IN THE SUPREME COURT OF
19-7564
THE UNITED STATES OF AMERICA

IN RE MICHAEL DWAYNE SEIBERT, Petitioner

ORIGINAL

PETITION FOR A WRIT IN ACCORDANCE WITH 28 U.S.C. § 1651 AND HABEAS CORPUS ACCORDING TO THIS HONORABLE COURT'S ORIGINAL JURISDICTION.

CAPITAL CASE

Michael D. Seibert
170151139
Miami Dade PTDC
1321 NW 13th Street
Miami, Florida 33125

CAPITAL CASE

Petitioner is being illegally and/or unlawfully prevented from raising a substantial, meritorious claim of Fraud on the court in violation of his right to due process, and equal protection.

This petition presents exceptional circumstances establishing that there are errors so egregious that their commission deprives the trial court of it's jurisdiction or authority to punish and render it's judgment subject to collateral attack by writ in accordance with 28 U.S.C. § 1651 and Habeas Corpus according to this Honorable Court's original jurisdiction.

Furthermore, the Florida Supreme court and the Eleventh circuit court of Appeals have held that a defendant represented by counsel is prohibited from filing any pro se motions/petitions, in spite of the fact that petitioner's state appointed public defender refuses to raise petitioner's substantial meritorious claims due to his belief that said claims are beyond the scope of his limited representation. Therefore, this Honorable Court is the only court petitioner can appeal to for relief.

Furtherstill, as petitioner will demonstrate below, several Federal circuit courts allow defendants to file pro se motions even when they are represented by counsel. Therefore, since the Eleventh circuit court does not allow defendants to file pro se motions -- there is a split in the Federal circuits that only this Honorable Court can and should address due to the significance of this issue for so many litigants.

QUESTION PRESENTED

When a defendant is represented by counsel, who refuses to raise a substantial meritorious claim of fraud on the court, and therefore defendant's conviction & sentence is null and void and therefore the trial court lacks jurisdiction to hold a resentencing hearing, Can a defendant then raise the claim pro se?

PARTIES TO THE PROCEDURE BELOW

This petition stems from a resentencing hearing pursuant to Hurst v. Florida. Mr. Seibert is facing a potential death sentence and is currently in the custody of Daniel Junior, Miami Dade PTDC.

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UNITED STATES CONSTITUTION

The First Amendment of the United States Constitution states, in relevant part: "...the right of the people ... to petition the Government for a redress of grievances."

The Sixth Amendment of the United States Constitution states, in relevant part: "...to have the assistance of counsel for his defense."

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law..."

STATUTES

28 U.S.C. § 1651

TABLE OF APPENDICES

APPENDIX - A - ORDER OF THE TRIAL COURT
STRIKING PETITIONER'S
PRO SE MOTION A

PETITION FOR A WRIT IN ACCORDANCE WITH U.S.C. § 1651

Petitioner Michael D. Seibert respectfully requests that this Honorable Court hear and grant his petition for a Writ in accordance with it's authority under *28 U.S.C. § 1651.*

OPINION BELOW

The Order striking petitioner's pro se Motion filed in the trial court is attached at Appendix A.

STATEMENT OF JURISDICTION

This Honorable Court's jurisdiction is invoked pursuant to *28 U.S.C. § 1651(a)* and *Article III of the US Constitution* and this Honorable Court's original jurisdiction of Habeas Corpus.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution states, in relevant part: "...the right of the people ... to petition the Government for a redress of grievances."

The Sixth Amendment of the United States Constitution states, in relevant part: "...to have the assistance of counsel for his defense."

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law..."

28 U.S.C. § 1651 (a)

STATEMENT OF FACTS

1. Petitioner Michael Dwayne Seibert is a prisoner, in the custody of Daniel Junior, Director of the Miami Dade PTDC, being held in violation of the United States Constitution, and the Florida Constitution, due to being wrongfully convicted following a fundamentally unfair trial.

2. Furthermore, Petitioner is being illegally and/or unlawfully denied his First Amendment right to petition the government for a redress of his grievances and his right to due process.

3. This is the only Court that can hear petitioner's Petition for a Writ due to the fact that the Florida State courts, the Federal District courts in Florida and the United States Eleventh circuit court of Appeals have all taken the absurd and unconstitutional position that they do not want to hear anything a Death sentenced prisoner has to say pro se. They systematically refuse to allow Death sentenced prisoners to discharge counsel and/or file any pro se motions no matter how substantial or meritorious their claims are, if they are represented by counsel. This is not only reflected in Petitioner's case, but in a host of other cases, i.e. *Gordon v. State, 75 So.3d 200 (Fla.2011), Cross v. U.S., 893 F.2d 1287, 1292 (11th Cir. 1990) (collecting cases), Holland v. Florida, 130 S.Ct. 2553*, etc..

4. The courts have also enshrined this doctrine in their rules and law as demonstrated above and in *Florida Southern District Rule S.D. Fla. L.R. 11.1 (d) (4).*

5. Petitioner would allege that this is contrary to the First Amendment of the United States Constitution and contrary to well-established United States Supreme Court precedent.

6. It is also contrary to several Federal circuit courts precedents presenting a split in the Federal circuit courts that should be addressed by this Honorable Court, as this is a matter of great public importance. No court should be allowed to prevent a prisoner, especially a Death sentenced prisoner, from having pro se access to the courts in order to present his/her claims for relief.

