

23-5598

SUPREME COURT OF THE UNITED STATES

ESTEBAN MERCHAN, Petitioner, Pro-Se,

Vs. Case NO.: FLAD2#2022-3509

THE STATE OF FLORIDA, et al Respondents

JUL 05 2023

OFFICE OF THE CLERK

"On Petition For Writ of Certiorari to the
Second District Court of Appeals, In
The State of Florida."

BRIEF FOR PETITIONER WITH JOINT APPENDIX

Esteban Merchan X69023, Pro-Se
Florida State Prison
P.O. Box 800
Raiford, Florida 32083

du Toit

Questions Presented For Review

- If a defendant pleads Guilty to First degree Murder as a Principal. (The latter charged alternatively as Premeditated Murder or Felony Murder and Not differentiated in the Plea agreement) and it's unclear whether the Defendant was convicted on a Theory of Premeditated Murder or Felony Murder, and the underlying Felony included the use of a deadly weapon as an essential element. Would it be ~~proper~~ (legal) to enhance the Attempted First degree Murder with a Weapon, from a First degree Felony to a Life Felony based on use of a ~~weapon~~ deadly weapon?

If no temporal break exist between the Felony Murder and the Attempted Murder and the Attempted Murder occur as Defendant was fleeing the crime scene and neither the passage of time nor separation in spaces, separates the Attempted Murder from the underlying Felony of Armed Robbery and the Defendant never reach a point of safety. Does the Weapon remain an essential element to the Attempted Murder, when the Weapon is an essential element of the predicate Felony of Armed Robbery?

IF the Factual basis of a plea agreement was based on an unreasonable determination of facts and based on this Misinformation Defendant sentence was Enhanced based on unreasonable application of law, IS Defendant conviction and sentence legal?

Based on the - incomprehension of law IS defendant plea agreement fairly obtain, IF it was based on an unreasonable determination of facts and that Misinformation was the facts considered into making the plea, by defendant?

When the Factual basis was founded upon Misinformation and based on this Misinformation Defendant sentence was enhanced based on an unreasonable application of law, does it violated Petitioner Constitutional rights?

IF a Felony was reclassified from a First degree Felony, to a life felony based on an unreasonable application of law, IS the sentence legal?

When the Factual basis was founded upon Misinformation and that Misinformation was the facts considered into making the plea, IS the plea knowingly and intelligently given?

Does a Defendant have to plea guilty to an underlying Felony, when the indictment Charges Premeditated Murder and the Defendant was put on notice by the charging document and its reciprocal discovery rule, to be convicted of Felony Murder?

Is it legal to enhanced Attempted Murder from a first degree Felony to a 1st Felony, based on the used of a Weapon, when the Weapon is an essential element of the Predicate Felony of Armed Robbery and the crime occur contemporaneous with one another?

Can an aggravating Factor be used during the penalty phase without been proven beyond a reasonable doubt at trial?

If the Factual basis of a plea agreement was Founded upon Misinformation of the elements of the crime, is the sentence legal?

When the Factual basis of a plea agreement is Founded upon Misinformation, is the conviction and sentence legal?

If the Factual basis of a plea agreement was based on Misinformation is the plea agreement voluntarily given?

Emmet Lamar Balthus, Circuit Judge
In the Circuit Court of the Thirteenth
Judicial Circuit in and For Hillsborough
County, Florida. P.O. Box 3360, Tampa
Florida, 33601 (Sentencing Judge)

Samantha L. Ward, Circuit Judge
In the Thirteenth Judicial Circuit Court
in and For Hillsborough County, Florida
Criminal and Trial Division
P.O. Box 3360, Tampa, Florida 33601

Office of the State Attorney
Ron Gale - Assistant State Attorney
419 Pierce St, Tampa, Florida 33602

① Casanueva, Silberman, and Black, JJ,
Judges in the District Court of Appeal
of Florida Second District
1700 North Tampa Street, Suite 300
Tampa, Florida 33602

