

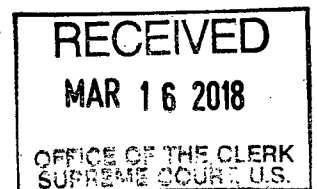
Docket Number _____

UNITED STATES SUPREME COURT

In Re: **ALEJANDRO RODRIGUEZ**

**PETITION FOR EXTRAORDINARY WRIT
OF HABEAS CORPUS**

By Alejandro Rodriguez, pro'se
M61209 E2-201U
Okeechobee Correctional Institution
3420 N.E. 168TH Street
Okeechobee, Florida 34972



QUESTION PRESENTED

- 1) Did Prosecutor violate Petitioner's right to lawyer and right to confront witness on videotaping?
- 2) Did trial court err admitting unreliable secondary evidence violating Petitioner's right to due process of law?
- 3) Was ineffective pre-trial lawyer which represented a Sixth Amendment violation?
- 4) Did Prosecutor fail to prove the crime beyond a reasonable doubt violating due process of law?
- 5) Was ineffective trial lawyer depriving Petitioner's right framed by United States Constitution?
- 6) Has Appellate Lawyer been ineffective which mean a Sixth Amendment Claim?

PARTIES INTERESTED IN THE OUTCOMING
STATE OF FLORIDA

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SUPREME COURT OF THE UNITED STATES

OPINION BELOW

This case is from State Court, the opinion of the highest court to review the merits was reported at *Rodriquez v. State*, 77 So.3d 649 (Fla. 3d DCA 2011) such opinion was rendered on Direct Appeal, it was attached to this Petition as Appendix "A."

BASIS FOR INVOKING JURISDICTION

The Petitioner Alejandro Rodriguez, pro files the aforetitled pleading in this Court, respectfully petitioning to this Honorable Court for an Extraordinary Writ pursuant to Article III Section 2 of the United States Constitution and United States Code, Title 28 1651 Subsection (a).

PROCEDURAL AND FACTUAL BACKGROUND

The Office of the State Attorney for the 11th Judicial Circuit in Dade County of Florida charged the Petitioner by

way of information with six counts of sexual battery arising out in February, 2008. Petitioner was convicted by a jury on November 17, 2009 and was sentenced to six life term in a Florida State Prison; See Case No. F08-6369. The Direct Appeal affirmed Petitioner's conviction and sentence on August 17, 2011 Motion for Rehearing en banc was denied on December 2011; See *Rodriguez v. State*, 77 So.3d 649 (Fla. 3rd DCA 2011), Appendix "A." On July 19, 2012 Petitioner filed a Writ of Mandamus requesting the records but it was denied as moot; See *Rodriguez v. Reizanstein*, 88 So.3d 167 (Fla. 3rd DCA 2012). On 09/28/2012 Petitioner filed a habeas corpus petition, it was denied for unknown reason besides rehearing was denied. See Case No.: 3D12-1929, a second petition was filed on October 24, 2012, it was denied in an unelaborated fashion. See Case No. 3D-2806 a claim of habeas corpus was filed in Federal Southern District of Florida it was denied on November 2013. Also, was denied a Certificate of Appealability. See unpublished opinion 1:13-CV-21479-KMW. On November 2013 was appealed the Certificate of Appealability to 11th Federal Court was denied. See Case No.: 14-10283-E, on December 2013 a habeas corpus petitioner was filed to Florida Supreme Court which transferred it to 3rd DCA it was denied for unknown reason. See Case No.SC 13-2524. On April 28, 2014 was filed a 2nd Petition on Florida Supreme Court, which was denied using collateral estoppels doctrine. See Case No.: SC 14-815 in addition Petitioner has filed a Petition for Extraordinary Writ in this Court but it has been denied in three opportunities for unknown reasons. On March, 2016 this court ordered to Petitioner to change the Petition under rule 33.1 booklet format.

STATEMENT OF THE FACTS

On February 2008, Petitioner was battery by the police and his fellows (Exhibit D) then they arrested and accused him of has been surprised penetrating victim's vagina with his finger. A criminologist made DNA Test on Defendant's finger, such test exonerates Petitioner of such allegations (Exhibit F) then alleged victim was transported without legal custody to see a state paid doctor, later victim's mother learned with doctor that not injuries was observed, victim's mother was loving Petitioner for more than three years. Two days later of such arrest State forced the child and parents to record an interview during three consecutive days. State failed to obtain and record any statement. On October 2008 was admitted child hearsay statement (Exhibit O) that were fabricated by State, in the admission hearing transcript was neither published such statement nor debated alleged child's hearsay statement content because State did not have a recorded statement.

