel's decision to limit the scope of cross-examination in a manner that kept the jury from hearing relevant and important facts bearing on the worthiness of crucial testimony denied Petitioner his Sixth Amendment right to a fair and impartial trial and competent representation of counsel. Petitioner asserts that trial counsel knew or should have known that the way to lay the proper foundation, for impeaching a witness, was prior to question the witness about the contents of a previous inconsistent statement, and call the witness' attention the time, place, and person, to whom the statement was allegedly made. If a witness admits to making the prior statement trial counsel may not offer any evidence to

prove the statement was made.. In the case at bar counsel obviously never intended to impeach the alleged victim because he never even attempted to lay the proper foundation. Further, even if the witness admits making a prior statement, the witness must be given an opportunity to explain it, and show that he or she was mistaken when it was made, or explain that the prior statement is not inconsistent.

Prior inconsistent statements are not hearsay and can be admitted as substantive evidence if the witness testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is inconsistent with the witness' testimony and was given under oath during a trial, a hearing, or a deposition. Petitioner asserts that impeaching the alleged victim with her prior inconsistent statements was necessary to support his argument that the alleged victim fabricated the allegations. Petitioner contends that the prior inconsistent statements in her CPT interview and her deposition would have been especially helpful in arguing that issue. Petitioner asserts that he suffered prejudice due to trial counsel's constitutional deficiency for not impeaching the State's only witness. Evidence that is relevant to the possible bias, prejudice, motive, intent or corruptness of a witness is not only admissible, but necessary, where the jury must know of any improper motives of a prosecution witness in determining that witness' credibility. That is particularly true in the case of allegations of sexual abuse where there is no independent evidence of the abuse and the sole defense is the crime did not occur. There were several prior statements during the CPT interview and her deposition that were not only blatantly conflicting but also inconsistent to what she testified to at trial. Trial counsel was well aware of these statements because he was the one who deposed the alleged victim and during the deposition he asked some of the same questions that were asked in the CPT interview

eliciting different answers. If trial counsel would have admitted CPT interview and deposition into evidence, the statements would have met the safeguards of reliability and the statements would have allowed them into evidence. This case developed from the alleged victim's allegations and every time that she was questioned her story changed drastically. Considering the State's evidence when assessing the situation, the only thing that any reasonably competent attorney could do is present every inconsistent statement to the jury so they could assess her credibility. Because this case was nothing but a credibility contest it boiled down to who was more believable. Impeachment would have demonstrated that the alleged victim was not credible enough to surmount the State's burden of proving guilt beyond a reasonable doubt. Had trial counsel pointed out the many discrepancies between the CPT interview, the deposition, and her testimony at trial there is a reasonable probability that Petitioner would have been acquitted. Petitioner asserts that the principal purpose of depositions and the CPT interview is for testimonial use at trial. Petitioner asserts that because the alleged victim's "trustworthiness" was critical, trial counsel's failure to capitalize on numerous inconsistent statements, given by the only witness for the State, rendered counsel's performance constitutionally deficient. Petitioner asserts that he was severely prejudiced by counsel's failure to refute the allegations.

Petitioner asserts that because trial counsel failed to review and use the transcripts of the CPT interview and deposition to compare and challenge the alleged victim's trial testimony the jury was deprived of the opportunity to hear this crucial evidence. Thus, trial counsel's preparation and performance fell far below an objective standard of reasonableness. Petitioner asserts that had trial counsel thoroughly reviewed the records in this case and prepared a defense the outcome of the trial would have been different.

Petitioner asserts that it is part of attorney's role to expose weaknesses in a witness' story and bring credibility issues to the attention of the jury see *Jacobs v. Warden LA. State Pen.*, 2011 U.S. Dist. LEXIS 103901 and *Biglow v. Williams*, 367 F3d 562 (6th Cir. 2004). Petitioner asserts that had the alleged victim been properly impeached with her prior testimony there is a reasonable possibility that the outcome of the proceeding would have been different.

Other than the alleged victim the State introduced no physical evidence or eyewitnesses to the crimes. In closing argument, the Prosecution emphasized that the alleged victim was the most credible witness because the abuse was inflicted upon her.