7. *Bounds v. Smith, 430 U.S. 817 (1978)* and *Ex Parte Hall, 312 U.S. 546 (1941)* Guarantee a right to be heard. Therefore, the State courts and Federal courts in the Eleventh circuit are acting contrary to this Honorable Court's precedent.

8. Furthermore, in *Dorsey v. Kelly, 112 F.3d 50 (2nd Cir. 1997)* and *Clemons v. Delo, 124 F.3d 944 (8th Cir. 1997)* both of these cases deal with State prisoners that were represented by counsel who failed to raise certain meritorious claims, the prisoners raised the claims themselves in pro se supplemental briefs, and the Federal courts found that they had satisfied the exhaustion requirements by presenting their claims in pro se supplemental briefs, heard their claims on the merits and granted relief.

9. Furtherstill, in *Reid v. Senkowski, 961 F.2d 374, 376 (2nd Cir. 1997)* the Federal court held that, "A petitioner may satisfy the exhaustion requirement by presenting his Federal claim in a pro se supplemental brief, even if he has an attorney.

10. This Honorable Court, as well as several Federal circuit courts have held that prisoners have a right of access to the courts for a redress of their grievances. However, the courts in Florida and the United States Eleventh circuit court of Appeals are acting contrary to this well-established precedent.

11. The reason that this is a matter of great public importance is because it strikes at the very foundation of basic principles of equity and justice.

12. Not only are these courts denying access to the courts, they are systematically preventing such access by claiming that a Death Sentenced prisoner can not file anything pro se if they are represented by counsel including a motion to Discharge ineffective/incompetent counsel, no matter how deficient the counsel is. Accord *Holland v. Florida, 130 S.Ct. 2553.*

13. I believe it is also important to note what Justice Alito said in *Holland v. Florida, supra*, "Petitioner also appears to allege that he made reasonable efforts to terminate counsel due to his inadequate representation and to proceed pro se, and that such efforts were successfully opposed by the state on the perverse ground that petitioner failed to act through appointed counsel. See ante, at 4; Brief for petitioner 50-51 (stating that petitioner filed "two pro se motions in the Florida Supreme court to remove Collins as counsel (one which if granted, would have allowed [petitioner] to proceed pro se)."

14. That is why it would be futile for petitioner to attempt to file his petition in any other court than this Honorable Court.

REASON FOR FILING PETITION

1. On June 22, 2017 the Circuit Court of the Eleventh Judicial circuit in and for Miami Dade County, Florida entered an order in accordance with *Hurst v. Florida* granting petitioner's successive motion to vacate petitioner's Death Sentence and ordered a new sentencing hearing.

2. On July 26, 2018 Petitioner filed a pro se successive Motion to Vacate Conviction and Prohibit the Imposition of a Death Sentence. On August 1, 2018 the trial court entered an order to strike said motion -- due to the fact that Death sentenced prisoners are not allowed to file pro se motions when represented by counsel and petitioner's public defender refused to adopt said motion because, he told me: it's beyond the scope of his representation.

3. This case warrants equitable intervention due to the fact that petitioner is not guilty of the First Degree Murder he was wrongfully convicted of due to a fundamentally unfair trial, ineffective assistance of counsel and the egregious conduct of the prosecutors, police and trial court judge who colluded together in order to deprive petitioner of his Constitutional rights and in order to deceive or mislead the trial court and the Appellate court.

4. Any order obtained by fraudulent representation to a court may be recalled and set aside at any time.

5. The power to set such orders aside is an inherent power of the courts of record and one which is "Essential to ensure the true administration of justice and the orderly function of the judicial process." In fact, a final order produced by fraudulent testimony against a defendant in a criminal case is deserving of no protection, and due process requires that the defendant be given every opportunity to expose the fraud and obtain relief. *State v. Glover, 564 So.2d 191 (Fla. 5th DCA 1990).*

6. Therefore, since petitioner can't proceed pro se in any other court except for this Honorable Court, petitioner prays that this Honorable Court will grant petitioner a hearing on the merits and grant the requested relief petitioner seeks.

CLAIM I

FRAUD ON THE COURT.

1. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)*, this Honorable Court said, "To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in it's discretion, such as fabrication of evidence.'

2. Because a fraud on the court prevents termination of the tainted proceedings, no court has ever applied the statutory provisions governing second-or-successive petitions to a judge's power to remedy a fraud on the court. See *Gonzalez v. Sec. for Dept. Corrs., 366 F.3d 1253, 1275 (11th Cir. 2004)* (stating that in *Calderon*, the Supreme Court recognized that a mandate in a habeas case can be recalled when there was a fraud on the court, creating a question about the legitimacy of the judgment); See also *Douglas v. Workman, 560 F.3d 1156, 1193-94 (10th Cir. 2009)* (Noting that the Anti-Terrorist and Effective Death Penalty Act is designed to protect against judicial abuse by the petitioner, not the state's perpetration of fraud on the court.

3. In *Hazel-Atlas 322 U.S. at 248*, the Court noted, "This equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."

4. It is an indisputable fact that petitioner's conviction was obtained through the use of fabricated evidence and perjured testimony and therefore said conviction and sentence was obtained by fraudulent means, as petitioner will establish below. It is also plain and clear on the face of the record that the Prosecutors and Police knowingly and intentionally used fabricated evidence and perjured testimony in order to deceive and mislead the trial court.

5. Furthermore, it is plain and clear on the face of the record that the trial court judge, Stanford Blake, colluded with the Prosecutors and Police in order to violate defendant's due process rights and right to a fair trial.