This unprofessional lawyer's conduct was not tolerated by Petitioner then Petitioner withdrew the retained lawyer. He failed to recognize the relevancy of DNA evidence that was disclosed a month later of admission allowing to state has a sole fabricate evidence supporting six charges of sexual battery and allowing to court make determinations in unfair proceeding.

On February 2009 victim's mother delivered to court a victim's letter (Exhibit E) written ten months later of state allegation of the most heinous abuse. Alleged victim wrote this letter to Petitioner, she expressed suffering for missing Petitioner.

Due to State did no has injuries evidence to show victim's mother and juror, mother was arrested

(Case No. F09-5687 she was in jail nine months she was nolo prose after alleged victim testified against Petitioner. Alleged victim was compelled to testify against herself about her motive to write an amazing letter. A new lawyer was appointed to the case his strategy was similar to retainer lawyer.

State trial strategy was to obtain conviction with prejudice, it was raised by victim, age, sex, and producing spillover effect with six counts of sexual abuse also by allegation of physical injuries, and supported by authorities' reputation. The prejudice was raised to such a level that prima facie evidence which disprove the essential element of crime exonerating Defendant was ignored by juror. At the end of unreliable evidences that was presented, appear on record an oral motion to arrest judgment to acquittal (Exhibit A) relying in improper ground "state failure to prove time in some counts" it was supported legally insufficient then it was denied. Petitioner was found guilty contrary to the law and to the weight of the evidences.

The Petitioner was represented by a lawyer to appeal his conviction and sentences in direct appeal proceeding, it was on August 17, 2011. His appeal was grounded in a harmless error, the 3rd DCA of Florida denied such appeal, the lawyer was not merely ineffective he also retained the records for more than 90 days. Therefore, the net results of such representation were intentional deprivation of right to appeal conviction and sentence besides deprivation of right to appeal court's decision. The Petitioner filed a habeas corpus in such court alleging ineffective assistance of appellate counsel but it was denied based on no controlling cases and facts that was rebutted by records in an unelaborated fashion - no

opinion· depriving Petitioner's right to appeal such decision to a higher court. The Petitioner filed in United States District of Florida a Habeas Corpus. Such Court denied on the merits but based on cases with lack of legal and persuasive value, allegation that are rebutted by records, relying in unlike cases with unlike material facts and unlike crime besides cases at litigate in unlike issues. In other words, the Petition was denied legally insufficient moreover such court denied the Certificate of Appealability which was also denied by 11th Federal Circuit Court of Appeal violating both Court that law· Slack v. McDaniel· then the Petitioner filed such Petition in Florida Supreme Court which denied the Petition alleging that Petitioner as exhausted the right to appeal ignoring that appellate lawyers ineffective and Petitioner has been deprived to appeal erroneous Court's decision.

THE NATURE OF RELIEF SOUGHT

Mr. Rodriguez respectfully requests this court to vacate conviction and sentence and remand for new trial or acquit Petitioner.

MEMORANDUM OF LAW
GROUND ONE
PROSECUTOR VIOLATED PETITIONER'S
RIGHT TO LAWYER AND RIGHT TO CONFRONT
WITNESS IN VIDEOTAPING.

The record shows that a videotaping was produced after Petitioner was prosecuted under Fla. Stat. 794.011(2) being arrested and initial bond denied excluding Petitioner and his lawyer from such proceeding. However, such proceeding is governed by Florida Statutes.

F.S.A. Section 92.53 establish constitutional right to confront witness and constitutional right to be represented by lawyer in videotaping. The Defendant is deprived of his constitutional right to confront witness against him. Where the procedure employed to take testimony of the minor failed to insure the Defendant and his attorney are present in chamber and can communicate with the child witness. *Dad v. State*, 566 So.2d 257 (Fla. 5th DCA 1990), in the instant case produced such videotape without a court order and later it was admitted by court into evidence.

Florida Statute 92.53(4) established the following:

The Defendant and the Defendant's counsel shall be present at the videotaping, unless the Defendant has waived his right, the court may require the Defendant to view the testimony from outside by means of a two-way mirror or another similar method. That will ensure that the Defendant can observe and hear the testimony of the victim or witness in person, but the victim or witness cannot hear or see the Defendant. The Defendant and the

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In this case, the discretionary abuse consist that court had actual knowledge about pending DNA results which are conclusive evidence therefore obtaining DNA in scene represent that this evidence is prima facie_evidence, its probative value is higher than an impeachment. Florida's courts admit this evidence as long as it is scientifically reliable and otherwise helpful to the trier of fact *Andrew v. State*, 533 So.2d 841, 13 Fla.L.Weekly 2364 9 (Fla. Dist. Ct. App. 5th Dist. 1988). Abrogation on other grounds recognized by *Haden v. State*, 690 So.2d 573, 22 Fla.L.Weeklu S55 (Fla. 1997) therefore the essential element identity status depends of DNA results, there was not sound reason to follow Townsend proceeding to admit secondary evidence; for better demonstration, the two probable DNA results show no need to follow such proceeding.