Given the witness' central position in this case, a different result might have been obtained had the jury been able to hear all the testimony relevant to the witness' credibility. It is axiomatic, and fundamental to our system of justice, that a party may impeach a witness by introducing statements of the witness which are inconsistent with the witness' trial testimony. The alleged victim's testimony is the only evidence of the crime, which makes the alleged victim's credibility a pivotal factor in this case and any evidence or impeachment that would negate the alleged victim's credibility was crucial. A different result might have been obtained had the jury been able to hear all of the testimony relevant to the alleged victim's credibility. Since trial counsel did none of the things mentioned, by failing to challenge the alleged victim's credibility constitutes a waiver of the sufficiency of the evidence defense.

At the evidentiary hearing trial counsel testified that his decision, not to confront the alleged victim with her inconsistent statements because he didn't want to look like he was bullying the alleged victim thereby alienating the jury, was a "strategic/tactical" decision

based on his extensive (thirty-one (31) years) experience with capital sexual battery cases see *U.S. v. Nall*, 2009 U.S. Dist. LEXIS 77125 (August 18, 2009.) (Which holds: There is no strategic or tactical reason to forego evidence with which to attack the victim's credibility, particularly in a case which involves a credibility contest between the victim and the Petitioner). Petitioner asserts that counsel knew or should have known that a gentler/softer approach to challenging the alleged victim's testimony, without running the risk of alienating the jury and keeping with his "tactic" of not alienating the jury, he could have used closing argument to point out the inconsistencies and discrepancies between the CPT interview, alleged victim's deposition, and her trial testimony. Closing argument provides trial counsel the opportunity to interpret and summarize the evidence in the manner most favorable to his side. The role of trial counsel in closing argument is to assist the jury in analyzing the evidence and trial counsel could have stressed, to the jury, how the alleged victim could not remember basic details of what happened because she was alleging incidents that never occurred. If the sole defense, in a wholly circumstantial case, is that the crime really did not happen, trial counsel will have to attack the credibility of the witness. Petitioner asserts that labeling a choice, not to impeach, as "strategic/tactical" does not shield it from collateral attack, instead, under *Strickland v. Washington*, 166 US 668, 104 S Ct 2052 (1984) the question is the extent to which a strategic/tactical choice is supported by trial counsel's preparation see *Campbell v. Reardon*, 780 F3d 752, 763-64 (7th Cir. 2015).

The Post Conviction Court acknowledged that failing to impeach may constitute ineffective assistance of counsel. However, the Post Conviction Court determined that whether trial counsel should have cross examined or more strenuously examined a witness on certain issues, is essentially a hindsight analysis. The Post Conviction Court stated that

in light of trial counsel's challenging the alleged victim's credibility on other grounds trial counsel's failure to impeach the alleged victim with the inconsistent statements does not necessarily equate to ineffective assistance of counsel thus concluding that trial counsel's performance was not deficient and the Petitioner was not prejudiced by his failure to impeach. Therefore, the Post Conviction Court found that Petitioner is not entitled to relief on this issue. Petitioner asserts that the Post Conviction Court's determination was not based on competent and substantial evidence. The record clearly shows that despite his testimony at the evidentiary hearing trial counsel did not present any impeachment evidence at trial. Petitioner asserts that where, as here, the entire case is a credibility contest and the Prosecution's key witness has made numerous prior statements that are inconsistent with the testimony adduced at trial impeachment is critical and failure to extensively impeach the only witness was constitutionally deficient performance. The most viable defense was to use the inconsistent statements for impeachment to show that the alleged victim was not a alleged victim at all but was fabricating the whole thing because she was being manipulated by her father and step-mother. The alleged victim did not want the Petitioner with her mother and her father influenced her to make the allegations to have Petitioner locked up. Because trial counsel failed to bring out the inconsistencies in the alleged victim's statements Petitioner was prejudiced. Trial counsel's failure to challenge the alleged victim's credibility demonstrated that he did not put forth a reasonable defense. Trial counsel's performance was constitutionally unreasonable, because no reasonably competent attorney would forgo the opportunity to impeach the alleged victim, in a wholly circumstantial case, thereby demonstrating that her testimony was false. By not cross-examining the witness regarding her prior inconsistent statements trial counsel could not

present evidence that the witness fabricated the allegations and therefore she was not credible.