6. The police committed an illegal entry of my home and an illegal search of my home after their illegal entry in violation of the Constitution. Then the prosecutors, police and trial court judge conspired to use fabricated evidence and perjured testimony in order to convert their illegal entry and search into a legal entry and plain view observation, that was/is physically impossible, as petitioner will establish below.

7. Counsel made errors that are so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment. Counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. (*Strickland v. Washington, 466 U.S. 668, 687).* This was due to counsel's unreasonable failure to obtain the two unequivocal, concrete pieces of evidence that are indispensible to proving the knowing and intentional fraud the prosecutors, police and trial court judge perpetrated upon the court.

8. If counsel would have obtained the **Registered Blueprint** [See Attached Exhibit 1] **and a Computer-Generated Reconstruction of the crime scene** and established the location of defendant and the police officers, after the initial entry, there is no way a court could have found that the officer's testimony or the trial judge's alleged findings of "fact" was even physically possible.

9. **Counsel's failure to obtain the two pieces of indispensible evidence – – on which defendant's very life depends – is undoubtably ineffective assistance of counsel of the highest and gravest sort.**

10. Defendant's trial counsel was ineffective and Constitutionally deficient by failing to obtain the indispensible evidence to establish the above facts -- when they could have easily been obtained by procuring a Certified copy of the **Registered Blueprint** and establishing on the Blueprint the location of defendant and the officers, after their initial entry of defendant's home. [See Attached Exhibit 1(a)].

11. A reasonably effective lawyer would have obtained these crucial pieces of evidence -- that would have completely undermined the perjured testimony and fabricated evidence the prosecutors and police illegally and/or unlawfully used against defendant -- in order to wrongfully convict defendant.

12. It is plain and clear on the face of the record that the trail court judge, Stanford Blake, perpetrated a fraud against defendant due to his alleged findings of "fact" that are contrary to the evidence and testimony. Thus, Judge Blake's alleged findings of fact are clearly erroneous and entitled to no deference.

13. Officer Bales and Sgt. Zeifman both testified unequivocally that they conducted searches of defendant's home. Both officers unequivocally testified that Officer Bales "walked backwards" or "backed up" from where he was originally located after the initial entry of defendant's home, over to where the bathroom is located, searching for other individuals, when they had no probable cause and/or reasonable suspicion to believe anyone else was present. (Trial transcript 1100-1101 and Trial Transcript 1199) [See Attached Exhibits 2 and 2(a)]. In fact, Officer Bales testified that he conducts protective sweeps all the time as a matter of routine procedure and that he was trained to do so when he went to the Police Academy.

14. **This was the only testimony the trial court judge received – however, he failed to mention these unlawful actions because he knows the law and knows this was unlawful – that is why the judge completely changed the officer's testimony by finding as his finding of "fact" that, "the officers sat down with the defendant in the living room to talk. One of the officers then turned his head to the side, and through the partially open door to the bathroom, observed a severed foot on the side of the bathtub."** [See Sentencing Order page 5 Exhibit 3].

15. This is a clear example of the trial court's bias and disregarding the evidence and testimony -- in order to convert the illegal and/or unlawful search into a "plain view" observation.

16. This fraudulent conduct by the trial court judge proved fatal to petitioner as it mislead the Florida Supreme court during petitioner's Direct Appeal allowing them to find "...Officers' quick look around the apartment was not an extensive search because they did not open any containers or even enter any other rooms." *Seibert v. State, 923 So.2d. 460, 471 (Fla. 2006).* Without the fraud committed by the prosecutors, police, trial court judge and the ineffective assistance of counsel in establishing the true facts on the record, the Florida Supreme court would not have been mislead into believing a physical impossibility. See Demonstrative Exhibit 1(a).

17. Furthermore, this is why it is incumbent that petitioner be given an Evidentiary hearing in order to establish the fraud upon the court and the true facts of the case and petitioner's Constitutional entitlement to relief.

18. Furthermore, Sgt. Zeifman testified that the door to the apartment was opened fully. (Trial Transcript 1213) [See Attached Exhibit 4] However, the trial court judge converted this testimony into: "...defendant opened the door 'slightly', they pushed it open. The door had been barricaded with a couch". (See Sentencing Order page 5 Exhibit 3).

19. This was just not true. Defendant is at a loss to comprehend how the door could be opened fully as Sgt. Ziefman testified (T. 1213) [See Attached Exhibit 4] – yet at the same time be barricaded with a couch, as the judge found. **This just does not add up and it is demonstrative of the judge's bias and desire to rule against defendant by making findings of "fact" that are contrary to the evidence and testimony.** Accord *United States v. Duguay, 93 F.3d 346, 349-50 (7th Cir. 1996)*, holding,

> "where the inferences drawn from historical facts by resident judges and local law enforcement are the same, as they generally are when a judge denies a motion to suppress, the reviewing court has no occasion to distinguish between the two. In a case like this one, however, where the district court judge made findings of fact and credibility judgments that conflict with the account proffered by local law enforcement officers, our job is to apply the clearly erroneous standard to the court's findings." *United States v. Johnson 170 F.3d at 713 (7th Cir. 1999).*

The findings of the trial court judge were clearly erroneous and objectively unreasonable and therefore not entitled to deferment by this Court.

20. Trial counsel was ineffective and grossly negligent for standing by and allowing the prosecutors, police officers and the judge to collude and perpetrate a fraud upon the court through the use of fabricated evidence and perjured testimony. These actions amount to extrinsic fraud. This also created a factually inaccurate, misleading record in the trial court which was intentionally used to deceive and mislead the Appellate courts.