Office of the Attorney General
Ceresse Crawford Taylor A. A. G.
3507 E. Frontage Rd., Ste 200
Tampa, Florida 33607

Danby Shady, Clerk

There is No parent or Publicly held
Company owning 10% or more by this
Petitioner

BTU

This issue was first raised in the Circuit Court of the Thirteenth Judicial Circuit in and For Hillsborough County, Florida. On August 8, 2022 pursuant to Fla. R. Crim. P. 3.800(a) motion to correct illegal sentence L.T. No.: 09-CF-21603

On September 1, 2022. The motion was denied by the Circuit Court of the Thirteenth Judicial Circuit in and For Hillsborough County, Florida L.T. No.: 09-CF-21603

A motion for Rehearing was filed in the Circuit Court of the Thirteenth Judicial Circuit in and For Hillsborough County, Florida. On September 18, 2022 L.T. No.: 09-CF-21603

The motion for Rehearing was denied by the Circuit Court of the Thirteenth Judicial Circuit in and For Hillsborough County, Florida on October 6, 2022 L.T. No.: 09-CF-21603

A Notice of Appeal was filed to the District Court of Appeal of Florida, Second District on October 24, 2022. Instrument Number 2022513347 Case Number 2D22-3509 (Not Certified)

A Notice of Appeal was filed to the District Court of Appeal of Florida, Second District on October 27, 2022 Case Number 2D22-3509

A motion for extension of time was file on November 30, 2022, to file Initial Brief to the District Court of Appeal, Florida, Second District, Case No.: 2D22-3509

On December 12, 2022, The District Court of Appeal of Florida, Second District, was granted with a 30 day extension Case No.: 2D22-3509

On January 11, 2023, Another Motion for extension of time, to file Initial Brief to the District Court of Appeal of Florida, Second District, was file. Case No.: 2D22-3509

The District Court of Appeal of Florida, Second District, granted Motion for extension of time on January 12, 2023 granting a 15 day extension. Case No.: 2D22-3509

On January 27, 2023, Defendant's Initial Brief was ~~was~~ file in the District Court of Appeal of Florida, Second District Case No.: 2D22-3509

The District Court of Appeal of Florida, Second District, affirmed the lower court decision on March 17, 2023. Case No.: 2D22-3509

On April 3, 2023, Motion for Rehearing on Bench was file in the District Court of Appeal of Florida, Second District Case No.: 2D22-3509

The District Court of Appeal of Florida Second District, Denied the Motion for Rehearing on Banc on April 11 2023 which was treated as a motion for Rehearing Pursuant to Fla. R. Crim. Pro. 9330 (a)(2) (a) Case No.: 2D22 3509

On April 27 2023 the District Court of Appeal of the State of Florida, Second District File Mandate by Chief Judge Robert Morris

~~On September 30~~ State of Florida vs Prentiss Jackson Case No.: 09-CF-021603 (B) (Co-Defendant)

On September 30 Motion for an order Prohibiting the State from Presenting Evidence or Argument, As to counts 1 and/or 2 of the Indictment in the Alternative on a Theory of Felony Murder, Filed by Co-Defendant Attorney, who File in the Circuit Court of the Thirteenth Judicial Circuit in and ~~on September 30~~ For Hillsborough County, Florida Case No. 09-CF-021603 (B) by Judge Ficcarotta

On September 30 in the circuit court of the Thirteenth Judicial Circuit in and For Hillsborough County Florida order denying defendants motion for an order Prohibiting the State from Presenting Evidence or Argument, as to counts 1 and/or 2 of the Indictment, for the Alternative Theory of Felony Murder Case No.: 09-CF-21603 (By) Judge Ficcarotta

On July 17 2023. The Office of the Clerk for the Supreme Court of the United States received Petitioner's Petition for Writ of Certiorari. The Writ was marked July 5 2023. FLAD2# 2D22-3509

The Office of the Clerk for the Supreme Court of the United States wrote Petitioner a letter on July 21 2023, according to Rule 14.5 FLAD2# 2D22-3509

Table of Cited Authorities

224.71 L.Ed 1012

Harrington V. Richter, 131 S.Ct. 770, 786-87
(2011)

Hyde V. Glavin, 199 U.S. 62, 84, 25 S.Ct. 760, 764
50 L.Ed 90 (1905)

LaFler V. Cooper 566 U.S. 156, 132 S.Ct. 1376,
182 L.Ed. 2d 398.