First: If DNA is negative as in this case the statements are unreliable and inadmissible, consequently, the child is incompetent to testify because she does not understand the duty to tell the truth therefore, the case is dismissed by this negative prima facie evidence which disprove an essential element of crime. See a case quite similar *Raupp v. State*, 678 So.2d 1358 (Fla. 5th DCA 1996)

Second: If DNA had been positive there is not sound discretion to follow Townsend proceeding because to prove the crime beyond a reasonable doubt State had sufficient "competent" evidence to prove it. The essential elements of crime are proved by police arrester as witness of facts, Doctor Karne's testimony as witness of corpus delicti and DNA identificatory Prima facie evidence. This child could be declared unavailable; her participation is a cumulative evidence. Thus, as DNA is prima facie evidence the

burden to rebut State's version is by Defendant. State's initiative and purpose to use Townsend proceeding was to introduce secondary evidence to obtain conviction using its prejudicial value. Court abused its discretion endorsing such goals violating Petitioner's right to due process of law.

The admission of hearsay statement of small children must be carefully review under strict scrutiny test. An adequate indicia of reliability required to allow the admission of out of court statement, such admission is under exacting test. All of the criteria set forth in *Adaho v. Wright*, 497 U.S. 110 S.Ct. 3139, 11 L.Ed.2d 638 (1990) must be met.

Court's unsound determination is evident not merely to admit this secondary evidence using wrong case law also violating Townsend and F.s. 90.803(23) excluding DNA results and many others evidences that indicate unreliability. On top of that Sate failed to obtain essential child's statement on videotaping; there is no child's hearsay statement on record.

GROUND THREE

PRETRIAL LAWYER INSUFFICIENCY

Six amendment guarantee of counsel is to ensure that defendant has the assistance necessary to justify reliance on the outcome of the proceeding thus counsel may not exclude certain lines of defense, pretrial counsel failed to object the method used in videotaping excluding Defendant and his lawyer from such proceeding, it is settled that a child testimony is allowed only after a determination has been made that the testimony is clearly reliable, and is necessary to avoid violating defendant's

constitutional rights of confrontation and due process. *State v. Townsend*, 635 So.2d 949 (Fla 1994). Later pretrial lawyer failed to object State's notice to rely in hearsay, such failure led to court and state engaged in wrong proceeding and premeditated exclusion of victim's mother, father, and other eyewitness testimonies, DNA test, and police brutality occurred in scene from reliability determination among others. "Premeditate" is used in this context because if such evidence and witness are considered in statement evaluation it is obvious that such statement are not admitted into evidence for lack of trustworthiness. Lawyer's duty at this stage of the case was noticing to court the existence of such evidence and the improper proceeding that they were engaged. Later the admission of such statement was not objected on several grounds available at this stage including aforesaid evidences and witness, on top of that failure to notice to court in further proceeding that DNA result go to the merit of the case and they must be considered in trustworthiness determination. The requirement of a contemporaneous objection to preserve an issue for appeal is based on practical necessity and basic fairness in the operation of a judicial system; it place the trial judge on notice that an error may have been committed, and provide him an opportunity to correct it at an early stage of the proceeding. *Garzon v. State*, 939 So.2d 278 (Fla. 4th DCA 2006). The guarantee of Six Amendment also ensure that convictions are obtained only through fundamentally fair procedures. *Strickland v. Washington*, 445 U.S. 68, 104 S.Ct. 2052. Florida state courts have recognized that the failure to preserve a potentially reversible error for appellate review is sufficient to establish a claim of ineffective

assistance of counsel. *Austing v. State*, 804 So.2d 603 (Fla. 4th DCA 2002); *Vaz v. State*, 626 So.2d 1022 (Fla. 3rd DCA 1993). Failure to avoid introduction of unreliable evidence at trial was a total disregard of Petitioner's right to a fair proceeding. Denoting ineffective assistance of counsel in addition all charges are supported only by hearsay, lawyer's duty was to suppress such chargers in a motion to avoid, not merely spillover effect, also to avoid unnecessary proceeding, the State Nollo Prosecute three of them by its own initiative which mean that state prosecute charges without evidences. Deprive Petitioner right for speedy trial was other omission of this attorney giving time to state to fabricate more evidence.

A convicted Defendant making a claim of ineffective assistance must identify act or omissions of counsel that are alleged not to have been result of reasonable professional judgement and then, court must determine whether, in light of all circumstances, identify act or omission were outside wide range of professional competent assistance; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in particular case *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); U.S.C.A. Const. Amend. 6. Failure to recognized DNA relevancy failed to object the method used in videotaping, failed to object wrong proceeding, failed to notice to court about evidences that must be consider in reliability determination, failed to act when state disclose DNA evidence and give state all time necessary to fix the case are the prongs of pretrial lawyer unreasonable performance where all his omission deprived petitioner's right to effective representation.