21. **One of the most basic and fundamental principles of Constitutional law, in the Fourth Amendment context, is that there either is a Constitutional violation or there is not one.**

22. When there *is* a Constitutional violation -- as there *is* in this case -- and trial counsel, (through inadequate preparation, neglect, and omission of the most important pieces of reliable, factual evidence, easily available to him) fails to obtain said evidence and use it to make it clear and plain on the face of the record in the trial court that there was *in fact* a Constitutional violation (when counsel very easily could have and should have) -- is without a doubt ineffective assistance of counsel under the *Strickland* standard.

23. **Especially when the entire trial hinged on this very error/omission of trial counsel – thus making it a fundamental error of the gravest sort and ineffective assistance of the severest magnitude.**

24. The entry by the state of the unchallenged, inaccurate and extremely misleading crime scene sketch (State's Exhibit 48)[See Attached Exhibit 5] is one of defendant's most important legal issues and trial counsel's greatest point of error in failing to challenge the inaccurate crime scene sketch. Trial counsel very easily could have and should have -- by introducing a copy of the Registered Blueprint and a "to scale" Computer-Generated Reconstruction of the apartment/crime scene to the court– which would have conclusively proven how misleading the state's fabricated crime scene sketch really is.

25. Trial counsel's proper adversarial testing would have made the courts aware of the true layout and dimensions of the apartment. Such a legal challenge would also have discredited the fabricated, misleading crime scene sketch created by the police department – that is not only inaccurate in terms of relationships of people & objects, but it is also proportionately incorrect.

26. Furthermore, the crime scene sketch not only omits the existence of the doorway and the pocket door that separates the main living area from the hallway/closet area – it also expands the narrow doorway opening that leads into those rooms, and shortens the actual width of the apartment -- in order to minimize the actual distance the officer had to travel within the apartment from where he was originally located after the initial entry.

27. These are extremely important points -- as the United States Supreme Court has repeatedly held that Fourth Amendment claims are **Fact Specific**:

> "[A]n apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights".

Arkansas v. Sanders, 442 U.S. 753, 757 (1979) (*United States v. Hoffman, 607 F. 2d 280, 284 n. 1* quoting *Sanders. (1974).*

28. The Registered Blueprint is an accurate factual representation of the crime scene. The state's fabricated, misleading and inaccurate crime scene sketch is not factual. The Registered Blueprint and accompanying testimony would have established and proven the existence of the doorway and pocket door that officer Bales would have had to have crossed the threshold of in order to enter that area of defendant's home. The courts are not aware of these crime scene spatial relationships -- due to the way the prosecutors and police officers misrepresented the true facts of this case in their effort to frame defendant for a crime he did not commit.

29. These are extremely important facts that trial counsel was ineffective and grossly negligent in establishing on the record -- due to the controlling precedent in these types of cases. See *United States v. Brand, 556 F. 2d 1312, 1318 (5th Cir. 1977):*

> "...Unless the materials in the bedroom were in plain view from the living room, however, their seizure was illegal. The medical emergency justified the officer's presence only in the living room. Brand retained a reasonable expectation of privacy in other areas of the house. Infringement of that expectation requires the suppression of any evidence acquired thereby, including its use to secure a search warrant".

30. This specific piece of credible evidence (the Blueprint) was also important and indispensable to defendant's Direct Appeal in the Florida Supreme Court. See *Seibert v. State, 923 So. 2d 460, 471 (Fla. 2006),* which states:

> "...Officers' quick look around the apartment was not an extensive search because they did not open any containers or even enter any other rooms."

31. Had trial counsel obtained the Registered Blueprint, entered it as evidence and demonstrated on the Blueprint the exact locations of the officers after their initial entry of defendant's home, the location of defendant and the location of the foot in the bathroom -- where the officer allegedly observed it from the main living area of the apartment -- the Florida Supreme Court would not and could not have made the finding that the officer observed the foot from the main living area of the apartment. Officer Bales' claim of observing the foot from the main living area of the apartment is a physical impossibility.

32. It would have been abundantly clear to the court that the officer would have had to have entered another room of defendant's home in order to make his observation – thus constituting an illegal search in violation of defendant's Fourth Amendment Constitutional rights.

33. It is abundantly clear that the sole reason and purpose the prosecutor introduced and used **the inaccurate and extremely misleading "crime-scene sketch" (that is clearly labeled "not to scale")** -- and failed to correct crime scene technician Marsha Knowles' false testimony that the crime-scene sketch is **"to scale", (even when the trial court judge specifically questioned that very issue – the prosecutor failed to correct that misrepresentation of fact and false testimony)** (T. 3022) [See Transcript excerpt Exhibit 6] – **All of this was designed to purposely and deliberately mislead the trial court about the true facts.**

34. The prosecutor also failed to correct crime scene technician Marsha Knowles' false testimony that there was only one (1) interior door, (Trial Transcript 3018). Since the prosecutor knew this testimony was false, it is obvious that her failure to correct these misrepresentations was to deliberately mislead and deceive the trial court and jury about the true facts layout/dimensions of the apartment.

35. "As long ago as *Mooney v. Holohan*, 294 *U.S. 103, 112 (1935)* this Court made clear that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'. This was reaffirmed in *Pyle v. Kansas, 317 U.S. 213 (1942)*".