Although it is generally limited to the scope of the direct examination, cross-examination is not always confined to the identical details testified to on direct, but extends to its entire subject matter, and to all matters they may modify, supplement, contradict, rebut or make clearer the facts testified to on direct examination. Furthermore, Petitioner asserts that when, as here, the State asked the same questions, during direct examination, that were asked in the CPT interview and deposition the door was opened for the entirety of the CPT interview and the deposition to come into evidence. In order to open the door, the witness must offer misleading testimony or make a specific factual assertion which the opposing party has the right to correct so that the jury will not be misled. This concept is based on considerations of fairness and the truth-seeking function of a trial and that a Defendant has an absolute right to conduct a full and fair cross-examination. This right is especially necessary when the witness being cross-examined is the only witness, on whom, the Prosecution relies. On cross-examination a party may inquire into matters that affect the truthfulness of the witness' entire testimony. An attorney's failure to present available impeachment evidence is constitutionally deficient, unless some tactical or other consideration justified it. Even after choosing to pursue a "insufficient evidence" line of defense, trial counsel still did not introduce readily-available evidence that would have corroborated that defense, and there was no plausible strategic/tactical reason for counsel not impeaching the alleged victim. If trial counsel had, so much as, attempted to prepare an insufficient evidence defense here, one of the initial steps would presumably have been to find ways to poke holes in the testimony of the only witness' testimony. A decision cannot

be characterized as “strategic/tactical” where it was actually the result of “confusion.” When the issue in a case challenging the effectiveness of trial counsel revolves around evidence available but not considered by the jury, for the purpose of determining whether Petitioner has been denied effective counsel under the *Sixth Amendment of the U.S. Constitution* there is no distinction between whether that omission resulted from the acts of the prosecution or an ill-prepared defense counsel. Petitioner asserts that counsel's failure to impeach the alleged victim precluded a thorough confrontation of the accuser.

The Post Conviction Court held that trial counsel did not believe it would lead the jury to think the alleged victim was lying by impeaching with the prior inconsistent statements. Trial counsel also testified that the evidence was insufficient for a conviction. Petitioner asserts that to render effective assistance the attorney must make a reasonable investigation into the facts of the case and acquaint himself with pertinent law. However, this comes down to trial counsel's failure to challenge the alleged victim's credibility with the prior inconsistent statements. Despite what trial counsel believed it was the jury's responsibility to evaluate the credibility of the alleged victim a responsibility that was usurped by counsel's deficient performance. Because the alleged victim's testimony was critical to the prosecution's case, any attack on her credibility would have affected the verdict, and thus the error was harmful and there is a reasonable probability that a different result would have been obtained had the jury been able to hear all of the inconsistent testimony.

GROUND TWO: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE THE STATE'S INTRODUCION OF EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS.

The Post Conviction Court held that Petitioner's claims that trial counsel failed to challenge the State's notice to introduce evidence of other crimes, wrongs, or acts on the correct legal theory. That was not the issue at all. The issue before the Post Conviction Court was that to have the evidence of other crimes, wrongs, or acts introduced the State misled the Trial Court by presenting that the alleged victim was in fear, of the Petitioner, and that was why she did not report the sexual abuse and counsel's failure to investigate led to his ineffectiveness as to properly challenging the introduction of this evidence. The Prosecution also misled the Trial Court by arguing that the alleged victim called the police on one occasion when Petitioner was strangling her mother. The altercation that the State was referring to occurred on November 18, 2015. In that report it states that the alleged victim called because she witnessed her mother being pushed and held down on the floor. No mention of hitting or strangling her mother that was alleged at trial. The statement by the alleged victim's mother states "Charles and I had a disagreement. I was pushed out of the room and hit the door handle. Also Charles grabbed me and sat me on the floor so I would calm down, and stop crying. Charles and I had the disagreement about our daughter". The 911 call history notes that the complainant was an eleven (11) year old female who is advising that her mother's boyfriend is holding her mother down in the baby's room and that they have been fighting for a couple of hours. She locked herself in her room and advised they were yelling. There were 4 photos taken of the incident involving the alleged victim's mother. Not once did her mother mention that she was strangled or choked nor did the alleged victim mention that in her 911 call or her statement to the police. The