GROUND FOUR
PROSECUTOR FAILED TO PROVE THE CRIMES
BEYOND REASONABLE DOUBT

State failed to prove several essential elements beyond a reasonable doubt, violating petitioner's right to due process of law. The prosecutor must establish not only the defendant is guilty, but also that the evidence is inconsistent with any reasonable hypothesis of innocence. *Ducket v. State*, 568 So.2d 891 15 Fla. L Weekly S439 (Fla 1990). Petitioner was charged with six count of sexual battery alleging previously penis and digital penetration and the last occurrence was a digital penetration where petitioner was caught in the act according with Police's hypothesis.

The state made a DNA test to Petitioner's finger to determine whether or not such allegation was true later said test shows Petitioner innocence by failure to find victim's DNA on Petitioner swab (finger and hand). Victim's DNA was found into a petitioner's nail which could have been there for a long time before and for several reasons, this child was in contact with petitioner 24/7 for more than a year because the child lived with petitioner. In order to convict the Defendant of sexual battery the state must prove, among other things, that Defendant finger penetrated victim's vagina. *JWC v. State*, 573 So.2d 1064 16 Fla. L. Weekly 416 (Fla.5th DCA 1991); *Jaggers v. State*, 536 So.2d 14 Fla.L.Weekly 51 (Fla. 2nd DCA 1991). In the instant case state fail to prove that the object (finger) penetrated victim's vagina.

State the same day of event without legal custody, late at night transported the child from 160 St. S.W toward to North (1 hour trip) skipping several institutions with emergency service (Jackson Hospital, Kendall Hospital, and Children Hospital) and nacked her to examine her, it is obvious why state used this method and this place, later Doctor Karen expressed to victim's mother that nothing happened, victim's mother kept loving petitioner for more than 3 years, the state later obtained a document from such state paid doctor alleging slightly damage on victim's hymen but it still is present

Petitioner's requested to his lawyer a new medical examination, but it was denied. Violating due process which has been settled by the requirement of the statute that such evidence shall be evaluated in an adversarial context (admission hearing) state fail to show them in a hearing as an essential requirement to admit child's hearsay.

It is noteworthy that state made psychological evaluation on the child. Such evaluation was not presented in court due to it reveal a complete soundness of the child and as corroborative evidence of such soundness is the letter written by the victim ten months later to petitioner expressing in amazing language her suffering for missing petitioner such evidences corroborate that no crime has occurred State of Florida who the child welfare should be the paramount priority not merely separated mother and daughter also incarcerate victim's mother as a hostage to compel the child to testify against petitioner such false imprisonment was ended after petitioner's trial, if state has had material evidence of the abuse there is no need for abuse of innocent people. It is obvious that state at this stage of the case neither has a child's testimony nor blood on panty as appear in further proceeding it is true that state has failed to transcribe and publish testimony and the blood was neither tested in lab nor collected by doctor in rape kit.

There is only one excuse to failed to test a body fluid "collected in crime scene" it is that it did not exist at that stage. It is well known that personnel who work in a lab do not know about the facts of the case, therefore they must identify such body fluid, it could be from her mother (victim expressed in some deposition that she was wearing her mother clothes

that night), so such blood could have had several sources in accord to the facts of the case. Failure to identify such stain was that such stain was not present when all items were tested including her panty (see crime lab) and failure to collect "oozing blood" on kit applied collect specimen for several purposes was that such blood was not oozing.

SUMMARIZING NOT CRIME EXISTENCE
EVIDENCES

1. Initial accuser is police team after battery the accused.
2. The action started by police not by victim or her family.
3. The family and victim are in petitioner behalf.
4. Police transported and examined victim without legal custody.
5. Initial diagnostic nothing happened (mother and victim keep loving Petitioner)
6. Police need a doctor who is paid by state skipping several hospitals with emergency services.
7. Doctor failed to collect "oozing blood" in rape kit.
8. Blood on panty" is not identify when tested the panty.
9. State need to produce videotaping without Defendant and his attorney.
10. Mother, father and other witness (polices) are excluded from reliability test.
11. Mother is separate from victim to avoid a second physical examination.
12. DNA test exonerate Petitioner (not finger into vagina).
13. Initial psychological test reveal child soundness.
14. Victim's letter corroborates soundness expressing suffering for missing Petitioner.
15. Victim's testimony has not been transcribed nor published or showed to Petitioner.
16. Courts including appellate court has refused to transcribed essential statement.