36. Also, in *Napue v. Illinois, 360 U.S. 264, 267 (1959)* the Court said,

> "[t]he same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears" at *269* (quoted from *Giglio v. United States, 405 U.S. 150, 152 (1972).*

37. This is exactly what happened in this case. These reprehensible actions must not be condoned, tolerated or allowed to remain hidden, unquestioned or unchallenged by denying defendant an opportunity to establish the true facts of the case and what actually took place through evidentiary development of this claim. The prosecutor certainly knew the true layout/dimensions of the apartment, and therefore knew that the testimony of Marsha Knowles was not truthful and knew that officer Bales' testimony was not physically possible.

38. Also, trial counsel was ineffective by failing to hire a crime scene expert to prepare a "to scale" Computer-Generated Reconstruction of the crime scene in order to enable the court(s) to see and know for themselves the true layout and dimensions of the apartment, as well as the exact location of the officers after their initial entry of defendant's home and where they had defendant seated and completely under their control. Thus the officers accomplished their stated purpose and justification for entry.

39. The police officers' stated purpose allegedly was to check on defendant's welfare. "A warrantless search must be 'strictly circumscribed' by the exigencies which justify it's initiation", *Mincy v. Arizona, 437 U.S. 385, 394 (1978).* Once this stated goal was accomplished i.e. that the officers had complete control over defendant and that the defendant was in fact okay – the officers then embarked upon an exploratory search of defendant's home (Trial Transcript 1100-1101) [See Attached Exhibit 2].

40. Furthermore, they justified their clearly illegal actions by claiming it was to check for other individuals and that it was done as a matter of routine procedure -- Officer Bales' exact words. (Trial Transcript 1100-1101 and 1199) [See Attached Exhibits 2 and 2(a)]. The Supreme Court has repeatedly held that officers must have probable cause to believe other dangerous individuals are present in order to justify a protective sweep and that it can not be done as a matter of routine procedure. See *Maryland v. Buie, 494 U.S. 325, 335-337 (1990).*

41. The officers entered defendant's home against his expressed will in order to check on his welfare and make sure he was not trying to harm himself – this was the alleged purpose and justification for the officers to enter defendant's home. But after gaining entry and immediately having defendant sit down (thus gaining complete control over him so that he could not harm himself) (and seeing that he was in fact not harmed or bleeding) – then for the officers to search other areas of defendant's home – is objectively unreasonable and contrary to clearly established precedent by the United States Supreme Court.

42. Defendant retained a reasonable expectation of privacy in the other areas of his home. If the officers felt that defendant posed a threat to himself or others after talking with him and observing him inside of his home, then they could have taken defendant with them for a mental health evaluation.

43. But according to State law and Federal law, the officers could not legally and/or lawfully embark upon an exploratory search of defendant's home as a matter of "routine procedure" or because they "felt" like doing it.

44. A "to scale" Computer-Generated Reconstruction of the crime scene would demonstrate the exact distance from where the officers were originally located after their initial entry, the location of defendant and the location of the foot within the bathroom/bathtub – that officer Bales claimed to have observed from the main living area.

45. The testimony of officer Bales is physically impossible due to the distance, angles and locations of the officers -- and where the foot was located. A Computer-Generated Reconstruction of the apartment would have proven the impossibility of officer Bales' claims and exposed the fraud perpetrated upon the court – by enabling the court(s) to see and know for themselves what could or could not have been seen from the main living area of the apartment without the benefit of a search -- which is always the critical question. Accord *United States v. Bowdach, 414 F. Supp. 1346 (S. D. Fla. 1976)* which states,

> "[t]he critical question is always whether the evidence was in fact exposed to the officer's view or whether it was discovered only as a result of a search".

46. These two essential and critical omissions (the Registered Blueprint and the Computer-Generated Reconstruction) of credible and reliable evidence would have ensured that the results of the proceedings would have been different -- because they would have established beyond any doubt that there was in fact an unconstitutional search. But for trial counsel's unprofessional errors/omissions, the results of the proceedings would have been different. Therefore, trial counsel was Constitutionally deficient.

47. Additionally, if the trial court had erroneously upheld the illegal search of defendant's home, then defendant's counsel on direct appeal could have used these two essential and critical pieces of reliable evidence to have meaningfully and effectively argued this issue to the Florida Supreme Court.

48. **The omission of these two pieces of evidence (which were easily obtainable by trial counsel and upon which defendant's life Depends) – No reasonably competent counsel, acting zealously in his client's best interest, would fail to secure and present to the trial court.**

49. Trial counsel's failure to adequately and meaningfully prepare and challenge the state's case at the most critical and important time in the proceedings was completely and objectively unreasonable under prevailing professional norms. Accord *Strickland v. Washington, 466 U.S. 668, 688 (1984).*

50. Moreover, due to the fact that almost every single shred of alleged evidence used to convict defendant was derived from the illegal and/or unlawful search – there is no question that defendant was significantly prejudiced and harmed. But for Counsel's unprofessional errors/omissions, there is more than a reasonable probability that the results of the proceeding(s) would have been significantly different.

51. **This is a straight forward fraud on the court and ineffective assistance of counsel claim that points out specific acts or omissions/errors by trail counsel that prejudiced defendant's case, created an unfair trial and which raises a serious, substantial factual dispute that is not resolved or refuted by the record.** Factual allegations as to the merits of a Constitutional claim as well as to issues of diligence must be accepted as true and **an evidentiary hearing is warranted if the claims involve disputed issues of fact.**

52. Furthermore, there is a clear factual dispute in the record between what crime scene technician Marsha Knowles testified to when she falsely testified that the crime scene sketch is **"to scale"** (Trial Transcript 3022) [See Attached Exhibit 6] – and the crime scene sketch itself, which is clearly labeled **"not to scale"**. This critical discrepancy in the record can only be resolved by evidentiary development of this claim.