Post Conviction Court also held that Petitioner avers that trial counsel should have used that evidence to argue to the judge that the alleged victim was not afraid to report because she had previously called the police on one occasion. Because of his failure to investigate trial counsel could not have argue against the introduction of evidence of other crimes, wrongs, or acts. The Prosecution also claimed that the Petitioner committed acts of violence against the alleged victim's, younger, sister as well. Not once did the mother of the alleged victim ever say anything about any violence towards the alleged victim's, younger, sister. Because of what the Prosecution claimed in the their notice of intent the Trial Court allowed the evidence in. In the notice the Prosecution claims the alleged victim witnessed violent acts such as Petitioner placing her mother in choke holds until she would turn blue in the face and pass out, and punching her in the face and arms, and dropping her younger sister and hurting her on purpose to make her mother cry. The only time this abuse was alleged was during the alleged victim's testimony during trial. The Prosecution must prove by clear and convincing evidence that the collateral act or acts were actually committed by the Petitioner. Only after the Trial Court determines that clear and convincing evidence supports the claim that the Petitioner committed the collateral crime can the evidence be admitted into evidence. A Defendant has the right to present evidence on the issue, which may include additional discovery. The only evidence provided was the testimony of the alleged victim. If the violent act was committed against the alleged victim's mother, then trial counsel should have required the Prosecution to call her mother to corroborate what the alleged victim claimed. The reason the evidence was allowed was because the Prosecution misled the Trial Court into believing that altercation(s) between the alleged victim's mother and Petitioner was reason the alleged victim was scared to immediately

report the sexual abuse. That is why the Trial Court believed the collateral crime evidence was relevant. After the proffer it was shown that the Prosecutor misled the Trial Court. The Trial Court stated "If she was living with the mother as she said, and she called the police when he was abusing her mother as she said -- well, that's certainly I think relevant to what she could have done because you brought out the fact that she never made a report because she was afraid of the Petitioner because of what she had witnessed Petitioner doing to her mother. Yet there's been testimony from her that she at one point did call the police and was told by the police to call again if she had anymore problems. I think that's relevant". The State Court now says trial counsel was able to cross-examine the alleged victim to show that she was not afraid to call the police and had been told by the police to contact them if any other trouble arose and questioned the plausibility of the Prosecution's assertion of the alleged victim's fear during closing arguments. The purpose of the notice was to show that the alleged victim was afraid to report the sexual abuse and now trial counsel showed the alleged victim was not afraid to report. The main fact here shows that the Prosecutor misled the Trial Court in the intent notice and it was not proven by clear and convincing evidence that the Petitioner committed the collateral crime the Prosecution sought to admit. Petitioner asserts that no reasonably competent attorney would have allowed the jury to hear the alleged victim's contention that the Petitioner abused her mother and his daughter, unless the attorney was prepared to present a strong rebuttal to the allegations which was not the case here at all.

The Post Conviction Court held that trial counsel attempted to use this testimony to challenge the credibility of the alleged victim and show that even though Petitioner allegedly battered the alleged victim's mother, he did not harm the other children in the

household. Trial counsel believed that the Petitioner battered the alleged victim's mother. The only other person in the household was the alleged victim's brother (Avery Boone) who would have testified that none of what the alleged victim claimed actually happened and that the only one alleging these batteries, against the alleged victim's mother, occurred is the alleged victim. Even though, at the evidentiary hearing, trial counsel testified that his goal was to attempt to challenge the alleged victim about Petitioner abusing her baby sister, or her brother, the only way to do that would have been to call the alleged victim's mother and her brother and question them about these issues. Trial counsel did not even have the alleged victim's mother or brother on his witness list thus, it is obvious that trial counsel never investigated these witnesses to develop a strategy to discredit the alleged victim which was the only viable defense Petitioner had.

GROUND THREE: ³ TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE, INTERVIEW, AND/OR CALL WITNESSES TO TESTIFY AT TRIAL.

The Post Conviction Court held that because information between a patient and their therapist is privileged, private, protected a therapist cannot be compelled to testify. The Post Conviction Court further held that based on the protections of therapist and patient privilege the alleged victim, the alleged victim's mother or father would have asserted the privilege to prevent the testimony from being presented at trial. However in previous testimony on the topics, where the privilege could have been invoked, the alleged victim, the alleged victim's mother, father, and (the therapist) Brian Willis discussed material that could have been deemed privileged. Trial counsel could have asked the alleged victim, the alleged victim's mother or father if they would be okay with him questioning the therapist

³ Grounds Five, Six, and Seven of Petitioner's Motion for Post Conviction Relief all pertain to counsel's failure to call witnesses and for convenience/clarity are being combined and argued as Ground Three in this Petition.

since they all discussed what was going on with Mr. Willis during their depositions. Trial counsel could have interviewed Mr. Willis and asked him whether he would testify about what was said during the depositions of the alleged victim, the alleged victim's mother, and father. Furthermore Mr. Willis had previously testified, in front of Judge Marci Goodman, (see *Boone v. Boone*, Case No. 2013 DR 768 (Fla.)) about the very issues that would have been discussed in the case at bar. Petitioner asserts that the fact that Mr. Willis had previously testified about the alleged victim's therapy sessions, on the record in open court, indicates that he would have been amenable to testifying to these issues during Petitioner's trial.