17. Allegation of previous penis and finger penetration is rebutted by fresh tear, "oozing blood".

18. Court failed to rule under 92.53 to videotape the testimony (no corroborative evidence at this stage).

19. Court failed to protect the child by preventing the child participation (need the child, not corroborative evidences and Brady material might be recorded in DVD).

20. More evidences of not crime existence can be appreciated on victim's deposition.

Deposition (Exhibit N)

Lawyer first time leading question

Lawyer: And you remember that

Child: Yes but I don't remember actually what he did to me.

Second time leading question and lawyer puts words in her mouth

Lawyer: I know you don't remember specifically but did it involve something where he would touch your private parts?

Child: Yes

Lawyer need an answer that satisfy state and continued coercing asking for third time same question

Lawyer: Do you remember that part?

Child: No. Because like I don't remember anything just the little thing like I leave that my parents leave the house and he did excuses.

Lawyer deliberate coercion repeating the question forcing her to lie, by leading the question and using psychological skill to obtain an answer favorable to the State, he was not satisfied with first answer, it was good to point out that about 3 months later she recall at trial that the panty used about 2 years before was blue so she demonstrated good memory.

21. As we have seen on the last issue state need violate more time Petitioner's right to speeding trial because the multiple coercive action against the child has not matured yet. If such statements are showed to juror there was a probability to exonerate Petitioner.

The above overwhelming list of evidence that prove not crime existence impede that state meet his burden to prove "corpus delict and the object" as essential elements beyond a reasonable doubt.

SUMMARY OF EVIDENCE BY COUNT

Evidence	Counts 1 2 3 4 5 6
Scientific Exculpatory Evidence (Exhibit F)	x
Mental Soundness (Psychological Test) (State& Mother Possess)	x x x x x x
Mental Soundness (LETTER EXPRESSING SUFFERING)	x x x x x x
Not corroborative of the abuse	x x x x x x
Fabricated Corroborate Evidences (See Not Crime Exist)	x x x x x x
Not Record of Reliable Evidences (Exhibit B)	x x x x x x
Record of Unreliable Evidence (Exhibit [N] [D] [F])	x x x x x x
Not Witness of Prior Abuse	x x x x x x
State's Case is Not supported by Eye Witness	x x x x x x
Secondary Evidence	x x x x x x
Admitted Under wrong Case Law	
Secondary Evidence	x x x x x x
Admitted Excluding Rebutting Evidence	
Conviction Only Supported Hearsay	x x x x x x
State Excluded Material Witness(Mother)	x x x x x x
Charges Supported by Inconsistent Evidence (Exhibit N)	x x x x x x
Convict on Are Only Supported By Unfair Evidence Trait	x x x x x x
Secondary Evidence	x x x x x x
Was Obtained in a Long Rule Coercive Period	

The above table possess overwhelming ground to prove that state failed to meet his burden to prove every essential element of crime beyond a reasonable doubt as the law requires.

GROUND 5

INEFFECTIVE ASSISTANCE OF TRIAL LAWYER

Trial lawyer was appointed to this case after retained lawyer was withdrew for his deliberate conspiracy with state. In such stirring circumstances is appointed trial lawyer, his duty was to develop a defense by object and claim Richardson hearing for illegal obtained and admitted child's hearsay. Whether he had not obtained a new ruling his duty was to file motion to suppress charges not supported by substantial competent evidence, using exculpatory evidences (state nullo prose 3 charges without an adversarial testing process.) Motion to suppress evidence could be grounded in evidence illegally obtained and admitted wrongfully or a simple objection to such admission, the record shows no pretrial motion additionally he should accelerate the trial as Petitioner requested several times to both lawyer but his performance was absolutely contrary to any reasonable defense he became a vehicle to prosecute Petitioner by coercing the child not merely by delaying the case then state fight the case out of court he helped the state to coerce the child (See Exhibit N). "Trial lawyer" helped the state to fabricate record in addition he deprived Petitioner right to appeal to meritorious issues and on top of that "filed" an improper motion to acquittal violating completely Florida Jurisprudence which was the last remedy in criminal proceeding to exonerate Petitioner before conviction. Since such motion is a

great mean to put the evidence to be evaluate by a "literate magistrate" who shall evaluate the evidences different than a juror depriving Petitioner o his constitutional rights of an effective representation and due process of law. His deliberate prosecutorial performance in absolute out of scope of representation can be observed on (Exhibit N) where he demonstrated his personal interest in obtain a response. That satisfy State's interest forcing the child to lie making three time the same leading question and using psychological skill to obtain an answer favorable to the state. In such deposition, there is palpable evidence how the case was prejudiced by both lawyer obtaining time for the state benefit violating Petitioner right to speedy trial that was claimed by Petitioner. The child at this event emphasized three times that she did not remember what Petitioner did to her but the cruel mother's incarceration and the total isolation for long time made effect several months later when she remembers at "trial" not only the abuse date she also remembers a trivial fact as panty color that she used two years before, all of that was product of deliberate conspiracy by authorities involved. Trial lawyer was noticed about DNA which exonerate Petitioner, police brutality perpetrate by accuser, victim's letter expressing suffering for Petitioner, victim's mother arrest to coerce and intimidate the child and he failed to file pretrial motion or a simple objection, his prosecutorial performance is affirmed not merely for such omission and overact described also collaborated to fabricate evidence for further proceeding by considering necessary obtain deposition to who is certified to operate in Florida and give him excellent exculpatory evidence that he