53. **These factual disputes must be resolved – not only to have a fair and just determination of the facts – but also to establish on the record what the true facts of the case actually are.** These factual disputes have not been resolved. It was unreasonable for judge Blake to deny evidentiary development of these issues. **The whole reason judge Blake denied defendant an opportunity for full and fair litigation was in order to prevent defendant from exposing the fraud judge Blake, the prosecutors and police perpetrated against the defendant.**

54. Nowhere in the record before this court are there any measurements or credible dimensions of the layout of the apartment. Nor does the record establish the exact locations of the officers, defendant or the location of the severed foot within the bathroom/bathtub. As the record stands right now – the trial court judge (with no credible evidence or direct knowledge of the true dimensions/layout of the apartment) – made his alleged "findings of fact" through sheer speculation and guesswork.

55. **It was objectively unreasonable for the trial court judge to "guess" and "speculate" about what the true facts are** -- especially when this speculation was based on the inaccurate, extremely misleading crime-scene sketch, the untruthful testimony of crime-scene technician Marsha Knowles that the crime-scene sketch is "to scale" when it is not, the guess work of officer Bales as to how far he traveled in his search, the perjured testimony of officer Bales. Based on this unreliable/incompetent information, the trial court judge made his alleged findings of "fact". **Therefore, the judge's fact finding process was highly flawed and not entitled to deferment, as the "facts" are not based on credible, reliable evidence. The judge's findings of fact are no more than speculations derived from guesswork.**

56. The United States Supreme Court has repeatedly held that these Fourth Amendment claims are **Fact Specific.** "An apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights." *Arkansas v. Sanders, 442 U.S. 753, 757 (1979).* **Therefore, a trial court judge must not be permitted to "guess" and "speculate" about what the facts of the case are, or the extent of the search.**

57. Needless to say, this is a death penalty case ... it's not traffic court. Therefore it defies logic and rudimentary demands of justice that a trial court judge can just **"guess"** and **"speculate"** about a **fact specific issue** like this when a man's life is on the line. This flies in the face of rudimentary demands of justice.

58. **The state through the use of false testimony and fabricated evidence has been able to successfully twist the facts and misrepresent them to the court(s), and "spin" this case in a way that does not even come close to the truth regarding what actually happened.** For example, the court(s) do not know what the actual layout or dimensions of the apartment are – because this has never been credibly established on the record.

59. Due to these major factual disputes between the true layout/dimensions of the apartment, the inaccurate extremely misleading crime-scene sketch and trial counsel's Constitutionally deficient performance – this court, in the interest of furthering justice and maintaining society's confidence in the integrity of the judicial process – should grant defendant an evidentiary hearing in order to afford defendant an opportunity to establish the true facts and the reality of what actually took place in this case.

60. For all of these reasons, trial counsel was ineffective for failing to address these issues. Defendant will use the Registered Blueprint to demonstrate the locations of defendant, the officers and the location of the severed foot -- in order to demonstrate by clear and convincing evidence the impossibility of officer Bales' testimony, the absurdity of the judge's findings of "fact" and why it is incumbent upon this Court to order an evidentiary hearing. [See Demonstrative Blueprint Exhibit 1(a)].

61. Furthermore, this Demonstrative exhibit is clear and convincing evidence that defendant's trial counsel was Constitutionally deficient by failing to obtain this evidence, i.e. the Blueprint which would have prevented the trial court from making it's erroneous decision and/or prevented the Florida Supreme court from rubber stamping the trial court's clearly erroneous findings of "fact".

62. This demonstrative Exhibit conclusively proves counsel was deficient for failing to secure/present this evidence and that what the officer testified to was physically impossible. Therefore, the state deceived the trial court through the use of fabricated evidence (State's Exhibit No. 48) [See Attached Exhibit 5] and perjured testimony.

63. If officers use false evidence, including false testimony, to secure a conviction, the defendant's due process rights are violated. *Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001).* Defendant's convictions must be reversed on due process grounds where the government knowingly elicits, or fails to correct, materially false statements from it's witnesses. *United States v. Haese, 162 F.3d 359 (5th Cir. 1998).*

64. For all of these reasons it was objectively unreasonable for the trial and Florida Supreme court to deny defendant the opportunity to develop the factual basis underlying his claim. Therefore an evidentiary hearing is warranted in this case.

CLAIM II

TRIAL COUNSEL'S FAILURE TO USE POLICE OFFICERS' PREVIOUS INCONSISTENT STATEMENTS TO IMPEACH THE OFFICERS' CREDIBILITY – VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

1. On March 17, 1998, Officer Douglas Bales authored an official police report describing his involvement and actions in this case. [See official police report Exhibit 7]. In this official police report, Officer Bales stated:

> "At which time I walked west towards hallway and bathroom".

However, in his testimony on the witness stand he completely changed his testimony to: he merely backed up. (T. 1101) [See Attached Exhibit 2] Trial counsel was ineffective in failing to impeach the officer's credibility regarding these inconsistent statements.

2. In Officer Bales' official police report, he did not mention anything about moving "backwards" or "backing up". No, he described exactly what he did; He walked west towards the hallway and bathroom.

3. Officer Bales continued to walk down the little hallway until he was in front of the closed bathroom door, stood there for a few moments listening and then opened the bathroom door, stepped inside of the bathroom at which point he yelled (his words) "it's a # 31". He then went on to say, **"I then heard a commotion out in the hallway"**. [See police report Exhibit 7].