The Post Conviction Court's determination, that Mr. Willis, the alleged victim, the alleged victim's mother, or father, if called to testify would have refused to testify due to the information being privileged, is pure speculation. Trial counsel nor the Post Conviction Court could not know, for certain, that the the alleged victim, the alleged victim's mother, father, or Mr. Willis would claim privilege exception because trial counsel had not done any investigation into this issue. Exercising due diligence Petitioner wrote the Santa Rosa County Clerk of Court and the Official Circuit Court Reporters requesting a copy of the transcripts of the February 2013 in the aforementioned Family Court case that would corroborate everything Petitioner claims in his motion for post conviction relief. Due to the Official Circuit Court Reporter's Office experiencing a "severe technological disruption" Petitioner has not received the transcripts from that proceeding. Petitioner asserts that had the alleged victim told her therapist that she was being sexually abused the therapist would have been legally obligated to report the abuse to authorities. Which shows that the alleged victim could not have said this to the therapist. Thus the previous testimony is

accurate and admissible and the therapist would have been able to testify if he chose to. This crime was based on the alleged victim telling her father and step-mother, after being questioned several times, then waiting to report it because she had a counseling session with Mr. Willis set up for the next day. According to the step-mother, Mr. Willis advised her to call DCF and the Santa Rosa Sheriff's Office and report the sexual abuse. The problem with this is that Mr. Willis was bound by oath to report this abuse to the law himself. In light of all that was involved Mr. Willis would have been able to discuss what was reported to him and that would have meant that trial counsel could have deposed Mr. Willis and called him as a witness. Trial counsel has a obligation to conduct an investigation into any viable defenses. There must be adequate **preparation** for trial not just **presentation at trial**. Trial counsel never contacted the therapist with regard to his putative testimony, and never inquired into whether he might be willing to testify. It should be perfectly obvious that it will almost always be useful for trial counsel to speak before trial with a readily-available material witness whose non-cumulative testimony would directly corroborate the defense theory. Trial counsel's anticipation of what a potential witness would say does not excuse the failure to contact a particular witness. Petitioner asserts that trial counsel may not fail to conduct an investigation and then rely on his resulting ignorance to excuse his failure to explore a strategy that would likely have yielded favorable testimony see *Stermer v. Warren*, 360 F Supp 3D 639 (E D Mich. 2018) (Which holds: The failure to investigate and present available evidence is a relevant concern along with the reasons for not doing so. Obviously, you cannot make strategic decisions until and unless you have sufficiently investigated the facts)

GROUND FOUR: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST THE COURT TO ORDER THE ALLEGED VICTIM TO UNDERGO A MEDICAL EXAMINATION.

The Post Conviction Court's holding that during trial Detective Assmann explained that the choice to have a medical examination belonged to the alleged victim and the alleged victim's family is misplaced see *Florida Statute 39.301 (14) (b)* (Which states: The parents or legal custodians shall be informed of the right to refuse service, as well as the responsibility of the department to protect the child regardless of the acceptance or refusal of services. If the services are refused and the Department deems that the child's need for protection requires services, the Department shall take the child into protective custody or petition the court as provided in chapter). See also *Florida Statute 39.301 (17) (e)* (Which states: A child is a victim of sexual battery or of sexual abuse, the department shall notify the jurisdictionally responsible state attorney, and county sheriff's office or local police department, and, within 3 working days, transmit a full written report to those agencies. The law enforcement agency shall review the report and determine whether a criminal investigation needs to be conducted and shall assume lead responsibility for all criminal fact-finding activities). Law enforcement officials have a duty to preserve evidence that might be expected to play a significant role in the suspect's defense and failing to preserve potentially exculpatory evidence amounts to a due process violation because it was "likely" to show Petitioner's innocence." *Florida Administrative Code Chapter 64c-8.002*, establishes specific definitions, standards, policies, and procedures for the operation of the CPT Program. It is clearly expressed that a CPT physician's examination shall serve to produce a diagnosis. "CPT Nurses" qualify as an expert in the area of child assault medical examinations. Examinations, by a CPT Nurse have been historically ordered where, as

here, there is strong and compelling evidence of the need for an examination especially when the alleged victim's credibility is at issue. Because the consequences of an erroneous decision are so grave, courts must exercise the greatest possible care in their efforts to reach the correct decision in child molestation cases. There is a particular duty imposed on courts to use every appropriate technique to ensure that the truth is ascertained. Under some circumstances, this may involve providing a psychological or physical examination of the child or the alleged molester at public expense. When a jury trial is involved, the Trial Court should ensure that the jury has the benefit of whatever aid or assistance the court can properly provide the jurors in arriving at the right result.