failed to give the appropriate relevancy such deposition had only two purpose consume time and build record "stain on panty" because this "evidence" is fabricate by the state and there is several evidence that demonstrate such fabrication (see issue number 5). To demonstrate his prosecutorial and unprofessional performance motion to acquittal "on record" it was brought to appellate court attention where trial lawyer performance was clearly pervasive by failure to raise an adequate motion for judgment of acquittal at the close of the evidence presented by State pursuant to R.Crim.P. 3.380(a); Borking v. State, 725 So.2d 1202 (Fla.DCA 2nd 1999). His ground about state's failure to prove a time frame in some counts was erroneous because an indictment or information is merely imperfect or imprecise the failure to file a timely motion to dismiss waives the defect and it may not be raised for the first time at trial. Dobosie v. State, 520 So.2d 260(Fla.1988). A motion for judgment of acquittal must be based on grounds which are relevant to the matter at issue. It is properly denied where it is based upon an allegation which does not go to provide one of the elements of offense. Jesus v. State, (Fla. 4th Dist.1990).

A motion for judgment of acquittal is designed to test the sufficiency of evidence against the Defendant State v. Williams, 742 So. 2D 509, 24 Fla.L.Weekly D2366 (Fla. Dist. Court App. 1st Dist. 1999); Boyce v. State, 638 So.2d 98,19 Fla. L. Weekly D1131 (Dist. Court 4th 1994). It also provides the trial court with a procedural device to withdraw the case from the jury in those cases where the State has failed to present competent evidence on one or more essential elements to the offense charged upon which the jury

reasonably reach a finding of innocence. Pinkerton v. Edwardsm 425 So.2d 147 (Fla. Dist. Ct. App. 1 Dist. 1983

In the instant case where Defendant was accused of several acts of sexual battery state failed to meet this burden to prove the essential element of crime beyond a reasonable doubt. The DNA results disprove initial allegations which it is relevant of the issue of victim's credibility, another issue that undermine victim's credibility is allegation of systematic sexual abuses is a traumatic and heinous crime that outcome in denial, secrecy, retraction and other, nevertheless she expressed in letter written to Defendant suffering for missing Defendant, love and her wishes to him to get married with her mom (See Exhibit E). Both evidences are material to the issue of Defendant innocence therefore state was far to meet his burden to prove the crime beyond a reasonable doubt. Such biological and psychological evidences overwhelm motion for judgments of acquittal requirements, there was not reasonable reason to raise above grounds on such motion.

GROUND 6

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate lawyer failed to correct the record where trial court failed to establish on record (admission hearing transcript) recorded child hearsay which court determined its reliability then admitted into evidences necessary for the appellate court to review everything that was said on forensic interview. Thereafter, the recorded hearsay was not transcribed. The absence of transcripts of such interview is likely to prevent a serious problem due to the order is due that turns on the issue of fact and

the proper exercise of judicial discretion. It may be impossible to evaluate the order without reference to a full record of the testimony and other because the scope of review is limited to the record of the proceeding in the lower court. It would be improper for an Appellant to make argument without reference (Padovano 18.3), the failure to provide transcript defeat the appellate court's ability to review either the factual or legal basis for the trial court's decision. See *Carney v. Carne*, 86 So.2d 1972 (Fla. 1st DCA 2003); *Stainless Marine Inc. v. Corbra Sport Fishing Boat, Inc.*, 778 So.2d 1026 (Fla. 3rd DCA 2001) clarified (Feb.28th, 2001)

The use of DVD on appeal in lieu of written transcript is not authorized by any rule. Although video may eventually provide useful supplement to a written transcript. See *Travieso v. Golden*, 643 So.2d 1134 (Fla. 4th 1994), additionally trial court failed to state on admission order that DNA was taken in scene. Therefore, statement of fact on admission order are incomplete. (See Admission Order at Exhibit "O").

The purpose of the statement of facts is to permit the appellate court to expedite the termination of litigation. It is intended as an aid to or explanation of the question involved and should contain without argument a closely condense chronological statement in narrative form of the essential and pertinent history of the case, including facts that are necessary to be known in order to determine the points in controversy. *Smith v. Persha*, 1972 134 So.44 (1931).