McMullan V. Pennsylvania, 477 U.S. 79, 91
L.Ed. 2d 67, 106 S.Ct. 2411

Moore V. Dempsey, 261 U.S. 86, 87-87, 43
S.Ct. 265, 67 L.Ed 543 (1923)

Townsend V. Burke, 334 U.S. 736, 741, 68
S.Ct. 1252, 1255, 92 L.Ed. 2d 1690 (1948)

United States V. Enes, 880 F.2d 376
(11th Cir. 1989)

United States V. Renne, 738 F.2d 1156
(11th Cir. 1984)

United States V. Tucker, 404 U.S. 443, 447
92 S.Ct. 584, 591-592, 30 L.Ed. 2d 592 (1972)

Plea Colloquy page = Pg
Plea Colloquy Line = L

Florida Statutes

782.04(1)

777.04

775.087(1)

812.13(3)(a)(b)

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APPENDIX

Order Denying motion to correct Illegal Sentence

Order Denying motion of Appeal

Order Denying Rehearing

Order Denying Rehearing In Banc

1(F)

1(G)

Copy of motion to correct Illegal Sentence

Copy of Initial Brief

Copy of Indictment

Copy of Plea agreement

Copy of Plea colloquy

Letter From the Office of the Clerk

Copy of The First Cover

Copy of Proof of Certificate of Service

Copy of Unsworn oath and verification

In the order denying defendant's motion to correct Illegal Sentence. The ^{Thirteenth} Judicial Circuit Court. Deny the Motion For ~~on~~ The Following Reasons

"The Court Finds Defendant Was not charged under the theory of Felony ~~Felony~~ Murder With respect to Count Four; Rather he was only charged under a Premeditated theory of Attempted First degree Murder"

"Further Defendant did not Plead guilty to any underlying Felony"

"Finally to the extent Defendant argues an Armed Robbery was included as a Factual basis for his plea to count Four, the ~~and~~ Court Finds such a description to be inaccurate Rather, as part of the plea colloquy. The State Included the Following:

"State" The state believes in good faith that IF the defendant were convicted at trial and Subject to the death penalty. That we could prove beyond a reasonable doubt the Following aggravating Circumstance. The defendant was a member of a criminal street gang at the time of these offenses and That these Murders occurred during the course and Commission of an Armed Robbery."

"The Court does not Find the State's recitation as to What it Would Argue as an aggravating Factor at a Potential penalty phase proceeding on

Counts one through Three would otherwise Preclude reclassification under Section 775.087(1) on Count Four in this instance. Accordingly Defendant's Motion is denied.

on Petitioner motion for Rehearing, The ~~Thirteenth~~ Thirteenth Judicial Court Denied Petitioner claim stating "After reviewing Defendant's Motion, his August 8 2022, 'motion to correct illegal sentence' the court file, and the record, the court finds its September 1, 2022, order adequately address and disposed of defendant's claim

The District Court of Appeal of Florida Second District did not give an opinion on the Appeal or The Rehearing

E

I, Esteban Merchan, Claim that my Federal Constitutional rights have been deprive

The Petitioner would proffer that the Law requires correction of this illegal sentence in order to preserve the petitioner Constitutional rights see *Moore v Dempsey*, 261 U.S. 86, 87-87, 43 S.Ct. 265, 67 L.Ed. 543 (1923) "What we have to deal with on habeas review is not the Petitioner's innocence or Guilt but solely the question whether their Constitutional rights have been Preserved" see also *Hyde v Shore*, 191 U.S. 62, 84, 25 S.Ct. 760, 764, 50 L.Ed. 90 (1905) (Emphasis added)