4. If Officer Bales was only five (5) or six (6) feet away from defendant, "backing up" while still facing defendant and merely turning his head to the side in order to make his observations, as he alleged – then, it would have been impossible for him not to have seen defendant and Sgt. Zeifman, at least out of his peripheral vision, as opposed to only "hearing" a commotion out in the hallway. If this officer was inside of the bathroom -- he would not have seen what took place in the living room after he yelled "it's a # 31". If officer Bales was only a few feet away from defendant and merely turning his head, Sgt. Zeifman's attack upon defendant would have drawn his attention. **Trail counsel was ineffective for failing to make this argument and demonstrating through officer Bales' inconsistent statements that he was in fact inside of the bathroom.**

5. "Trial counsel's failure to use police report to impeach the police officer's testimony relating to foot prints, where counsel knew the officer's testimony was contradicted by the text of police report constituted ineffective assistance of counsel." *Hadley v. Groose, 97 F.3d 1131 (8th Cir. 1996)*. 6. Trial counsel's failure to address these issues and failure to listen to defendant's version of what actually took place denied defendant the effective assistance of counsel, created an unfair trial and prejudiced defendant by not subjecting the prosecution's case to meaningful adversarial testing.

7. **Lastly, counsel was ineffective by failing to demonstrate to the trial court that even if officer Bales would have walked all the way across the living room area of the apartment and stopped at the threshold of the small hallway closet area, from which location he could have surveyed that entire area for officer safety purposes – he still would not have been able to observe the foot he allegedly observed, without entering that room. Thus, constituting an illegal search.**

CLAIM III

TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND SECURE POTENTIAL IMPEACHMENT TESTIMONY VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

1. At the beginning of defendant's trial, during *voir dire,* while examining the prospective jury, trial counsel became aware of the testimony of one of the prospective jurors, Olivia Vallus, (T. 1794). Her ex-husband, (to whom she was married for 16 years), was a Miami Beach Police Officer, the same police department involved in the prosecution of this case. She revealed the following:

(a.) Her ex-husband, the police officer, was abducted and shot;
(b.) The Miami Beach Police Department conducted the investigation of that incident, and
(c.) She had first hand knowledge of the police officers involved in this case and the lawless unethical practices and informal procedures/modes of operation of the Miami Beach Police Department.

2. Prospective juror Olivia Vallus gave the following testimony:

> PROSEPCTIVE JUROR VALLUS: I was upset with their attitude. I was upset with the way, the fact they made the theory how the crime was put out, because they did what helped them. Particularly with me, when they interviewed me I had personal knowledge of certain things. I knew about certain things and I let them know what this was and with the witnesses, the reports, it was all twisted and twisted and turned around and I just didn't appreciate it. (T. 1930) [See Transcript excerpt Exhibit 8].

3. **This is exactly the same type of conduct that took place in defendant's case. Trial counsel was Constitutionally deficient for failing to investigate this potential witness in order to develop impeachment testimony against the officers involved in that case, who were also involved in this case.**

4. Furthermore, Prospective juror Vallus went to Tallahassee and campaigned on behalf of police officers – So she was hardly a defense friendly witness. Therefore her testimony would have been highly credible.

5. Prospective juror Vallus had first hand knowledge of the officers in this case and they were engaging in the exact same type of conduct, twisting the facts around to what suited them and committing perjury about what actually took place. Trial counsel could have, and should have, deposed this potentially valuable witness. A pretrial investigation in a criminal case provides the basic foundation, on which most defenses rest and it is a critical stage of the lawyer's performance, *House v. Balcom, 725 F.2d 608 (11th Cir. 1984).*

6. Trial counsel's failure to investigate, locate and present potential witnesses' testimony – which could have affected a jury's evaluation of the truthfulness of prosecution witnesses – amounted to ineffective assistance. *Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985).* Defendant was prejudiced by trial counsel's Constitutionally deficient performance -- as this witness's testimony could have affected the jury's evaluation of the officers' credibility.

7. Impeachment evidence may qualify under *Jones v. State, 591 So.2d 911 (Fla. 1991)* as evidence of innocence that may establish a basis for *Rule 3.851* relief. *State v. Mills, 788 So.2d 249 (Fla. 2001).*

CLAIM IV

DEFENDANT'S CONVICTION WAS OBTAINED IN VIOLATION OF DEFENDANT'S UNITED STATES CONSTITUTIONAL RIGHTS AND CORRESPONDING FLORIDA CONSTITUTIONAL RIGHTS.

1. Defendant has always maintained his innocence and that was defendant's defense at trial. It was Karolay's Ex-boyfriend Danny Mavarres and/or William "Ace" Green who committed the actual murder -- while defendant was out purchasing more drugs.

2. Defendant returned to his apartment and found one Ace Green pacing back and forth in front of defendant's apartment building, talking on a cell phone. When Ace saw defendant approaching the front entrance, from about a block away, he started walking towards defendant.

3. Note that Ace was not defendant's roommate as the state falsely claimed. Ace was basically a homeless person who was sleeping on the beach. Defendant felt sorry for Ace and let him use defendant's shower, gave him some food and let him sleep on a mattress on the floor of defendant's apartment.

4. Ace Green was not on the lease, had no key and defendant had every right to throw him out after about a week or so after the way he was acting.

5. When defendant saw Ace starting to approach him, defendant turned around and quickly walked to the back door of the apartment building and shut the door preventing Ace from entering. However, Ace convinced someone to allow him to illegally and unlawfully enter the building and approach defendant's apartment door.