The Post Conviction Court held that the Petitioner's reliance on *Florida Statutes*, § 39.303 and § 39.304, to support his belief that the Trial Court can order a medical examination in this situation is misplaced. When a child reports that they have been sexually abused, *Florida Statute* § 39.303 (2), specifies the types of cases that must be referred to the CPT for a medical evaluation. Any report alleging sexual abuse of a child is criteria for the mandatory referral for a medical evaluation. Because of the seriousness of child abuse, the legislature established mandatory criteria. The CPT Policy and Procedure Handbook Chapter 3 3.1(e) explains mandatory referrals and 3.1 (f) explains exceptions to the medical evaluation criteria. The Prosecutor knew about this because she is the State's representative for the Department of Health task force as stated in *Florida Statute* § 39.303 (9) (a). Based on his 31 years of experience as a criminal defense attorney and his self proclaimed extensive experience in handling capital sexual battery cases trial counsel knew or should have known the criteria for the mandatory referral for a medical evaluation. Counsel should have had the Trial Court order the Prosecution to have the CPT follow

policy and procedure and had the CPT conduct a medical evaluation which is mandatory by the CPT policy and procedure handbook under *Florida Statute § 39.303 (2)*. Also in *Florida Statute § 39.304 (b)* if the child verbally complains or otherwise exhibits distress as a result of injury or is alleged to have been sexually abused, the person required to investigate may cause the child to be referred to a licensed physician or an emergency department in a hospital for diagnosis without the consent of the child's parents or legal custodian.

The Post Conviction Court held that Petitioner has shown no evidence that the alleged victim had an injury that required medical attention during the relevant time frame. Petitioner asserts that a medical/physical examination could have revealed tearing or scarring, from even minor penile or digital penetration, even if the alleged abuse had occurred years earlier see *Ross v. Kernan*, 2018 US Dist Lexis 121021 (SD Cal 2018) (Which holds: Damage from vaginal penetration can be seen for years after the alleged abuse occurred). Petitioner asserts that due to the degree of the sexual abuse alleged and Petitioner's vehement declaration of innocence any reasonably competent attorney would have moved the Trial Court to have the alleged victim examined in order to discredit her. Yet despite the fact that counsel himself viewed the case essentially as a swearing match, that turned entirely on whether the "jury believed the child," he made no effort to support Petitioner's claim of innocence with medical testimony or other medical evidence suggesting that the alleged victim's allegations were not credible see *Holsomback v. White*, 133 F3d 1382: (11th Cir 1998). (Which holds: On cross examination, Dr. Thomas Nolen conceded that, if lubrication were used, a penis could be inserted into the anus without creating signs of penetration "on maybe one occasion," but not on multiple

occasions, even over a period of a few months. The substance of his testimony would have been that it was "medically impossible" for these repeated acts of abuse to have occurred without physical signs of abuse). In this case the alleged victim testified that Petitioner penetrated her anally on a regular basis for five to six months without a condom or lubrication, This case is essentially a credibility contest between the alleged victim and the Petitioner. There was no other evidence circumstantial or otherwise. When a case hinges on whom to believe, an expert's interpretation of physical evidence or lack thereof may well tip the scales and sway the jury to acquit. That is to say, in a credibility contest the testimony of neutrally disinterested witness is exceedingly important. Petitioner asserts that in the case at bar obtaining physical evidence should be the focus of trial counsel's pre-trial investigation so it could become a focal point of the trial. A reasonably effective attorney would have consulted an expert and depending on what the investigation revealed reasonably competent counsel would have been prepared to call the expert as a witness to drive home the lack of physical evidence. Petitioner asserts that his attorney's investigation was not reasonable, within the meaning of *Strickland*, when the facts of the case supply the attorney with notice that a particular line of investigation may substantially benefit his client and then does not pursue it. Petitioner alleged ineffective assistance of counsel because trial counsel made no effort to find medical/physical evidence to support Petitioner's vehement claim of innocence. Trial counsel's decision could not have been an informed strategic or tactical decision.