Later during jury trial, the transcript shows that the state "published" the recorded hearsay to juror but court reporter made some error, he failed to transcribe everything said during such proceeding

and attach the DVD as an exhibit. It is essential for appellate court what judge and juror panel heard during playing of DVD. Such statements have not been seen by Petitioner.

The purported breach is:

1. Court failed to reflect DNA obtained in-scene in admission statement of fact.
2. Court failed to publish child hearsay in admission hearing transcript
3. Court failed to transcribe recorded child hearsay (DVD)
4. Failed to transcribe trial proceeding where DVD was played.

Moreover, Exhibit 1 shows a considerate amount and vital record not on appellate lawyer possession, both appellate lawyers prejudiced the case since a decision based on a finding of fact is presented to be correct and will be affirmed in the absence of an adequate record. *Appelegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152, 1155 (Fla.1979), *Pinelli v. DCF*, 878 So.2d 491 (Fla 1st DCA 2004); *Smith v. Orhama Inc.*, 807 So.2d 594 (Fla. 3d DCA 2005). Failure to correct the record is a breach of clear duty which prejudice Petitioners appeal.

A Defendant who has exercised the right of appeal is entitled to a full appellate record. See *Berube v. State*, 573 So.2d 109, 110 (Fla. 4TH DCA 1991 Fla. R.App.P.9.200(f).

Appellate lawyer raised indirect appeal a harmless error alleging court erred in child hearsay admission such approach was erroneous, out-com-ing in sentence affirmation, his intentional wrongful performance can be demonstrated as following:

1. The occurred error was improper approached;
and
2. Harmless error is not reversible error.

The correct standard to be applied in reviewing a trial court decision in a criminal case depend on the nature of the adjudication, although there are many subtle variations nearly all decision made at the trial level can be classified as decision of fact decision of law and discretionary decision. In the instant case the reviewing decision is the evaluation of evidence reliability and its admission as secondary evidence (child's hearsay) since to DNA obtained in-scene it is settled that the admission or exclusion of evidence is generally governed by the abuse of discretion standard. *Blanco v. State*, 452 So.2d 520 (Fla. 1984); *Florida's Institution of Neurological Rehab, Inc. v. Marshall*, 943 So.2d 976 (Fla. 2nd DCA 2006). As general rule a court ruling on the admission of evidence will not be reversed absent an abuse of discretion. *Globe v. State*, 877 So.2d 663, 673 (Fla. 2004); *Russ v. State*, 832 So. 2d 901, 910 (Fla. 1st DCA 2002). Therefore, appellant lawyer should focus whether or not there was discretionary abuse. The peculiar obtaining of DNA in-scene which reliability is well recognized by State of Florida jurisprudence and courts make voidable such evaluation. Trial courts clearly do not have discretion to admit evidence in violation if privilege or definite provision of the evidence code. Child's hearsay is an exceptional evidence that may be admitted in exceptional circumstances. *State v. Townsend*, 635 So.2d 949 (Fla.1994); Fla. 90.803(23)(A)(1). In this case the admission of a child hearsay is clearly against the weight of the evidence and trial court has misapplied the law to the cases then the decision is clearly

erroneous and the appellate court should reverse the case because the trial court has failed to give legal effect to the evidence in its entirety. *Holand v. Gross*, 89 So.2d 255, 258 (1992); *Bradely v. Waldord*, 611 S.2d 31(Fla. 1st DCA 1992). Thus, failure to approach the admission of a secondary evidence as a discretionary abuse and approach such admission grounded whether or not court should reconsider "corroborative evidences" was a deliberate act of conspiring to preclude Petitioner from the appropriate relief. Harmless error review was used by the appellate counsel to deny remedy for constitutional violation, the equally expansive harmless error rule in all cases prevent a criminal defense from obtain any benefit. *U.S. v. Pallais*, 921 F.2d 684, 692 (7th Cir.1990)

As general rule claim of ineffective assistance of pre-trial and trial lawyer are generally not reviewable on direct appeal, the reason for this rule is because the issue offer involves collateral question of fact that cannot be determined by the record. *Sobel v. State*, 564 So. 2d 1110, 1112 (Fla. 4th DCA 1992) review denied; *Kelley v. State*, 486 So.2d 485 (Fla. 1986); *Healey v. State*, 556 So.2d 489 (Fla. 2nd Dist.1989).

The exception arises when the record is sufficient to allow determination of an effectiveness claim. In *Fasar v. State*, 548 So.2d 1119 (Fla. DCA 1989) the court conclude that an effectiveness claim based on pervasive error could be considerate on direct appeal where the fact given rise of misrepresentation or prejudice to Defendant were apparent on the face of record. See also *Lynn v. State*, 567 So.2d 1043 (Fla. 5th DCA 1990); *Gordon v. State*, 469 So.2d 795, 797 (Fla. 4th DCA 1985). However, lawyer cumulative

misconduct and absence in crucial proceeding was a prong that prejudice the case depriving Petitioner of a fair trial.