Indeed ("a sentence Founded at least in part upon Misinformation is of Constitutional Magnitude") see *United States v Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 591-592, 30 L.Ed. 2d 592 (1972) *Turnend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 1253, 92 L.Ed. 2d 1690 (1948) *U.S. v ERYES*, 880 F.2d 376 (11th Cir. 1989) ~~103 F.2d 1030~~ *U.S. v Rene*, 738 F.2d 1156 (11th Cir. 1984). See also *Harrington v Richter*, 131 S.Ct. 770, 786-87 (2011)

"Any Amount of additional jail time was Sixth Amendment Significant" *Lafter v. Cooper* 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed. 2d 398.

EI-D

8/8/2022 Motion to correct Illegal Sentence

9/1/2022 order denying Defendant motion to correct Illegal Sentence Signed by Judge B. Ward

9/19/2022 Motion For Rehearing

10/6/2022 order denying Defendant Motion For Rehearing, Signed by Judge B. Ward

10/24/2022 Notice of Appeal

11/30/2022 Motion For extension of time to file Initial Brief

12/12/2022 Granted, motion of extension of time to file Initial Brief Within 30 days of this order

1/11/2023 Motion For extension of time to file Initial Brief

1/12/2023 Granted Motion For extension of time to file Initial Brief Within 15 days of this order

1/27/2023 File Initial Brief

3/17/2023 Appeal Affirmed by Judge Casanueva, Silbermann, Black J.S.

4/3/2023 Motion For Rehearing In Banc Was File

4/11/2023 Motion For Rehearing In Banc Was denied, and was treat as a motion For Rehearing

7/17/2023 The office of the Clerk For the Supreme Court of the United States received Petitioner, Petition For Writ of Certiorari

7/21/2023 The office of the Clerk For the Supreme Court of the United States wrote Petitioner a letter according to Rule 14.5

Statutes

- Florida Statute 782.04(1) See Appendix
- Florida Statute 777.04. See Appendix
- Florida Statute 775.087(1) See Appendix
- Florida Statute 813.13 See Appendix

STATEMENT OF FACTS

On January 21, 2010, The ~~appellant~~ ^{Defendant} was indicted on three counts of Premeditated Murder and on one count of Attempted Murder in the First degree With a Weapon on October 5, 2012. Defendant signed a Plea agreement to avoid the Death penalty in this case (See Appendix for plea agreement and indictment)

Excerpts from the pertinent parts of the Factual basis of the plea colloquy are as follows

Mr Sims, during this ride, indicated that they were going to a location in what they describe as Tampa, but it was actually "Brandon to obtain a, quote, unquote Book of knowledge." Pg 16 L. 8-11
Upon arrival of Mr. Forget's vehicle there, the defendant, Mr. Merchant, Mr. Jackson and Mr. Sims exited the vehicle and they met in the driveway with some other individuals who were already present at the residence. All entered the backyard of the residence via a gated Privacy Fence on the side of the house Pg 17 L. 5-11

Mr. Arroyo all stated that they heard ~~that~~ what they recognized -- what they recognized or later (Pg 17 L. 24-25) learned were four to five gunshots. All three individuals who arrive with Mr. Forget, The defendant,

Mr. Evans and Mr. Jackson all returned to the front yard driveway area. At that time the defendant and Trentice Jackson both approached Ralph Arroyo, who was still seated in the Nissan Altima, forcibly removed him from the car and began striking him together. Mr. Marchan was still in possession of the knife and Mr. Jackson was in possession of a firearm (pg 18 L. 1-10). At the time Mr. Marchan and Mr. Jackson both returned to Mr. Forget's car, which Mr. Evans had already entered. Mr. Arroyo was able to flee on foot at the time, he was minutes later located nearby by Hillsborough County Sheriff's deputies (Pg 18 L. 15-19). Ralph Arroyo was located minutes after the murder as he fled on foot and he was trying to gain assistance from some of the residence of the neighborhood consistent with the statements of Timothy Forget and Matthew Nunez. He stated that while he was waiting for Mr. Guadalupe, another vehicle backed into the driveway and two Black males and one Hispanic male exited from the ^{20 L. 23-25} ~~(Pg 18 L. 23-25)~~ passenger side of the vehicle and entered the backyard and that he heard gunshots and that those same three individuals exited the backyard and that is when he was removed - forcibly removed from the Black Altima and attacked (Pg 21 L. 1-5).