6. About this time defendant was entering the bathroom to relieve himself, thinking that Danny Mavarres must have returned to give Karolay a ride home. However, to defendant's horror he discovered Karolay in a strange and unnatural position in the bathtub. At that point defendant went back to the front door to double check that it was in fact locked and put the safety chain on the door. Defendant was fearful that due to the fact that Ace or Danny killed Karolay, Ace or Danny were planning the same for defendant.

7. When Ace saw/heard defendant approaching the door, he at first tried to get defendant to let him in after defendant threw Ace out earlier that night. Then after awhile when Ace realized defendant wasn't going to let him in he said "What are you gonna do with the body?" "How are you gonna get rid of it?"

8. Now think about that for a minute ... How strange and odd it was for Ace to ask those questions about a body just out of the blue -- unless Ace killed Karolay or Ace discovered that Danny killed her after having entered defendant's apartment while defendant was out purchasing more drugs.

9. At this point in time, defendant didn't know what to do. Defendant was scared to call the police since defendant was under the influence of drugs and alcohol. Defendant panicked and had a break with reality and tried to get rid of the body by flushing it down the toilet, which was physically impossible.

10. This is what happened; However, this did not come out at trial. Defendant's version of the facts were only partially brought out at trial. Therefore, the prosecutors were able to twist the truth and make defendant's defense sound ludicrous.

11. This is a circumstantial evidence case. There is not one single shred of evidence that proves that defendant committed this crime, nor can there be – because I did not do it.

12. "Circumstantial evidence is that the circumstances relied on must be not only inconsistent with guilt, but inconsistent with innocence and must even go further by excluding every reasonable hypothesis except that of guilt; Mere suspicion, even strong suspicion, is not sufficient as it's the absolute exclusion of every reasonable hypothesis of innocence that endows circumstances with force and effect of guilt". *Garcia v. State, 227 So.2d 209* (Emphasis added).

13. "When circumstantial evidence is relied upon for conviction in a criminal case, circumstances, when taken together, must be of conclusive nature and tendency, leading on whole to reasonable and moral certainty that accused, and no one else, committed offence, and it is not sufficient that facts create strong probability of, and be consistent with guilt, but rather they must be inconsistent with innocence". *Rodriguez v. State, 189 So.2d 656 Cert. Denied. Svarez v. Florida, 88 S. Ct. 66* (Emphasis Added).

14. "Circumstantial evidence is not sufficient to sustain conviction if facts in proof are equally consistent with some other rational conclusion than that of guilt". *Lamonte v. State, 145 So.2d 889.*

15. "Circumstantial evidence which leaves it indifferent as to which of several hypothesis is true or which merely establishes some finite probability in favor of one hypothesis rather than another, cannot amount to proof. however great the probability may be". *Lamonte, Supra.*

16. "Evidence that suspect is present at the scene of the crime and flees after it has been committed is insufficient to exclude reasonable hypotheses of innocence". *Owens v. State, 432 So.2d 579.*

17. Defendant wishes to point out that there is not, nor can there be, one single shred of direct evidence that proves beyond a reasonable doubt that defendant committed the actual murder. Because the truth is that either Danny Mavarres and/or Ace Green committed the murder of Karolay.

18. All defendant did was discover Karolay's dead body in my bathroom. At that time, defendant panicked due to having been in prison and not wishing to go back, scared to call the police and under the influence of drugs and alcohol – defendant tried to get rid of the body.

19. Defendant's version of the events that night or what really happened has not, nor can be refuted – as there is not one single shred of direct evidence that proves defendant committed the actual murder or had anything to do with it before or after the fact.

20. The truth is defendant is not guilty of the murder. The jury could only "Guess" or "Speculate" that defendant was guilty due to the fraud that was perpetrated upon the court. The trial was a complete and entire farce made up out of the minds of the prosecutors and police based on what they "thought" or "believed" happened, not based on the facts.

CONCLUSION

Defendant in no way waives or abandons any other claims.

Based upon the foregoing arguments and upon the record, it is abundantly clear that the prosecutors, police and trial court judge colluded together by using fabricated evidence and perjured testimony in order to wrongfully convict defendant.

It is also plain and clear from the record and from defendant's demonstrative Registered Blueprint [See Attached Exhibit 1(a)] – that the Prosecutors & Police knowingly and intentionally mislead the trial court and then the trial court entered into the conspiracy by materially and substantially changing the Officer's testimony in order to convert the illegal search into a plain view observation. Therefore the court did not perform in the usual manner it's impartial task of adjudging cases. These illegal and/or unlawful actions undermined the integrity of the judicial process.

The State engaged in a deliberately planned and carefully executed scheme to defraud not only the trial court, but also the Court of Appeals.

Trial counsel was Constitutionally deficient due to standing by and allowing this fraud to be perpetrated – by failing to conduct a reasonable investigation and to obtain impeachment evidence and the Registered Blueprint -- and establishing the locations of the defendant and officers after their initial entry. This would have eliminated the fraud that was perpetrated against defendant.

Therefore, relief is warranted in this case and defendant respectfully requests that this court conduct an Evidentiary hearing -- in order to allow defendant the opportunity to fully and fairly develop the record in this case -- and to prove defendant's Constitutional right to relief due to the fraud on the court which resulted in defendant's wrongful conviction. Defendant requests any other relief that this court deems warranted and just.

Further Affiant Sayeth Naught.

Respectfully submitted, Michael D. Seibert

Michael D. Seibert