The criteria for proving ineffective assistance of appellate counsel parallel the Strickland and standard for ineffective appellate counsel Petitioner must show 1) Specific error or omission which show that appellate counsel's performance deviated from the norm and fell outside the range of professionally acceptable performance an 2) The deficiency of that performance comprised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

In this instant case the first prong established is easily met. Appellate lawyer clearly failed to obtain vital record and correct adequately the record pursuant to Crim. R. App.P. 9.200 in addition he denied Petitioner's right to participate in his appeal to raise meritorious issues as herein, deny petitioner's right to participate is clearly by retaining the record delivering them four months after appeal was denied; depriving Petitioner to appeal erroneous decision on direct appeal he did not recognize that absence of counsel in criminal proceeding do not require to prove prejudice to overturn a conviction. He failed to appreciate that ineffective assistance of counsel was a prong that determined the erroneous conviction due to their pervasive errors and tangible misrepresentations framed in failure to clear discovery violation to avoid inadmissible evidence be suggested to juror and to avoid that incompetent witness testify at trial being such claims the end of the case. The misrepresentation encompass to trial lawyer who failed to raise the same claim that was

prescribed above and highlight the misrepresentation by failing to exonerate Defendant at trial and/or preserve the issue for review with an adequate motion to acquittal grounded in exonerating evidence (DNA). Appellant lawyer raised an admission court error which clearly was a discretionary abuse due to should determination using wrong case law to admit secondary evidence in addition to making abuse of proceeding reflected in to exclude DNA evidence in statement reliability determination leaving this issue to evaluate by jury. His unreasonable argument are subject to harmless error review which guarantee conviction affirmation. Due to those kinds of error he deviated from the norm and fell outside the range of the professionally acceptable performance his performance led to incorrect and unfair appellate results.

The second prong "prejudice" is met by factual fact that his omissions and erroneous approach of alleged harmless error led to affirm conviction, the prejudice element is palpable by failure to demonstrate that Mr. Rodriguez's conviction was the outcome of abuse of process by failure to recognize the relevancy of prima facie evidence (DNA) in all proceeding and abusing of preliminary proceeding to admit secondary evidence with high prejudice value to obtain illegal conviction. Certainly, such issues could be taken to put the whole cause in such a different light as to undermine confidence in the fairness and correctness off the appellate results. Petitioner find that petitioner's allegation fulfills this test. Wherefore, Petitioner requests to this Honorable Court to grant relief sought.

REASON FOR GRANDING THE PETITION

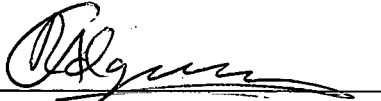
This petition possesses six issues, all of them are based on matter of law, issues No: 1, 4, 5 and 6 are friendly with Strickland but Issue No: 1 is with Cronin too, Issue No: 2 and 3 are essential to describe the evidentiary picture of his case that justify the relief sought. Such issues together show in what degree trial court and appellate courts involved were "contrary to" or unreasonably applied a clearly established federal law as determined by this court in 28 U.S.C 2254 (d) (c). They were presented in appellate and supreme state courts as well as federal court. See procedural and factual background in this petition. Such courts have been unreasonable in light of the evidence presented, and not merely by denying the petition in addition federal courts have denied the Certificate of Appealability violating another clear established federal law. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604; 146 L.Ed.2d 542 (2000); and 28 U.S.C. 2253 (c) that establish a straightforward right to appeal when a petition is litigated, because it could be ruled in a different way. Such exceptional circumstances meet the standard review established by this court in Rule 20(1) and it should be granted because a manifest injustice is on the face of record and petitioner's conviction and appellate proceeding has been obtained violating Petitioner's rights that are protected by United State Constitution. Besides the evidences on record have not been properly considered by no courts in their decisions, therefore the law of the case is erroneous, such decisions have been a departure of essential requirements of law considering evidences' relevancy. See direct appeal opinion at *Rodriguez v. State*, 77 So.3d 649 (Fla. 3d DCA 2011) and observe

how state court of appeal ignored several exculpatory evidences, including DNA causing malfunction of the judicial systems not merely by state courts also by federal courts.

CONCLUSION

Petitioner consider that the violation of Petitioner's rights to due process of law, rights to fair trial and right to appeal by previous courts and appellate lawyer are compelling reason that are added to a meritorious claim to grant it.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Alejandro Rodriguez', is written over a horizontal line.

Alejandro Rodriguez #M61209

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