The defendant, along with James Rodriguez, obtained transportation from another young man by the name of Jonathan Lopez to a York, Pennsylvania residence of James Rodriguez's Father. With the assistance of US Marshals, the defendant was located there and arrested and pursuant to a court ordered search warrant of the residence, a (Pg 21 L. 19-25) composition notebook, which was consistent in description and content with the "Book of Knowledge" that was the object of the defendants going to Brandon located (Pg 22 L. 1-4) The Murder of Rafael Guadalupe was contemporaneous with the Murders of Vincent Thomas and Tony Black and The Attempted Murder to Ralph Arroyo, to which the defendant is a principal (Pg 22 L. 22-25) That these Murders occurred during the course and Commission of an Armed Robbery (Pg 23 L. 5-7) The Court, Mr. Merchant, These are the Facts that the State alleges that they can prove beyond a reasonable doubt should this go to trial. Do you have any objection, correction or modification to these facts (Pg 23 L. 8-12) Mr. Fisher: your Honor, we disagree with some of the details that they have stated, ~~and~~ (Pg 23 L. 13-14)

Petitioner First instance raise, The Violation of his constitutional rights, on Page Five of his motion to correct Illegal sentence "The Defendant Wad ~~Proffer~~ That the law requires Correction of this illegal sentence in order to Preserve the defendants Constitutional rights. See *Moore v Dempsey*, 21 U.S. 86, 87-87, 43 S.Ct 265, 67 L.Ed. 543 (1923) Which reflects: "What we have to deal with on habeas review is not Petitioners innocence or Guilt but solely the question whether their Constitutional rights have been Preserved" " See Also *Hyde v Shine*, 199 U.S. 62, 84, 25 S.Ct 760, 764, 50 L.Ed. 90 (1905) Emphasis added

Indeed, "a sentence Fanded at least in part upon Misinformation is of Constitutional Magnitude." See *United States v Tucker*, 404 U.S. 443, 447, 92 S.Ct 589, 591-592, 30 L.Ed. 2d 592 (1972); *Townsend v Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 2d 1690 (1948); *U.S. v. BIVES*, 880 F.2d 376 (11th Cir. 1989); *U.S. v. Rennie*, 738 F.2d 1156 (11th Cir. 1984). See also *Harrington v. Richter*, 131 S.Ct 770, 786-87 (2010)

Petitioner then once again made the claim that Petitioner Illegal Sentence Violated his his "Statutory and his Constitutional limitation" on Page 17 of his initial Brief See Appendix.

comes now, The Petitioner, Esteban Merchan
Proceeding in Forma Pauperis. I Now claim
that my Federal Constitutional Rights have
been deprived. As, A State Court has
decided an important Federal question
in a way that conflicts with relevant
decision of this Court. Indeed, ("a
sentence founded at least in part upon
misinformation is of constitutional
magnitude") See United States v. Tucker
404 U.S. 443, 447, 92 S.Ct. 589, 591-592
30 L.Ed.2d 592 (1972); Townsend v. Burke,
334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92
L.Ed.2d 1690 (1948) The Petitioner Sentence
was Illegally Enhanced based upon
the use of a Weapon, Petitioner Sentence
was Enhanced on an unreasonable
determination of the Facts. Harrington
v. Richter, 131 S.Ct. 770, 786-87 (2011); And
drawn inferences from conflicting
evidence and based on this Misinfor-
mation Provided to the Judge by the Pro-
secutor. As a result, a State Court of
last resort has decided an important
Federal question in a way that conflicts
with the decision of a United States
Court of Appeals. See United States v.
Erves, 880 F.2d 376 (11th Cir. 1989) also
United States v. Reme, 738 F.2d 1156
(11th Cir. 1984) Petitioner conviction and
Sentence was Predecided by the Mis-
information and that it involved an
unreasonable Application of Such law