The Post Conviction Court held that trial counsel did not perform deficiently in failing to request the Trial Court to order a medical examination of the alleged victim as the Trial Court would have denied the request. The judge that presided over the evidentiary hearing

and denied post conviction relief was a successor judge thus, the judge cannot determine whether or not the request would have been denied. In the past this same Court has ordered the complaining child to consent to a physical examination by the accused's expert. Petitioner asserts that a Court always has inherent power to insure the right to due process and a fair trial. Again examinations have been historically ordered where, as here, there is strong and compelling evidence that the examination is needed because the alleged victim's credibility is at issue.

GROUND FIVE: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER COMMENTS DURING CLOSING ARGUMENT.

The Prosecutor made the following comments in closing argument:

"Ladies and gentlemen, she also told you that she felt like it was her hell to live in, her own personal hell to live in, her own personal hell to live in. Those were her words, that she felt guilty about what he was doing to her. She felt guilty that she couldn't control the things that were going on in her home, and instead of telling someone what he was doing to her, she took it out on her own body by cutting herself. Those were her words. So, when you are considering the credibility of her testimony, the State would ask that you consider what her reasons were for that delay in reporting".

When the Prosecutor said "Those were her words, that she felt guilty about what he was doing to her" and "instead of telling someone what he was doing to her, she took it out on her own body by cutting herself". Petitioner asserts that the Prosecutor was fully aware of the statements in the victim's, her mother's, and her father's, depositions and what was testified to by her therapist in the Family Court hearing and that it was contrary to the alleged victim's trial testimony as to why she was cutting herself. As the reason he didn't use her inconsistent statements to challenge the alleged victim's credibility trial counsel testified at the evidentiary hearing as follows:

"so my strategy in this case was trying to minimize the child being traumatized, I didn't want to make her cry and the jury to think my client is a monster"

Petitioner asserts that the issue of why she was cutting herself and where she was at when she was cutting herself was extremely important and needed to be fully explored in front of the jury. Trial counsel and the Prosecutor both knew that there was prior testimony that showed the alleged victim was cutting herself because of the way her father and step-mother were treating her and that she was at their house when the cutting occurred

Re: *Boone v. Boone* Case No. 2013 DR 768 (Fla.). Furthermore, the Prosecutor and trial counsel were well aware of the reason for the cutting because it was discussed in the depositions that they conducted jointly. First and foremost, a jury trial is supposed to be a search for the truth, not a means of "notching a belt." Petitioner asserts that a Prosecutor commits fundamental error when he/she knowingly misrepresents the facts of a case, or allows testimony, known to be false, into the record, uncorrected. The State's knowing use of false testimony is grounds for a new trial. The State putting on false or deceptive evidence was a violation of *Giglio v. United States*, 405 US 150, 92 S Ct 763 (1972) (Which holds: When the prosecution solicits or fails to correct known false evidence, due process requires a new trial where the false testimony in any reasonable likelihood affected the judgment of the jury). Petitioner asserts that the principle that the State may not knowingly use false testimony, to obtain a conviction, does not cease to apply merely because the

false testimony goes only to the credibility of the witness especially, when as here the case rests entirely on the credibility of the alleged victim. The jury's estimate of the truthfulness and reliability of a given witness may well determine guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a Defendant's life or liberty may depend. Next, "those were her words. So, when you are considering the credibility of her testimony, the State would ask that you consider what her reasons were for that delay in reporting." As alleged earlier counsel never challenged the alleged victim's credibility. During the entire cross-examination, not once, did counsel try to impeach or discredit the alleged victim when there were a plethora statements available to challenge the alleged victim's credibility. The jury never heard the prior inconsistent statements that could have affected their findings. When the State asked the jury to consider what her reasons were for the delay in reporting, counsel should have objected and reminded the Trial Court that the Prosecutor misled the Trial Court about the reasons that alleged victim had in the past called the police and there was no reason for her not to report the alleged sexual abuse because she has done so in the past. When the Prosecutor brought in the *Williams* Rule evidence she presented that the alleged victim was afraid to make a report, the Trial Court bought it and stated: "Well, that's certainly I

think relevant to what she could have done; because you brought out the fact that she never made a report because she was afraid of the Petitioner because of what he had done to her mother". And yet there was testimony from her that she at one point did call the police and was told by the police to call again if she had anymore problems.