Petitioner Challenges the legality of
Petitioner Conviction and Sentence for
Attempted Murder With a Weapon
The Factual basis of the plea colloquy
established the intent and purpose
the Petitioner when to Brandon was
to "obtain" "The Book of knowledge"
(Plea Colloquy page 16 lines 8-11) The
word obtain - used to describe, how
they wish to gain ownership of the
book under these circumstances
would mean by Theft, deception
or force, as necessitated in the
Robbery Statute. A Murder in the
Perpetration, Includes the period
of time when the Robber is Attemp-
ting to escape from the scene
and never reaching a point of ~~temporary~~
temporary safety when a Attemp-
ted Murder occurs as a result
of the Felonious transaction set
in motion by the perpetration of
the crime of an Armed Robbery
it makes the Weapon an essential
element of the Attempted Murder
and neither the Passage of time nor
separation in space separates the
Murder's from the Attempted Murder
as the entire criminal episode occur
in one continuous event. Therefore
the reclassification of the Attemp-
ted Murder is illegal as the
Weapon remains an essential element

Petitioner Pleads Guilty to 3x of First degree Murder as a principal. The latter charged Alternatively as Premeditated Murder or Felony Murder and Not differentiated in the plea agreement and it's unclear whether the defendant was convicted on a theory of Premeditated Murder or Felony Murder, and the underlying Felony included the use of a deadly weapon as an essential element of the Crime. Even the Murders occur during the Commission of an Armed Robbery and The Attempted Murder occur in Flight after the Attempt or Commission according to the Statute 812.13(3)(a)(b) reclassification under (775.087.(1) is illegal. The Factual basis establish that these Murders occur during the course and Commission of an armed Robbery (Plea colloquy pg 23 L. 5-7) and were a Predictable result of the Felonious Transaction and that these Murder occur Contemporaneous to the Attempted Murder to which the Petitioner is a principal (Plea colloquy) Pg 22 L. 22-25) and the Attempted Murder occur as defendants were fleeing from the backyard into the driveway (Frontyard) (Plea colloquy pg 20 L. 18-25, Pg 21 L. 1-5) and neither the passage of time, Nor Separation in spaces separates the Murders, From the Attempted Murder. one Must Factor the perpetration of a Robbery such as the relationship between the underlying Felony, The Murders and Attempted Murder in point of time Place and causal relationship. The "Perpetration" of a Robbery Includes the period of time when a Robber is Attempting to escape From the

Scene of the crime. In the case of Flight an important consideration is whether the fleeing felon has reached a place of temporary safety, and the attempted murder occur as defendant was fleeing the crime scene from the backyard to the driveway (frontyard) and before he got in the getaway car to flee the scene. The lower court does not deny that the defendant was not charged under the theory of Felony Murder, just that it does not apply to the attempted murder. However one cannot separate the attempted murder from the murders as they occur contemporaneous to one another on September 30, 2011. Petitioner Co-defendant Attorney file a motion prohibiting the state from presenting evidence or argument as to count one and two of the indictment in the alternative on a theory of Felony Murder. The lower court denied the motion on the same day thus permitting the state to try the ~~appellants~~ Petitioner Co-defendant under a Felony Murder theory and the prosecution pursued this theory at trial on October 4, 2011 and the jury was subsequently instructed on a Felony Murder theory. In light of the fact that the Petitioner Co-defendant share the same offense and factual basis, the face of the record clearly demonstrate the state accept petitioner plea under a Felony Murder theory. The state claims that petitioner did not plea guilty to any underlying felony. It is well settled that if an indictment charges premeditated murder the state need not charge felony murder.

or the particular underlying felony, to receive a Felony Murder instruction, it has been held that in a Felony Murder situation the notice required by due process of law is supplied by the charging documents as to other offenses is provided instead by our states reciprocal discovery rules and by the enumeration in section 782.04(1)(a)(2) Florida Statutes of the felonies which the state may rely to establish first degree felony murder. to be convicted as a principal under statute 782.04(1), the felony murder rule and the law of principal combine to make a felon liable for the acts of his co-felons. First § 782.04(1)(a), Fla. Stat., codifies the common law doctrine of felony murder and § 782.04(1)(a)(2) provides that first degree murder includes the killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate certain enumerated felonies, or the individual is a willing participant in the underlying felony and the murders resulted from forces which they set in motion. The focus in a felony murder is not an accused participation in the murder but in the underlying felony and the essential elements of a felony murder charged include the elements of a felony murder charged include the elements of the underlying felony. The state did not have to charge the underlying felony of Armed Robbery. The theory of felony murder applies to counts one through four, as there was no break in the chain of circumstances

and the underlying Felony, which establish the factual basis. Petitioner, Attempted Murder with a Weapon was reclassified from a First degree Felony to a Life Felony based on the use of a Weapon in violation of 775.087(1) unless otherwise provided by law. Whenever a person is charged with a Felony, except a Felony in which the use of a Weapon is an essential element, Petitioner Attempted Murder was illegally enhanced. One cannot separate the Attempted Murder from a Felony Murder as the Attempted Murder was a result of the Felonious Transaction and was contemporaneous with the Murders and the act of taking constitute a continuous series of act or events and in flight after the Attempt or Commission § 812.13(3)(a)(B) as the essential elements of a Felony Murder, include the elements of the underlying Felony, and the underlying Felony is part of the crime charged. Without the underlying Felony the charge cannot stand. An aggravating factor cannot be raised at the penalty phase, without having it establish through competent substantial evidence at trial. The State believes in good faith that if the defendant were convicted at trial and subject to the death penalty, that we could prove beyond a reasonable doubt the following aggravating circumstances: (Pg 23 L. 11-15) The Murder of Rafael Guadalupe was contemporaneous with the Murders of Vincent Thomas and Tony Black and the Attempted Murder to Ralph Arroyo, to which the defendant is a principal (Pg 22 L. 22-25

"And That These Murders occurred during the course and commission OF an Armed Robbery" (Rec-colloquy) (Pg 23 L. 5-7) "The court: Mr. Merchant, These are the facts that the state alleges that they can prove beyond a reasonable doubt should this go to trial" (Pg 23 L. 8-10) It is clear on the face of the record that IF Petitioner would have proceed to trial, at trial the state would have argue that these Murders occurred during the commission of an Armed Robbery, as they had every intention OF using it at the penalty phase. The state was confident that if they would have proceed at trial, the state would have proven it beyond a reasonable doubt at trial, in order to used it during the penalty phase. So, the states Argument that, "The court does not find the states recitation as to what it would argue as an aggravating factor as a Potential penalty phase Proceeding on counts one through three would otherwise preclude reclassification under section 775.087(1) on Count Four in this instance". Before an aggravating factor can be use during the penalty phase it must be proven beyond a reasonable doubt through credible and competent evidence. "The due process ~~and~~ clauses requires it to be proven beyond a reasonable doubt any aggravating ^{fact} or any component of the prohibited transaction that gives rise to both a special stigma and a special Punishment". 477 US 71, 91 L. Ed 2d 67, 106 Sct. 2411 McMillan v Pennsylvania. By the state

Claiming that they can use Armed Robbery as an aggravating factor during the penalty phase, Means that during trial they would have proven beyond reasonable doubt (Plea colloquy pg 23 L. 8-10) that, The Murders occur during the commission of an Armed Robbery, during the course of the robbery as defined by statute, encompasses the period of time when the felons are in flight from the crime scene and the weapon is an essential element of the crime of Armed Robbery. The totality of the circumstances of this case would suggest that the sole motive for the Murders was to "obtain" The "Book of Knowledge" which was the sole motive for the Petitioner going to Brandon (pg 22 L. 1-4) for no other reason would the state issue a search warrant for a composition notebook (pg 21 L. 19-25) At the time of the plea, petitioner was advised by counsel that petitioner was pleading out as a Principal to Felony Murder as the crime occur during the commission of an Armed Robbery (pg 22 L. 22-25) The state cannot side step that fact the beginning of the criminal episode was an armed Robbery to "obtain" the "Book of knowledge" and that the Murders and Attempted Murders was a result of the felonias transaction set in motion by the Perpetration of the crime of Armed Robbery and neither the passage of time, nor separation in spaces separates the Murders, From the Attempted Murders and the essential element of a Felony Murder