Then when prosecutor argued that the alleged victim was cutting herself because of the alleged abuse instead of presenting evidence that this was untrue trial counsel just responded with "Maybe she didn't have a friend to rely on, maybe that's why she cut herself". The Prosecutor replied Was there any evidence of that, ladies and gentlemen? Absolutely not. The evidence—the testimony was that she was cutting herself because of what he was doing to her. That's the evidence that you had—not that she cut herself because she was lonely and didn't have any friends. And this suggestion that perhaps she has other problems, no evidence of that, ladies and gentlemen, none. No other evidence, as to why she cut herself, and why she was depressed other than for the reason that she told you. The Prosecutor concealed the real evidence and counsel chose to do nothing about this concealment, which allowed the prosecutor to present this argument as factual evidence. Because the Prosecutor was present when the depositions were done she had knowledge of all matters relating to the cutting thus she knowingly misled the

jury. The Prosecutor presented everything that she could for a conviction, and concealed everything that would challenge what she presented. Petitioner asserts that the Post Conviction Court came to the wrong conclusion when it concluded that the comments were a fair analysis. There was nothing fair about what the Prosecutor said during closing arguments. Counsel's failure to object to the obvious untrue statement made by the State was prejudicial to the Petitioner, and led the jurors to accept the State's statement as the truth. Due process protects defendants against the knowing use of false evidence by the State, whether it be by document, testimony, or any other form of admissible evidence. If a lawyer has offered testimony or other evidence as to a material fact and comes to know of its falsity, the lawyer must take reasonable remedial measures. The prosecutor did nothing to correct the false impression of the facts and it was plain that the prosecutor knew it. The jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism. A Prosecutor has a special duty to commensurate with a Prosecutor's unique power, to assure that defendants receive a fair trial. No Prosecutor, or defense attorney may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial. It is of no consequence that the falsehood bore upon the witness's credibility rather than directly upon Petitioner's guilt. A lie is a lie,

no matter its subject, and, if it is in any way relevant to the case, the prosecutor has the responsibility and duty to correct what is known to be false and elicit the truth. This error resulted in a one-sided presentation of evidence and impeded the jury's ability to fully and fairly assess the credibility of the alleged victim. The Prosecutor has a "special obligation to avoid improper suggestions and insinuations. The Prosecutor has no business telling the jury her individual impressions of the evidence. Because she is the sovereign's representative, the jury may be misled into thinking her conclusions have been validated by the government's investigator apparatus." For this reason, Prosecutor's arguments not only be based on facts in evidence, but should be phrased in such a manner that is clear to the jury that the Prosecutor is summarizing evidence. While the Prosecutor is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts. Petitioner asserts that it violates due process for a Prosecutor to intentionally mislead the defense and jury in a material way. Society's search for the truth is the polestar that guides all judicial inquiry and when the Prosecution knowingly presents false testimony or misleading argument to the court, the State casts an impenetrable cloud over that polestar. A Prosecutor not only

misrepresented the testimony at trial, but also gave the jury information which she knew, or had reason to believe, was false. When a Prosecutor does act unfairly, there is little a Defendant can do other than rely on his attorney to lodge an appropriate and timely objection. The failure to make such an objection can have devastating consequences for a Defendant. Prosecutors may not misrepresent the evidence, assert facts that were never admitted in evidence, or state that the alleged victim's story never changed if there was no evidence to support such a factual assertion see *Washington v. Hofbauer*, 228 F3d 689, 700-01 (6th Cir. 2000).

CONCLUSION

Wherefore, because Petitioner has shown that the State Courts' decisions are a violation of the Sixth Amendment's guarantee of competent representation of counsel and a fair and impartial trial, as made obligatory, upon State Courts, by the Fourteenth Amendment ⁴ Petitioner respectfully requests this Honorable Court to reverse the State Courts' denials of post conviction relief and grant Petitioner a new trial or any relief deemed appropriate by this Court.

Respectfully submitted,
Charles C. Wendell Petitioner pro se
Charles C. Wendell, DC# P26134

Date: 1-28-2025

⁴ See *Gideon v. Wainwright*, 372 US 335, 83 SCt 792 (1963) cf *Powell v. Alabama*, 287 US 45 53 SCt 55 (1932)