are the essential elements, of the underlying Felony and a Weapon is an essential element of an Armed Robbery, It does not matter whether the petitioner was only charged under a Premeditated theory of Attempted First degree Murder. As the State cannot try to change the Factual basis, so that it could fit the element of a statute in order to uphold a conviction and sentence as technical violation under 775.087(1) is illegal Petitioner sentence was based on an unreasonable determination of facts, and because a guilty plea is an admission of all the elements of a formal charge, and the Factual basis was founded upon Misinformation, Petitioner asserts that Petitioner guilty plea has been unfairly obtained. 224 P.11 Ed 1012., Since a plea of guilty is more than a ~~conviction~~ ~~plea~~ an admission of conduct and is a conviction. Petitioner due process rights were violated as petitioner enter into a plea agreement based on unreliable information U.S. v. Remo, 738 F.2d 1156 (11th Cir. 1984) and was sentenced based on this unreliable information, and based on this Misinformation the sentencing judge used an incorrect application of law to enhanced Petitioner sentence U.S. v. Eves, 880 F.2d 376 (11th Cir. 1989) From a First degree Felony to a life Felony, Petitioner sentence exceed the Statutory limit Because petitioner sentence was founded upon an unreasonable determination of the facts, Harrington v. B.

Richter, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.
 2d 264 (2010) and based on this Misinformation
 the Factual basis was establish for the plea
 agreement. Based on this Misleading infor-
 mation at the time of the plea, petitioner
 could have not fully comprehend the nature
 of the charges as the Misinformation was
 the facts considered into making the plea.
 Based on this incomprehension, petitioner
 asserts that his plea could have not been
 knowingly, and intelligently given. Petitioner
~~was not aware~~ could have not realize that
 Petitioner was entering into a ~~plea agreement~~
 illegal plea agreement. Finally, Petitioner
 asserts that his life sentence for Attempted
 Murder was illegally enhanced from a First
 Degree Felony to a Life Felony based on an
 unreasonable application of Law and Petitioner
 sentence exceed the Statutory limit as
 it was illegally enhanced based on an un-
 reasonable determination of facts, and a
 sentence founded at least in part upon
 Misinformation is of Constitutional Magnitude
 United States v. Tucker, 404 U.S. 443, 447, 92
 S.Ct. 589, 591-592, 30 L.Ed.2d 592 (1972) Townsend
 v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255
 92 L.Ed.2d 1690 (1948) Petitioner ask this honora-
 ble court to Grant Relief by Allowing Petitioner
 the opportunity to Withdraw, From the plea
 as the plea is a result of an illegal
 sentence and was unfairly obtained through
 an unreasonable determination of facts
 and the Factual basis was establish through

Misinformation Violating Petitioner Constitutional Rights as Petitioner Sentence For Attempted Murder Was Illegally Enhanced From a First degree Felony, that carries 30 years, to a Life Felony. Exceeding the Statutory limitations based on an unreasonable Application of Law. The Law requires the correction of this Illegal sentence in order to Preserve the Petitioner Constitutional Rights. See, Moore V. Dempsey. 261 U.S. 86, 87-87, 43 S.Ct. 265, 67 L.Ed. 543 (1923) See also, Hyde V. Shore. 199 U.S. 62, 84, 25 S.Ct 760, 764, 50 L.Ed 90 (1905). The correction of this Illegal sentence is required by law in order to Preserve Petitioner Constitutional Rights.

Respectfully Submitted

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